A

TREATISE

ON

CRIMINAL LAW.

BY

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Page 23. Note 3, line 4, for "118 Mass. 458" read "113 Mass. 458."

Page 53. Note, end of 2d line in first column, add, "Infra, § 1448."

Page 135. For "Book III." at top of page read "Part III."

Page 147. Note, 1st column, 2d line from end, for "36 L. T." read "38 L. T."

Page 197. Last line of last note, change "Supra, § 26" into "Ibid."

Page 290. Note 4, end of 1st paragraph on second column, after "1865" add, "See supra, § 1121."

Page 302. Note 1, for "3 Met." read "8 Met."

Page 482. Note 3, line 7, omit "People *v.* Clark, 64 N. Y."

Page 526. Chapter heading, erase "Book IV." and change "Part III." to "Part IV."

Page 630. Note 4, for "3 Dall." read "2 Dall."

Page 640. First column, 3d line from end, for "Shenston," read "Sherston."

" " Second column, 4th line from top, for "impressive" read "oppressive."

" " Second column, 6th line from end, for "1798," read "1793."

BOOK II.

CRIMES

PART II. — OFFENCES AGAINST PROPERTY.

(CONTINUED.)

CHAPTER XVI.

MALICIOUS MISCHIEF.

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Statutory offence of killing or maiming animals, § 1082 *d*.

I. BY STATUTE.

§ 1065. In prior editions, the statutes in force in a series of States were given on this topic. They are now omitted for purposes of condensation; but the adjudications upon them are hereafter noticed, as throwing light upon the exposition of the offence as it exists at common law. Statutes based on common law.

It is proper to add, also, that for two reasons the points about to be stated bear closely upon the offence as determined by statute. In the first place, most of the statutes are but a codification of the common law. In the second place, many of these statutes define the offence as the "malicious injury of the property of another;" leaving it to the common law to define what these general terms comprise.[1]

Offence of wider scope in this country than in England.

§ 1066. Malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England. In the latter country, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has scarcely been a single article of property, which was likely to prove the subject of mischievous injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with 37 Hen. 8, c. 6, and ending with the Black Act, were provided for the single purpose of preventing wanton mischief to cattle and other tame beasts; and so minute was the particularity of the law-makers that dis-

[1] For special statutes see infra, § 1081. See Wharton's Precedents, as follows: —

(470.) Maliciously wounding a cow.

(471.) Giving cantharides to prosecutors.

(472.) Tearing up a promissory note.

(473.) Cutting down trees the property of another, not being fruit, or cultivated, or ornamental trees, under Ohio statute.

(474.) Destroying vegetables, under Ohio statute.

(475.) Killing a heifer, under Ohio statute.

(476.) Cutting down trees, &c.

(477.) Killing a steer at common law.

(478.) Altering the mark of a sheep, under the North Carolina statute.

(479.) Second count. Defacing mark.

(480.) Entering the premises of another, and pulling down a fence.

(481.) Destroying two lobster carts, under the Massachusetts statutes.

(482.) Removing a landmark, under the Pennsylvania statutes.

(483.) Felling timber in the channel of a particular creek, in a particular county, under the North Carolina statute.

(484.) Throwing down fence, under Ohio statute.

(485.) Breaking into house and frightening a pregnant woman.

(486.) Cutting ropes across a ferry.

(487.) Breaking glass in a building. Mass. Rev. Stats. c. 126, § 42.

(488.) Burning a record.

[For several forms of indictments which might be classed under this head see Wharton's Precedents, 213, &c.]

tinct and several penalties were assigned to the cutting out of the tongue of a cow,[1] to the breaking of the fore-legs of a sheep, when attempting to escape enclosures,[2] and to the wounding of cattle, when the injury was only temporary.[3] Upwards of eighteen hundred sections, it is estimated, of acts, running from Henry VIII. to George III., repealed or otherwise, were enacted for the special purpose of providing against malicious mischief; and as the statutory penalty was both more specific and more certain than that of the common law, the books, in this class of offences, give but few examples of common law indictments. But as the later English statutes are not in force in this country, malicious mischief, as a common law offence, has here been the subject of frequent adjudications.[4]

§ 1067. In its general application malicious mischief may be defined to be any malicious or mischievous physical injury, either to the rights of another or to those of the public in general. Thus, it has been considered an offence at common law to maliciously destroy a horse belonging to another;[5] or a cow;[6] or a steer;[7] or any beast whatever which may be the property of another;[8] to wantonly kill an animal where the effect is to disturb and molest a family;[9] to be guilty of wanton cruelty to animals,[10] either publicly (when the animal belongs to the defendant himself),[11] or secretly, through specific malice against another person who is the owner, in such case mere wantonness not being sufficient; to maliciously cast the carcass of an animal

Offence includes malicious physical injury to the rights of another person or to those of the public.

[1] Stat. 37 Hen. 8, c. 6. See supra, § 16.

[2] 9 Geo. 1, c. 22, s. 16.

[3] Ibid. c. 19.

[4] Loomis *v.* Edgerton, 19 Wend. 419.

[5] Resp. *v.* Teischer, 1 Dallas, 335; State *v.* Council, 1 Tenn. 305; though see, *per contra*, Shell *v.* State, 6 Humph. 283; Taylor *v.* State, 6 Humph. 285. See supra, § 894.

[6] Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cow. 258.

[7] State *v.* Scott, 2 Dev. & Bat. 35; Wh. Prec. 213. See supra, §§ 894 *et seq.*

[8] State *v.* Wheeler, 3 Vt. 344; Loomis *v.* Edgerton, 19 Wend. 419; Henderson's case, 8 Grattan, 708; though see Illies *v.* Knight, 3 Texas, 316; and see also a learned article in 7 Law Rep. (N. S.) 89, 90. As to dogs see infra, § 1076; supra, § 872.

[9] Henderson's case, 8 Grattan, 708.

[10] U. S. *v.* Logan, 2 Cranch C. C. R. 259; State *v.* Briggs, 1 Aiken, 226. See Statutes, infra, § 1082 *d*.

[11] U. S. *v.* Logan, 2 Cranch C. C. R. 259; U. S. *v.* Jackson, 4 Ibid. 483.

in a well in daily use;[1] to maliciously poison chickens, fraudulently tear up a promissory note, or break windows;[2] to mischievously set fire to a number of barrels of tar belonging to another;[3] to maliciously girdle or injure trees or plants kept either for use or ornament;[4] to put cow-itch on a towel, with intent to injure a person about to use it[5]; to maliciously break up a boat;[6] to maliciously cut off the hair of the tail or mane of a horse, with intent to annoy or distress the owner;[7] to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity;[8] to maliciously and indecently break into a room with violence for the same purpose;[9] though it is held not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with intent to injure B.[10]

But offence must be secret, or cruel, or involve a breach of the peace.

§ 1068. The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except, (1.) where the offence is committed secretly, in the night-time, or in such a way as to inflict peculiarly wanton injury;[11] or, (2.) where it is marked with malignant cruelty to animals; or, (3.) where it is accompanied with a breach of the peace.[12] Thus, in New York, an indictment charging that the defendant, "with force and arms, unlawfully, wilfully, and maliciously did break in pieces and destroy two windows in the dwelling-house of M. C. to the great damage of the said M. C., and against the peace,"

[1] State *v.* Buckman, 8 New Hamp. 203.

[2] Resp. *v.* Teischer, 1 Dallas, 338.

[3] State *v.* Simpson, 2 Hawks, 460.

[4] Loomis *v.* Edgerton, 19 Wend. 420; Com. *v.* Eckert, 2 Browne, 249; *per contra*, Brown's case, 3 Greenleaf, 177; and State *v.* Helmes, 5 Ired. 364, where it was held not to be indictable to maliciously cut down a crop of Indian corn standing in a field. See infra, § 1082 *c.*

[5] People *v.* Blake, 1 Wheeler's C. C. 490.

[6] Loomis *v.* Edgerton, 19 Wend. 420.

[7] Boyd *v.* State, 2 Humph. 39. This was under a statute prohibiting "disfiguring." Infra, § 1082 *d.*

[8] Com. *v.* Wing, 9 Pick. 1. Supra, § 167.

[9] Com. *v.* Taylor, 5 Binn. 277; Hackett *v.* Com. 15 Penn. St. 95. See infra, § 1093.

[10] State *v.* Burroughs, 2 Halsted, 426.

[11] See People *v.* Moody, 5 Parker C. R. 568, where an indictment for wantonly and clandestinely injuring harness in the *daytime* was held good at common law. And see State *v.* Newby, 64 N. C. 23; Northcot *v.* State, 43 Ala. 330.

[12] Dawson *v.* State, 52 Ind. 478.

&c., was held not to set forth an offence indictable by the laws of the State; it being held that an act which would otherwise be only a trespass does not become indictable by being charged to have been done with force and arms, or by being alleged to have been committed maliciously, or without claim of right, or without any motive of gain. Whether if the breaking of the windows in this case had been charged to have been done secretly, or in the night-time, the act would have been indictable, was doubted by Beardsley, C. J., it being said generally that the cases in which indictments have been sustained for maliciously killing or wounding domestic animals depend upon features peculiar to such offences, as the depravity of mind, and the cruelty of disposition, which such acts evince.[1] Maiming or wounding an animal, also, without killing it, was held in New Jersey, in 1858, to be not indictable either at common law or under the statute law of that State.[2] And it is held in other States that an injury to personal property, to be indictable, must be accompanied by or provocative of a breach of the peace.[3]

[1] Kilpatrick *v.* People, 5 Denio, 277. See this case commented on in 5 Parker C. R. 568.

[2] State *v.* Beekman, 3 Dutch. (N. J.) 124. "In Wharton's Crim. Law (ed. 1857), § 2002," said Chief Justice Green, in delivering the opinion of the court, "it is said that malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England, and the learned author has defined the common law offence of malicious mischief, as received in this country, to be 'any malicious or mischievous injury either to the rights of another or to those of the public in general.' This, probably, is law within the Commonwealth of Pennsylvania, where the crime of malicious mischief has received a very wide interpretation. But the proposition that any malicious or mischievous injury to the rights of an individual is an indictable offence at the common law is unwarranted either by principle or authority. It would render every wilful trespass an indictable offence." State *v.* Beekman, 3 Dutch. (N. J.) 124. See also, to same effect, R. *v.* Ranger, 2 East P. C. 1074; State *v.* Allen, 72 N. C. 114.

[3] Dawson *v.* State, 52 Ind. 478; Illies *v.* Knight, 3 Tex. 312.

In North Carolina, Nash, J., said: "At common law no trespass to chattels was an indictable offence without a breach of the peace. Not that an actual breach must be committed, but something more must be done than what amounts to a mere civil trespass, expressed by the terms *vi et armis*. The peace must be actually broken, or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. In the case of Mills, 2 Dev. 420, the court in their opinion use the expression, 'in

§ 1069. It has been shown,[1] that whenever goods are fraudulently taken against the owner's will *animo furandi*, the offence is larceny; while when they are simply maliciously injured, without being taken *animo furandi*, it is malicious mischief. It must also be noticed that there are articles of property not objects of larceny (*e. g.* real estate, dogs, &c.),[2] for maliciously injuring which a person may be indicted.

Distinguishable from larceny by absence of intent to steal.

§ 1070. Neither negligent injury, nor an injury inflicted angrily in hot blood, is sufficient to constitute the offence.[3] There must be malice to the owner[4] or possessor;[5] but there is ground to argue that malignant

Malice is essential to the offence.

the presence of the party,' &c. It is manifest the owner is meant, for in the succeeding sentence they say, 'Where they neither put the owner in fear, nor invoke him to an immediate redress of his wrongs, nor excite him to protect the possession of his chattels by personal prowess — and none of these can happen in the absence of the owner and his family — the trespass is not indictable.'" State *v.* Phipps, 10 Ired. 17. And see State *v.* Manuel, 72 N. C. 201.

[1] Supra, §§ 894 *et seq.* But see, as to some extent conflicting with views of the text, State *v.* Leavitt, 32 Me. 183.

[2] See infra, §§ 1076, 1082 *d.*

[3] Com. *v.* Walden, 3 Cush. 558; State *v.* Robinson, 3 Dev. & Bat. 130; Dawson *v.* State, 52 Ind. 478; U. S. *v.* Gideon, 1 Minn. 292; State *v.* Enslow, 10 Iowa, 115; Thompson *v.* State, 51 Miss. 353.

In R. *v.* Pembliton, 12 Cox C. C. 607; L. R. 2 C. C. R. 119, the defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor, contrary to the 23 & 24 Vict. c. 97, s. 51. It appeared that the defendant, who had been fighting with other persons in the street, after being turned out of a public house, went across the street, and picked up a stone, and threw at them. The stone missed them, passed over their heads, and broke a window in a public house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window. It was held by all the judges, that upon this finding the prisoner was not guilty of the charge within the above statute. It was held generally to support a conviction under sect. 51 there must be a wilful and intentional doing

[4] R. *v.* Austen, R. & R. 490; R. *v.* Kean, 2 East P. C. 1075; State *v.* Latham, 13 Ired. 33; State *v.* Newby, 64 N. C. 23; State *v.* Hill, 79 N. C. 656; State *v.* Wilcox, 3 Yerg. 278; State *v.* Pierce, 7 Ala. 728; Northcot *v.* State, 43 Ala. 330; Hobson *v.* State, 44 Ala. 380; Duncan *v.* State, 49 Miss. 331; Wright *v.* State, 30 Ga. 325; Branch *v.* State, 41 Tex. 622; State *v.* Enslow, 10 Iowa, 115; though, under Tennessee statute, see State *v.* Council, 1 Tenn. 305; and under English statute, R. *v.* Tivey, 1 C. & K. 705.

[5] Stone *v.* State, 3 Heisk. 457.

cruelty to an animal is indictable at common law, irrespective of particular malice to the owner, at least in cases of shock or

of an unlawful act in relation to the property damaged.

Lord Coleridge, C. J.: "I am of opinion that this conviction must be quashed. The facts of the case are these: The prisoner and some other persons who had been drinking in a public-house were turned out of it at about eleven P. M. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate-glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether, under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone, coupled with the finding of the jury, will do? Now I think that is not enough. The indictment is framed under the 24 & 25 Vict. c. 97, s. 51. The act is an act relating to malicious injuries to property, and sect. 51 enacts that whosoever shall unlawfully and maliciously commit any damage, &c., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the 58th section which deserves attention: 'Every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.' It seems to me on both these sections that what was intended to be provided against by the act is the wilfully doing an unlawful act, and that the act must be wilfully and intentionally done on the part of the person doing it, to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction; yet as they have found that he threw the stone at the people he had been fighting with, intending to strike them and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited, and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offence created by an act in which the words are carefully studied."

Blackburn, J.: "I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property,

scandal to the community;[1] and that a man may in such cases be indicted for malicious cruelty to an animal belonging to himself.[2] The same reasoning would lead us to conclude that ma-

to an amount exceeding £5, shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is, can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window. I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think, therefore, that the conviction must be quashed."

Pigott, B., concurred.

Lush, J.: "I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word 'maliciously' means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found."

Cleasby, B., concurred.

In Com. *v.* Williams, 110 Mass. 401, it was held that for a conviction under the St. of 1862, c. 160, which provides for the punishment of any one who "wilfully or maliciously injures" a building, it is not enough that the injury was wilful and intentional, but it must have been done out of cruelty, hostility, or revenge.

"The jury," said the court, "must be satisfied that the injury was done out of a spirit of cruelty, hostility, or revenge. This element must exist in all those injuries to real or personal property done wilfully and maliciously which are enumerated and made criminal in the several statutes, among the more recent of which is the statute including the act charged in this indictment. The injury must not only be wilful, that is, intentional and by design, as distinguished from that which is thoughtless or accidental, but it must in addition be malicious in the sense above given. The wilful doing of an unlawful act without excuse, which is ordinarily sufficient to establish criminal malice, is not alone sufficient under these statutes. The act, although intentional and unlawful, is nothing more than a civil injury, unless accompanied with that special malice which the words 'wilful and malicious' imply."

[1] See U. S. *v.* Jackson, 4 Cranch C. C. 483; Brown *v.* State, 26 Oh. St. 176; Mosely *v.* State, 28 Ga. 190.

[2] State *v.* Avery, 44 N. H. 392; Mosely *v.* State, 28 Ga. 190. See Com. *v.* Tilton, 8 Met. 232; Kilpatrick *v.* People, 5 Denio, 277. Under statute malice to owner may not be essential. R. *v.* Tivey, 1 C. & K. 704, cited infra, § 1082 *d*.

lignant and intentional injury to public works of art, or to public libraries, is indictable, irrespective of malice to individuals.

Malice is to be inferred from facts.

§ 1071. Of course the usual line of evidence as to proof and disproof of malice is here admissible.[1] Malice may be inferred from declarations; from prior acts; and even from the peculiar malignity of the act.[2]

May be negatived by proof of other motives.

§ 1072. Malice may be negatived by showing that the act was induced by other causes; *e. g.* that an animal killed was vicious, and was trespassing on the defendant's grounds.[3] But unless an animal thus trespassing is vicious, and cannot be safely driven out, so that killing or maiming him is the defendant's only safe means of riddance, killing or maiming is not justifiable, because the animal trespassed even within a cultivated enclosed field.[4] And malice may also be disproved, by proof that the object of the defendant was not malicious but friendly.[5] And on a charge of cruelly overdriving a horse, ignorance and want of malice is a defence.[6]

Honest belief in title a defence to malicious trespass.

§ 1072 *a*. An honest belief in title is a defence to an indictment for a malicious trespass.[7] And this is peculiarly the case when the trespass is the removal of fences.[8]

[1] See supra, §§ 101 *et seq.*; and see fully Whart. Crim. Ev. §§ 46, 734 *et seq.*

[2] See R. *v.* Welch, 13 Cox C. C. 121; Allison *v.* State, 42 Ind. 354.

[3] R. *v.* Prestney, 3 Cox C. C. 505; Wright *v.* State, 30 Ga. 325. See State *v.* Waters, 6 Jones (N. C.), 276.

[4] Snap *v.* People, 19 Ill. 80.

[5] R. *v.* Mogg, 4 C. & P. 364.

[6] Com. *v.* Wood, 111 Mass. 408.

[7] Infra, § 1077; R. *v.* Matthews, 14 Cox C. C. 5; State *v.* Gurnee, 14 Kans. 296; Losser *v.* State, 62 Ind. 437. Supra, § 87.

[8] In Palmer *v.* State, 45 Ind. 388, the point in the text was thus sustained by Downey, C. J.: "This is a mode of litigation which should not only not be encouraged, but which should receive the unequivocal disapprobation of the courts. The question here involved is one of purely private interest and concern, in which the State has not, and should not have, the least lot or share, except to furnish the necessary tribunal in which the parties may settle the controversy between them by the appropriate civil action. Who doubts if the prosecuting parties had known that they must enter the lists on equal terms with the defendant, employing their own attorney instead of using the State's attorney, and being liable for the costs of the action which they might bring, in the event that they were unsuccessful, in like manner as the defendant was liable for costs if the case was decided against him, that they would have hesitated to embroil themselves and the vicinity in a tedious, vexatious, expensive,

Consent of owner is a defence.

§ 1073. Consent of owner, when malice against the owner is alleged, is a defence. But the onus of proving consent is with the defence.[1]

and, perhaps, unnecessary lawsuit? There is, in this case, no more real ground on which to prosecute the defendant for malicious trespass than there would be for an action for malicious prosecution of this case, to be brought by the defendant here against the prosecuting witnesses. If there is any question about the defendant's ultimate right to the way in dispute, there certainly is no question as to the fact that he believed in good faith that he had such right, and that it was in pursuance of that belief that he removed the obstruction which had been placed in the way by the prosecuting parties. Even the witnesses for the State testify that while he was in the act of removing the fence, he stated that 'he had a right to have the lane open.' There is an utter failure of evidence to show any malice on the part of the defendant in removing the fence. The lane was thirty feet wide, and, according to what we know of Virginia worm fence, it would require four panels to reach across the lane. The number of rails required would probably be forty. The jury found that the damage done to them by removing them out of the way — it is not shown that they were otherwise injured — was fifty cents. This damage, we presume, is mostly imaginary. Some of the witnesses put the damage at fifteen cents. This is very exact.

"In Howe *v.* State (10 Ind. 492), the defendant was indicted for destroying timber on the land of which he had possession; but there was a question whether the contract by which he held it was valid or not. The court said: 'We think that a criminal prosecution cannot be maintained under the circumstances involved in this case. If any other ruling was to prevail, a man might be liable to prosecutions for acts committed whilst in the possession of lands under contracts declared fraudulent at the end of a long and doubtful lawsuit, in the nature of a chancery proceeding.' Windsor *v.* State, 13 Ind. 375, was a prosecution for malicious trespass, committed, as was alleged, upon a dwelling-house belonging to the trustees of a church; the defendant, claiming to be the owner, had removed the doors, &c. The court said: 'We do not think a criminal prosecution a proper mode of trying the title to real estate. A person without color of title could not defeat a criminal prosecution for malicious trespass upon lands, by setting up a title thereto in himself; but where he has a paper title, apparently valid on its face, and claims, in good faith, to be the owner, and is in possession, either by himself or others occupying by his direction, he cannot be prosecuted criminally for a trespass committed thereon by him, to the damage of a third person, although such third person, in the end, may prove to have the better title.'

"In Goforth *v.* State, 8 Humph. 37, it was decided that where the defendant threw down the fence of another unlawfully and without right, under the impression that he had a

[1] State *v.* Whittier, 21 Me. 341; Welsh *v.* State, 11 Tex. 368. See supra, §§ 141 *et seq.*

Injury must be such as to impair utility.

§ 1074. Where a statute makes it indictable to injure, there must be proof of injury done, to such an extent as to impair utility, to warrant a conviction.[1]

Owner is competent witness.

§ 1075. As in larceny, the owner of the property injured may be a witness for the prosecution.[2]

All kinds of property are subjects of offence.

§ 1076. Not merely personal property, as has been already shown,[3] may be thus protected, but so may real estate, it being held that it is indictable at common law maliciously to injure or deface tombs,[4] maliciously to strip from a building copper pipes or sheetings,[5] and to maliciously damage either immovables or movables in any way.[6] The authorities in reference to the malicious injury of trees and plants are elsewhere given.[7]

Owner's *title* is immaterial.

§ 1077. In prosecutions of this class the prosecutor's title to the property injured cannot be tried. It is enough if he had any special interest, rightful or wrongful, which may have been hurt.[8]

§ 1078. The manner of describing the property injured[9] has been already stated.

Indictment must contain proper technical averments.

An indictment is sufficiently descriptive of the property destroyed, if laid to be "one horse beast of the value, &c., of the proper goods and chattels."[10] But

legal right to do so, he was not guilty of malicious mischief. In Dye *v.* Commonwealth, 7 Gratt. 662, it was held that the statute of Virginia, to punish malicious trespass, was intended to apply to trespass upon the property of another, without color of title or claim of right *bonâ fide*, and not feigned for the occasion; and not to cases where there is a *bonâ fide* claim of right to the property."

To the same effect is Sattler *v.* People, 59 Ill. 68.

[1] Com. *v.* Soule, 2 Met. 21. Infra, § 1082 *d*.

[2] State *v.* Pike, 33 Me. 361.

[3] See supra, §§ 1067, 1068. That there is such a property in dogs as sustains an indictment for malicious mischief see State *v.* Latham, 13 Ired. 33; State *v.* Sumner, 2 Ind. 377; State *v.* McDuffie, 34 N. H. 523; though see R. *v.* Searing, R. & R. 350; and supra, § 872.

[4] 3 Inst. 202.

[5] R. *v.* Joyner, J. Kel. 29.

[6] Loomis *v.* Edgerton, 19 Wend. 419; Resp. *v.* Teischer, 1 Dallas, 335, where "breaking windows" maliciously was held indictable.

[7] Supra, § 1067; infra, § 1082 *c*.

[8] State *v.* Pike, 33 Me. 361; People *v.* Horr, 7 Barb. 9; Goforth *v.* State, 8 Humph. 37; Dawson *v.* State, 52 Ind. 478; State *v.* Gurnee, 14 Kans. 296. But see R. *v.* Whateley, 4 M. & R. 431, cited infra, § 1082 *b*. See § 932. As to "honest belief" see supra, § 1072 *a*.

[9] Supra, § 977.

[10] State *v.* Pearce, Peck, 66.

unless required by statutory discriminations, the averment of value is unessential.[1]

The owner of the property must be alleged,[2] and the allegation must be proved as laid.[3]

Malice must usually be averred.

§ 1079. An indictment for malicious mischief must either expressly charge malice in the defendant against the owner, or otherwise fully describe the offence as indicating general malice.[4] It is not sufficient to set forth that the act was done "feloniously, wilfully, and maliciously," without averring that it was done "mischievously," or with malice against the owner.[5] When, however, the term "maliciously" is not in the statute, it will be both sufficient and essential to use the statutory terms.[6]

Mode of injury must be averred.

§ 1080. It is not enough to aver that the defendant maliciously "injured" the prosecutor's property.[7] This is a conclusion of law, and the facts leading to it must be expressed.[8]

Yet the means or instruments of injury need not be set out.[9] Where there is a killing, as a statutory offence, it is enough to

[1] See State *v.* Blackwell, 3 Ind. 529; and State *v.* Shadley, 16 Ind. 230, as cases where, under statute, value is necessary.

[2] R. *v.* Patrick, 2 East P. C. 1059; R. *v.* Howe, 2 Leach, 541; Davis *v.* Com. 30 Penn. St. 421; and see as to when designation of locality is required, Com. *v.* Bean, 11 Cush. 414; Com. *v.* Dougherty, 6 Gray, 349; Com. *v.* Cox, 7 Allen, 577.

[3] Supra, § 977. Haworth *v.* State, Peck, 89; State *v.* Weeks, 30 Me. 182.

An indictment charging that the defendant "did unlawfully, maliciously, and secretly, in the night-time, with force and arms, break and enter the dwelling-house of A., with intent to disturb the peace of the commonwealth, and unlawfully and vehemently did make a noise, &c., and did thereby greatly frighten the wife of the said A., by means whereof she miscarried," &c., is good at common law, as an indictment for malicious mischief. Com. *v.* Taylor, 5 Binn. 277. See State *v.* Batchelder, 5 N. H. 549.

[4] Supra, § 1070; R. *v.* Lewis, 2 Russ. on Cr. 1067; Boyd *v.* State, 2 Humph. 39; Thompson *v.* State, 51 Miss. 353.

[5] State *v.* Jackson, 12 Ired. 329; Hobson *v.* State, 44 Ala. 380; though see State *v.* Scott, 2 Dev. & Bat. 35.

[6] Com. *v.* Turner, 8 Bush, 1.

[7] See State *v.* Langford, 3 Hawks, 381; State *v.* Jackson, 7 Ind. 270.

[8] See Whart. Plead. & Prac. §§ 154, 230; State *v.* Aydelott, 7 Blackf. 157.

[9] State *v.* Merrill, 3 Blackf. 346. See McKinney *v.* People, 32 Mich. 284; State *v.* Jackson, 7 Ind. 270. Under a statute, "cut, injure, and destroy" is enough. State *v.* Jones, 33 Vt. 443. For indictments where the mode of injury is adequately stated see Com. *v.* Cox, 7 Allen, 577, and Moyer *v.* Com. 7 Barr, 439.

say, "maliciously and wilfully did kill,"[1] and where there is a cutting down of trees, under a statute, it is enough to aver, following the statute, that the defendant, the trees, &c., maliciously and wilfully did cut, &c.[2]

Statutory offence of endangering lives of railroad travellers.

§ 1081. In England, severe penalties have been imposed by statutes on acts calculated to endanger the lives of persons travelling on railroads; and these statutes have been substantially reproduced in many of our States.[3] Under these statutes it has been ruled in England that

[1] Com. *v.* Sowle, 9 Gray, 304; State *v.* Merrill, 3 Blackf. 346; Hayworth *v.* State, 14 Ind. 590; Taylor *v.* State, 6 Humph. 285; State *v.* Scott, 2 Dev. & B. 35; Wh. Prec. 476.

[2] State *v.* Watrous, 13 Iowa, 489. See State *v.* Jones, 33 Vt. 443. And as to indictments generally see Com. *v.* Thornton, 113 Mass. 457; Com. *v.* Whitman, 118 Mass. 458; State *v.* Comfort, 22 Minn. 271; Caldwell *v.* State, 49 Ala. 34.

[3] The English statutes are as follows: By 24 & 25 Vict. c. 100, s. 32, "whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping." (*Former provision*, 14 & 15 Vict. c. 19, s. 6.)

By sec. 33, "whosoever shall unlawfully and maliciously throw or cause to fall or strike at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor." (*Former provision*, 14 & 15 Vict. c. 19, s. 7.)

By sec. 34, "whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and

it is no defence that the defendant was impelled by other motives than an intention to injure the train.[1] Wilfully throwing a stone at a train so as to endanger the safety of passengers is within the statutes,[2] as it is unquestionably indictable at common law.[3] It has been further held that on an indictment for wilfully and maliciously casting anything upon a railway carriage or truck, either with intent to injure it or to endanger the safety of persons in the train, if an intent to endanger the safety of travellers is proved, it is no defence that the train was a goods train, and there was no person on the particular truck.[4] But where the indictment charges maliciously throwing stones into a railway carriage, with intent to endanger the safety of a person in it, it has been ruled that there must be evidence of an intent to do some grievous bodily harm, such as would support an indictment for wounding a particular person with that intent; and, if it appears that the prisoner's intention was only to commit a common assault on some person in the carriage, the case is not sustained.[5]

It is not necessary, it has been ruled under the statutes, to aver in the indictment that the train belonged to a corporation duly chartered.[6] The statutes, also, have been ruled not to cover neglect on part of drivers and stokers to keep a good lookout for signals, according to the rules and regulations of the railway company, the consequence of which neglect is, that a collision occurs, and the safety of passengers is endangered.[7]

Obstructing engine or railroad carriage indictable.

§ 1082. Special statutes, also, have been enacted in England, and have been adopted by several of our own legislatures, making indictable the obstruction of engines and railway carriages.[8]

being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor." (*Former provision*, 3 & 4 Vict. c. 97, s. 15.)

[1] R. *v.* Holroyd, 2 M. & Rob. 339. See supra, § 119.

[2] R. *v.* Bowry, 10 Jur. 211.

[3] See supra, § 112.

[4] R. *v.* Sanderson, 1 F. & F. 37 — Channell. This accords with the rule stated supra, § 186; but see *contra*, R. *v.* Court, 6 Cox C. C. 202.

[5] R. *v.* Rooke, 1 F. & F. 107.

[6] R. *v.* Bowry, 10 Jur. 211.

[7] R. *v.* Pardenton, 6 Cox C. C. 247.

[8] The English statute now in force provides that "whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and ma-

Under the English statute it is held to be a misdemeanor to place a truck across a railway line in such a manner that if a carriage or an engine had come along the line it would have been obstructed, and the safety of passengers, who might have been in any such carriage, would have been endangered; nor is it to this charge a defence that the railway was not opened for passenger traffic, and no carriage or engine was in fact obstructed.[1] It is enough to sustain such a case to prove that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining; and that on one occasion the defendant himself, who was standing by, nodded his head, and directed the workmen to go on, is sufficient to warrant the justices in convicting the defendant.[2] Changing a signal so as to cause a train to go slower than it otherwise would is an obstructing;[3] and so, it is said, is stretching out the arms as a signal.[4] The intent is to be inferred from the facts; and where the evidence was that the prisoners placed a stone upon a line of railway, so as to cause an obstruction to any carriages that

liciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping." (*Former provision*, 3 & 4 Vict. c. 97, s. 15, and 14 & 15 Vict. c. 19, s. 6.)

By s. 36, "whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor." 24 & 25 Vict. c. 97, s. 35. (*Former provision*, 3 & 4 Vict. c. 97, s. 15.)

[1] R. *v.* Bradford, 8 Cox C. C. 309; 6 Jur. N. S. 1102; 2 L. T. N. S. 392; Bell, C. C. 268; 29 L. J. M. C. 171; 8 W. R. 531.

[2] Roberts *v.* Preston, 9 C. B. N. S. 208.

[3] R. *v.* Hadfield, L. R. I. C. C. R. 253.

[4] R. *v.* Hardy, L. R. 1 C. C. R. 278.

might be travelling thereon, it was ruled that if this were done mischievously, and with an intention to obstruct the carriages of the company, the jury would be justified in finding that it was done maliciously.[1] But the presumption, in such case, is one of fact, not of law.[2]

[1] R. *v.* Upton, 5 Cox C. C. 298.

[2] Allison *v.* State, 42 Ind. 354. In this case Downey, J., said: "The sixth instruction is as follows: 'It is not necessary that the proof should correspond with the allegation as to the number of pieces of timber placed upon the track. If the proof shows that one piece of timber was placed upon the track of said road, in such a manner as to obstruct the passage of cars over said road, it will be sufficient upon that point.'

"There is no valid objection to this instruction. It is not necessary to prove all that is alleged in an indictment, provided that what is proved constitutes a crime punishable by law, of the same nature or quality as that which is charged. It is a crime wilfully and maliciously to place any obstruction upon the track of any railroad, so as to endanger the passage of trains. 2 G. & H. 446, § 29. Placing a single piece of timber upon the track of a railroad would constitute such obstruction, and the fact that the indictment charged that several were placed upon it, and that the State proved that only one was placed upon it, is no variance of proof.

"The seventh instruction is as follows: —

"'If the proof shows conclusively that the defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the rule of law is, that every man intends the necessary consequences of his acts, and the presumption is, that the act was wilfully and maliciously done.'

"This charge may be abbreviated by leaving out the words, 'the rule of law is, that every man intends the necessary consequences of his acts,' which are not necessary to a proper understanding of it. It will then read as follows: 'If the proof shows conclusively that the defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of trains of cars over said road, the presumption is that the act was wilfully and maliciously done.' What is a presumption? Starkie says: 'Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be immediately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption, in contradistinction to a conclusion derived from circumstances by the united aid of experience and reason.' 1 Stark. Ev. 80. It is 'an inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presumpt. 12.' Bouv. Dict. vol. 2, p. 367.

"Presumptions are either presumptions of law or presumptions of fact. Presumptions of law are either conclusive or they are disputable. They are rules which, in certain cases, either forbid or dispense with any ul-

§ 1082 *a*. For the protection of manufactures and machinery analogous statutes have been enacted.[1] Under these statutes the following points have been ruled:

So malicious injury to manufactures, materials and machinery.

A warp, not sized, but upon its way to the sizers, to fit it for being used in manufacturing goods, is not a "warp in any stage, process, or progress of manufact-

terior inquiry; inferences or positions established, for the most part, by the common, but occasionally by the statute law, which are obligatory alike on judges and juries. Presumptions of fact, on the contrary, are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. These presumptions can only be made by a jury, or by the court when acting as a jury, in the trial of issues of fact. Bouv. Dict. title Presumption. In the charge under consideration, the court told the jury that upon the proof of one fact, that is, the placing of the timbers on the track so as to obstruct the passage of trains, the presumption is, that the act was wilfully and maliciously done. Had the court said, that upon proof that the timbers were wilfully placed on the track, the jury might infer malice, a different question would have been presented. The court did not state to the jury whether the presumption was one of law or of fact; whether it was conclusive or disputable; whether they had anything to decide, with reference to its application, or whether they were compelled to apply it at all events. There are many circumstances under which the defendant might have placed the timbers on the railroad track, so as to obstruct the passage of trains, which would have precluded the idea of its having been done wilfully and maliciously. It seems to us that the court should not have given this charge in the form in which it was given. We cannot conceive of any state of the evidence which would have justified the giving of it. We suppose it proper for the court to state to the jury a legal presumption for their government; informing them, if it is an indisputable presumption, that they must be governed by it; or if it be a disputable presumption, that it is to stand good until the contrary is established by the evidence, or by a counter presumption. But we cannot think that it is either proper or safe for the court to so far invade the province of the jury as to direct them when they shall make or apply a mere presumption of fact. When the trial of a criminal cause is by jury, the court should not lay down any arbitrary rules as to the weight they are to give to the evidence which has been adduced. They are the judges of the facts, and must be left to weigh the evidence, and consider the motives of the party, without any rules from the court which will compel them to indulge a presumption of fact, whether, under all the circumstances, they think they ought to indulge it or not."

[1] "Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or

ure," or prepared for carding or spinning.[1] It is not necessary that goods should be incomplete to be in "a stage, process, or progress of manufacture," under the statute.[2] The working tools

any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor." 24 & 25 Vict. c. 97, s. 18.

"Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping." 24 & 25 Vict. c. 97, s. 14. That the offence may be punished in this country at common law see supra, § 1076.

"Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or movable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or movable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping." 24 & 25 Vict. c. 97, s. 15.

[1] R. *v.* Clegg, 3 Cox C. C. 295.

[2] R. *v.* Woodhead, 1 M. & Rob. 549.

of a loom, and the cords employed to raise the harness, are "tackle employed in weaving."[1] And so of any material part of the machinery.[2]

It has been further held that where the owner removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and took away the legs, and it appeared in evidence that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the act, though the stage and legs were wanting.[3] And where certain side boards were wanting to a machine at the time it was destroyed, but the want did not render it so defective as to prevent it altogether from working, though it would not work so effectually as if those boards had been made good; it was held that it was still a threshing-machine within the meaning of the statute.[4] A threshing-machine is within the purview of the act, though it had been, prior to its destruction, taken to pieces to avoid an expected mob.[5] Plugging up the feed pipe of a steam-engine, and displacing other parts of the machinery so as to cause its stoppage, are within the statute.[6] And so of injuring ploughs used in agriculture.[7] As has been just incidentally seen, when a machine is broken by a mob, it is no defence that it was previously taken to pieces by the owner for its protection.[8] On the other hand, where the prosecutor had not only taken the machine to pieces, but had broken the wheel of it, before the mob came to destroy it, for fear of having it set on fire and endangering his premises, and it was proved that without the wheel the engine could not be worked, it was held that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing-machine.[9]

[1] R. *v.* Smith, 6 Cox C. C. 198.
[2] R. *v.* Tacey, R. & R. 452.
[3] R. *v.* Chubb, Deac. C. L. 1518.
[4] R. *v.* Bartlett, Deac. C. L. 1517.
[5] R. *v.* Hutchins, Deac. C. L. 1517.
[6] R. *v.* Fisher, 10 Cox C. C. 146; L. R. 1 C. C. 7.
[7] R. *v.* Gray, 9 Cox C. C. 417. For injuring aqueduct see State *v.* Jones, 38 Vt. 443; for defacing omnibus, Com. *v.* Coe, 7 Allen, 577.
[8] R. *v.* Mackerel, 4 C. & P. 448; R. *v.* Fiddler, 4 C. & P. 449.
[9] R. *v.* West, Deac. C. L. 1518. As to damaging property generally see supra, § 1070.

1082 *b*. Mines have also been protected by special enactments.

So as to mines.

In this country there can be no question[1] that malicious injury to mining property is indictable at common law. But in such matters the interests involved are so large, and the risks to life so great, that statutes have been passed imposing heavy penalties on malicious injury to mines. Under these statutes it has been held that the offence of damaging an engine was consummated where a steam-engine used in draining and working a mine having been stopped and locked up for the night, the defendant got into the engine-house, and set it going, and there being no machinery attached, the engine went with great velocity, and received damage.[2] A scaffold erected for the purpose of working a vein of coal is such an erection used in conducting the business of a mine, that injuring with intent to destroy it, or to render it useless, is included in the statute.[3]

1082 *c*. We have already seen that in several jurisdictions in this country it is at common law indictable to maliciously injure fruit or ornamental trees. In England prosecutions of this kind are now exclusively statutory; the statutes having absorbed the common law.[4] Under these

So as to trees and shrubs.

On an indictment for breaking a threshing-machine, the judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. R. *v*. Crutchley, 5 C. & P. 133. As to meaning of "stack" see Com. *v*. Macomber, 8 Mass. 354.

An indictment on 7 & 8 Geo. 4, c. 30, s. 3, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps at the time of the damage done were prepared for or employed in carding, spinning, weaving, &c., or otherwise manufacturing or preparing any goods or articles of silk, woollen, linen, &c. R. *v*. Ashton, 2 B. & Ad. 750.

[1] Supra, §§ 1066, 1076.

[2] R. *v*. Norris, 9 C. & P. 241.

[3] R. *v*. Whittingham, 9 C. & P. 234 — Patteson.

[4] The English statutes are as follows: —

"Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of £1), shall be guilty of felony." 24 & 25 Vict. c. 97, s. 20. (*Former provision*, 7 & 8 Geo. 4, c. 30, s. 19.)

statutes, apple and pear-trees grafted in a wild stock, and producing fruit, are "trees;"[1] and cutting down a tree is sufficient to bring a case within the statute, although the tree is not thereby totally destroyed.[2] As to hop-binds, however, it was held that when "destroying" is alleged, it must be shown that the plant died in consequence of the injury received. Proof of the infliction of injury by cutting and bruising is insufficient.[3] It has been further ruled that where shrubs are cut upon an unproved allegation that they are likely to be injurious to an adjoining wall, it is a malicious trespass, though the title to the spot on which the shrubs grow is in dispute between the parties.[4] "Woods," when used in this relation in a statute, includes a field which has been overgrown with wild brush.[5]

"Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of £5), shall be guilty of felony." Ibid. s. 24. (*Previous enactment*, 7 & 8 Geo. 4, c. 30, s. 19.)

[1] R. *v.* Taylor, R. & R. C. C. 373. See State *v.* Shadley, 16 Ind. 230.

[2] R. *v.* Taylor, R. & R. C. C. 373.

[3] R. *v.* Boucher, 5 Jur. 709.

[4] R. *v.* Whateley, 4 M. & R. 431. But see supra, §§ 1072 *a*, 1077; Dawson *v.* State, 52 Ind. 478.

The title to the land on which the plant grows is not in controversy in such a prosecution. Possession is enough. State *v.* Gurnee, 14 Kans. 296. Supra, §§ 1072 *a*, 1077.

Where the prisoner was indicted for damaging apple-trees growing in a garden, and the indictment alleged that the damage was done feloniously and not unlawfully or maliciously, this was held bad. R. *v.* Lewis, 2 Russ. C. & M. 1066.

In an indictment on 6 Geo. 3, c. 36, for destroying trees, the name of the owner of the trees must have been truly stated, otherwise it is fatal. R. *v.* Patrick, 2 East P. C. 1059. And see R. *v.* Howe, 1 Leach C. C. 481; 2 East P. C. 588.

A party might be convicted under the 7 & 8 Geo. 4, c. 30, s. 24, of having wilfully and maliciously damaged growing wood, to the value of sixpence, though section 20 expressly imposed a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of one shilling at least." R. *v.* Dodson, 9 A. & E. 704.

[5] Hall *v.* Crawfurd, 5 Jones L. 3.

Under the statute of 24 & 25 Vict. evidence of damage committed at several times in the aggregate, but not at any one time exceeding £5, will not sustain an indictment. R. *v.* Williams, 9 Cox C. C. 338.

It has been held, that at common law an indictment does not lie for maliciously injuring trees (Brown's case, 3 Greenl. 177), and growing corn (State *v.* Helmes, 5 Ired. 364). Cases to the contrary will be found supra, § 1067.

§ 1082 *d*. Similar legislation has taken place to protect animals.[1] As "cattle," under the statute have been considered steers;[2] pigs;[3] hogs;[4] asses;[5] geldings;[6] horses, mares, and colts.[7] In Missouri, however, the term has been held not to include a tame buffalo.[8] Under "property," dogs, though not the subject of larceny, have been held in this country to be included.[9] But in order to constitute a maiming of a horse, it has been said that a permanent injury must have been inflicted on the animal;[10] though wounding a horse out of malice to the owner, by driving a nail into the frog of his hoof, is a "maiming," even if curable;[11] and so is *a fortiori* pouring acid into the eye of a mare, and thereby blinding her.[12] And to shave a horse's tail is to "disfigure" under the statute.[13]

So of killing and maiming animals.

Under the statute of 4 Geo. 4, it was held that to injure sheep by setting dogs on them was not maiming;[14] but this contravenes views heretofore vindicated;[15] and may now be regarded as over-

[1] By 24 & 25 Vict. c. 97, s. 40, "whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony." (*Former provision*, 7 & 8 Geo. 4, c. 30, s. 16.)

Section 41 covers other animals.

By sec. 58, "malice against the owner of the cattle or other animal injured is unnecessary to be shown."

[2] State *v*. Abbott, 20 Vt. 537.

[3] R. *v*. Chapple, R. & R. C. C. 77. Compare Com. *v*. Percavil, 4 Leigh, 686; Duncan *v*. State, 49 Miss. 331. As to description of animals see Wh. Cr. Ev. § 124.

[4] State *v*. Enslow, 10 Iowa, 115.

[5] R. *v*. Whitney, 1 M. C. C. 3.

[6] R. *v*. Mott, 2 East P. C. 1075; 1 Leach C. C. 73, n.

[7] R. *v*. Paty, 2 East P. C. 1074; 1 Leach C. C. 72; 2 W. Bl. 721; R. *v*. Magle, 2 East P. C. 1076; State *v*. Abbott, 20 Vt. 237; State *v*. Hambeleton, 22 Mo. 452.

[8] State *v*. Crenshaw, 22 Mo. 457.

[9] State *v*. McDuffie, 34 N. H. 523; State *v*. Sumner, 2 Ind. 377. See supra, § 1076.

If A. set fire to a cow-house and burnt to death a cow which was in it, A. was indictable under 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow. R. *v*. Haughton, 5 C. & P. 559. See supra, § 152.

[10] R. *v*. Jeans, 1 C. & K. 539.

[11] R. *v*. Haywood, 2 East P. C. 1076; R. & R. C. C. 16. See supra, § 1074.

[12] R. *v*. Owens, 1 M. C. C. 205. Supra, § 1074.

On an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence of administering, at different times, to show the intent; but if the jury is satisfied that the offender administered the poison under an idea that it would improve the appearance of the horses, he ought to be acquitted. R. *v*. Mogg, 4 C. & P. 364.

[13] Boyd *v*. State, 2 Humph. 39.

[14] R. *v*. Owens, 1 Mood. 205; R. *v*. Hughes, 2 C. & P. 420.

[15] Supra, § 152; U. S. *v*. McDuell, 5 Cranch C. C. 391.

ruled;[1] and upon an indictment under 24 & 25 Vict. for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound.[2] It is no defence that the cattle were trespassing on the prosecutor's field.[3] Under the present English statute, it is not necessary to prove malice to the *owner*;[4] though malice in the act is essential.[5]

At common law, as we have seen, indictments have been repeatedly sustained in this country for maliciously injuring animals.[6]

Ownership of the animal if alleged must be proved.[7] But under statute the averment may be unnecessary.[8]

Cruelty to animals has been made in some States a statutory offence.[9]

[1] Elmsley's case, 2 Lew. C. C. 126.

[2] R. *v.* Bullock, L. R. 1 C. C. 115; 37 L. J. M. C. 47; 17 L. T. N. S. 516; 16 W. R. 405; 11 Cox C. C. 125.

On an indictment for maliciously killing two sheep, the property in them may be laid to be in the agister. R. *v.* Woodward, 2 East P. C. 653.

An indictment on 9 Geo. 1, c. 22, must have stated the species and sex of cattle wounded or injured; to state that the prisoner maimed certain cattle was not sufficient. R. *v.* Chalkley, R. & R. C. C. 258.

Merely "maiming" is not sufficient. State *v.* Pugh, 15 Mo. 509; *Aliter* "killing." Com. *v.* Sowle, 9 Gray, 304.

If a prisoner mixed poison with the corn intended for the feed of eight horses, and then gave each horse his feed from this mixture, an indictment charging that he did administer the poison to the eight horses is correct. R. *v.* Mogg, 4 C. & P. 364.

[3] Snap *v.* People, 19 Ill. 80.

[4] R. *v.* Tivey, 1 C. & K. 704; 1 Den. C. C. 63; S. P., Brown *v.* State, 26 Oh. St. 176. Supra, § 1070.

[5] Duncan *v.* State, 49 Miss. 331; Thompson *v.* State, 51 Miss. 353.

[6] Supra, §§ 1068, 1070. *Contra*, State *v.* Allen, 72 N. C. 114. For indictment for driving cattle from their range see Long *v.* State, 43 Tex. 467.

[7] Smith *v.* State, 43 Tex. 433. Supra, §§ 932 *et seq.*

[8] Com. *v.* McClellan, 101 Mass. 34; State *v.* Brocker, 32 Tex. 611.

[9] See State *v.* Avery, 44 N. H. 392; Com. *v.* Lufkin, 7 Allen, 570; Com. *v.* McClellan, 101 Mass. 34; Com. *v.* Thornton, 118 Mass. 458; People *v.* Brunell, 48 How. (N. Y.) Pr. 435; State *v.* Comfort, 22 Minn. 271. That cruel experiments are thus punishable see Davis *v.* Soc. for Prevention of Cruelty, 16 Abb. N. Y. Pr. N. S. 73. That cruelty is not imputable to matters of discretionary discipline see Com. *v.* Wood, 111 Mass. 408; Walker *v.* Special Sessions, 4 Hun, 441.

CHAPTER XVII.

FORCIBLE ENTRY AND DETAINER.

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I. CHARACTER OF OFFENCE.

Forcible exclusion of another from his lands and tenements is an offence at common law.

§ 1083. When a man violently takes and keeps possession of any lands and tenements occupied by another, with menaces, force and arms, and without the authority of law, he may be indicted at common law, for forcible entry and detainer. To enter, with intent to keep possession, constitutes the offence of forcible entry. Of this there may be a conviction without proving a for-

cible detainer.[1] A forcible detainer is where a party, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible.[2] In many of the States, through the substitution of statutory remedies giving the injured party summary relief by recourse to a civil tribunal, criminal procedure in such cases has fallen into disuse.[3]

[1] 4 Bla. Com. 148; Russ. on Cr. (6th Am. ed.) 303; Henderson's case, 8 Grat. 708.

[2] Steph. Dig. C. L. art. 79.

[3] In Massachusetts (Rev. Stats. c. 104), the person thus forcibly expelled or kept out may take, from any justice of the peace, a writ in the form of an original summons (Ibid. § 4), and the suit thus commenced is subjected to the same incidents as accompany other civil actions before justices of the peace. Ibid. § 5. Under this statute it has been held that a mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer; but the possession must be attended with such circumstances as might excite terror in the owner, and prevent him from claiming his rights; such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people. Com. *v.* Dudley, 10 Mass. 403. Where a writ of restitution has been executed, and the proceedings are afterwards quashed upon certiorari, a new writ of restitution may be awarded. Com. *v.* Bigelow, 3 Pick. 31. The process, it is said, will not lie against one who has merely entered into land under a levy upon it, as the property of a tenant in possession; Ibid.; nor for the lessor of a tenant at will against a stranger for expelling the tenant. Ibid.

In New York, though the statutory remedy (2 R. S. 507) presents some of the features of a criminal prosecution, it may be properly regarded as a civil suit; and while some of the decisions under it are applicable to forcible entry and detainer at common law, it can scarcely be considered as forming one of the subjects of ordinary criminal jurisdiction. By it is provided that when any person is forcibly put out or kept out of possession, he may be restored by making a complaint to a judge of the county court, who shall thereupon summon a jury of twenty-four inhabitants of the county, who, on being sworn a true inquisition to make, are to proceed to examine witnesses on oath, to be administered by the judge, and who are to make and sign their inquisition before the said judge, and deliver the same to him. If, in such inquisition, it is found that either the entry or the detainer of the defendant was forcible, he may traverse the inquisition; and on such an issue a traverse jury is to be specially convened. The complaint to be made to the judge is to be accompanied with an affidavit of the forcible entry and detainer, and that the complainant has "an estate of freehold or for a term of years in the premises then subsisting, or some other right to the possession thereof, stating the same;" and the judge is thereupon to issue a precept, &c. By the 11th section of the act, it is pro-

§ 1084. The following English statutes have been in several States held to be part of the common law: —

Modification of common law by statutes.

5 RIC. II. st. 1, c. 8.

Entry with Strong Hand and Multitude of People. — "And also the king defendeth, that none from henceforth make any entry into any lands and tenements but

vided that on the trial of the traverse the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, "that he was peaceably in the actual possession of the premises at the time of a forcible entry, or was in the constructive possession of the premises at the time of a forcible holding out." The only defence allowed to the defendant on the traverse is the denial of the forcible entry or forcible holding out, or showing that he or his ancestors, or those whose estate he has, have been in the quiet possession of the premises three whole years together next before the inquisition found, and that his interest is not determined. People *v.* Van Nostrand, 9 Wendell, 62. Where it was objected that as the indictment alleged a possession in fee simple in the relator, the complainant was bound to show such an estate on the trial; it was determined that since the Revised Statutes the nature of the estate had become immaterial; possession was sufficient; and the allegation of the estate, in addition to the possession, could be rejected as surplusage. Ibid.

The Revised Statutes, it was said in the same case, have essentially changed the law from what it was before; the decided cases before had narrowed the remedy to cases where the relator was seised of a freehold, or possessed of a term for years, and the consequence was, that in every other instance of a forcible entry and detainer, so far as this remedy was concerned, the wrongdoer, though he entered by force and without right, was preferred to the quiet occupant thus dispossessed; for if the latter could show on the traverse that the former had no estate within the purview of these acts, as thus construed by the courts, he was entitled to the verdict. People *v.* Van Nostrand, 9 Wendell, 52. The act gives the remedy provided by it, as well to tenants for years and guardians, as to such as have estate of freehold. People *v.* Rickert, 8 Cowen, 226. Though a lease by parol be for a longer term than three years, and so void for the term, within the statute of frauds, yet the tenant entering has an interest from year to year, regulated in every respect by the parol demise, except as to the term. Ibid. Proof of actual possession is sufficient to support the allegation in the inquisition, that complainant was possessed in fee simple. People *v.* Van Nostrand, 9 Wendell, 50. The petit jury may find the defendant guilty of the detainer only, for which a writ of restitution will equally go as if the conviction had reached the whole indictment, and the assessment of damages will be in proportion to the degree of guilt or injury. People *v.* Anthony, 4 Johnson, 198; People *v.* Rickert, 8 Cowen, 226.

As the statutes of both Pennsylvania and Virginia are simply declaratory of the common law, as modified by 5 Rich. 2, st. 1, c. 8, and 21 Jac. 1, c. 15, it is unnecessary to do more at present than to give their provisions,

in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." [1]

referring to another head for the adjudication given to them by the courts. See 2 Pa. L. J. 391, for a learned article on the law as obtaining in Pennsylvania.

PENNSYLVANIA.

Forcible Entry. — If any person shall, with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows, or other parts of the house, or by any kind of violence or other circumstances of terror, or if any person, after entering peaceably, shall turn out by force or by threats, or menacing conduct, the party in possession, every person so offending shall be guilty of a forcible entry, and, on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court, and to make restitution of the lands and tenements entered as aforesaid. Rev. Laws, 1860, Bill I. sect. 21.

Detainer. — If any person shall, by force and with a strong hand, or by menaces or threats, unlawfully hold and keep the possession of any lands or tenements, whether the possession of the same were obtained peaceably or otherwise, such person shall be deemed guilty of forcible detainer, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court, and to make restitution of the lands and tenements unlawfully detained as aforesaid: *Provided*, That no person shall be adjudged guilty of forcible detainer, if such person, by those under whom he claims, has been in peaceable possession for three years next immediately preceding such alleged forcible detention. Ibid. sect. 22.

VIRGINIA.

Forcible Entry. — None shall enter into any lands or tenements but in case where entry is given by law, and in such case not with strong hand, nor with multitude of people, but only in a peaceful and easy manner; and that none who shall have entered in a peaceful manner shall hold the same afterwards against the consent of the party entitled to the possession thereof. R. C. chap. 115, § 1.

[1] By stat. 8 Hen. 6, this statute is extended to cases where the entry was peaceable but the detainer forcible; and restitution is given in such cases. Rob. Dig. 284. Both statutes are in force in Pennsylvania. Van Pool *v.* Com. 13 Penn. St. 392.

By 15 Rich. 2, there is a summary power given to justices to convict on view. This as well as the preceding statutes is in force in Pennsylvania and Maryland. See Roberts's Digest; Van Pool *v.* Com. supra; Kilty's Report, &c., 227–36.

21 JAC. I. c. 15.

Restitution to be awarded. — "That such judges, justices, or justices of the peace, as by reason of any act or acts of parliament now in force are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth, upon indictment of such forcible entries or forcible withholdings before them duly found, to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's services, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

Gist of offence is the violence.

§ 1085. The violent and forcible taking or keeping of another man's property is, apart from the operation of particular statutes, a breach of the public peace, punishable in a criminal court by indictment. The gist of the offence is the violence; and from the peculiar sanctity attached by the common law to every man's dwelling-house, violence offered to it is distinguished as a substantive offence, and punished with peculiar severity. Forcible entry and detainer, as an indictable offence, continues, therefore, to be punished in the courts even of those States where the injured party is furnished with the most summary civil remedies.[1] Nor, notwithstanding occasional hesitation,[2] can its continued common law efficiency be disputed. At common law, to support an indictment there must be a breach of the peace.[3] But by the 5 Ric. 2, st. 1, c. 8, and 21 Jac. 1, c. 15, the common law, as we have seen, received a modification, which, in many of the States, has been considered as a constituent part of the offence.[4]

[1] R. *v.* Wilson, 8 T. R. 357; Newton *v.* Harland, 1 Man. & Gran. 644; Harding's case, 1 Greenl. 22; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Taylor, 5 Binney, 277; State *v.* Mills, 2 Dev. 420; State *v.* Speirin, 1 Brev. 119; Cruiser *v.* State, 3 Harr. (Del.) 205.

[2] Com. *v.* Toram, 5 Penn. L. J. 296; 2 Pars. 411.

[3] R. *v.* Wilson, 8 T. R. 357; R. *v.* Bake, 3 Burr. 1731; Com. *v.* Dudley, 10 Mass. 403; Henderson's case, 8 Grat. 708.

[4] Harding's case, 1 Greenl. 22; Roberts's Digest, 283.

§ 1086. There is a distinction to be observed between forcible entry, &c., as it existed and still exists at common law, and forcible entry, &c., under the above given statutes. In the first place, more force is necessary to constitute the former offence than the latter;[1] in the second place, in an indictment for the latter offence it is necessary to set forth either a freehold or a leasehold in the prosecutor, while in the former, an averment of mere possession is sufficient.[2] Keeping these distinctions in mind, the construction given by the courts to the statutory offence will apply with equal force to the offence at common law.

Statutory offence requires less force than common law, but either freehold or leasehold title.

§ 1087. Any one who forcibly puts out and keeps out another from possession may be indicted for forcible entry and detainer. Hence, as will hereafter be observed, a landlord who violently dispossesses a tenant whose lease has expired may be guilty of forcible entry. But where his wife is in possession,[3] or where his mansion is detained by one having a bare charge, a man may break open the doors and forcibly enter without exposing himself to a criminal prosecution.[4] "It is immaterial whether the person making such an entry had or had not a right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."[5]

Any person forcibly putting out another from possession may be indicted.

§ 1088. It seems that though a woman cannot be mulcted in damages for a trespass on her husband's property, she may, "if she comes with a strong hand," "under circumstances of violence amounting to a breach of the public peace," be convicted of a forcible entry.[6]

Wife may be so indicted as against her husband.

§ 1089. A joint tenant, or tenant in common, may offend against the statutes by forcibly ejecting or holding out his companion.[7]

So as to tenant in common

[1] R. v. Wilson, 8 T. R. 357; R. v. Bake, 3 Burr. 1731; Com. v. Dudley, 10 Mass. 403; Archbold's C. P. 569, and cases cited infra, §§ 1100, 1101.

[2] R. v. Wilson, 8 T. R. 357; Harding's case, 1 Greenl. 22; State v. Speirin, 1 Brev. 119; State v. Mills, 2 Dev. 420. Infra, § 1111.

[3] Morris v. Bowles, 1 Dana, 97.

[4] 1 Russ. on Cr. 6th Am. ed. 307. See infra, § 1097–1100.

[5] Steph. Dig. C. L. art. 79.

[6] R. v. Smyth, 5 C. & P. 201; 1 M. & Rob. 155.

[7] 1 Russ. on Cr. 6th Am. ed. 307; Com. v. Oliver, 2 Par. 420; Burt v. State, 2 Tr. Con. R. 489.

ejecting his companion.

Thus, where one of a board of trustees put certain persons in possession of a church, which was closed by order of a majority of the board of trustees, it was held those persons were guilty of a forcible entry and detainer.[1]

So as to third person dispossessing officer of law.

§ 1090. An indictment will lie against a third person who intrudes himself on land, or enters after judgment against a former intruder, and the sheriff, who is in possession of the writ of restitution, may turn him out of possession.[2]

Real estate, corporeal or incorporeal, may be thus protected.

§ 1091. As a general rule, an indictment for forcible entry lies to redress an expuision from any real estate, whether corporeal or incorporeal; and it has been said that the process can be maintained against any one, whether a terre-tenant or a stranger, who should forcibly disturb a landlord in the enjoyment of his rent, or a commoner in the use of his common.[3] But a way,[4] ferry,[5] or similar easement, is not the subject of this process.

A forcible entry may be made on land, whether woodland or otherwise, within the bounds of a tract possessed by another, although the whole tract be not enclosed by a fence or cultivated.[6]

To forcible trespass on personalty force is essential.

§ 1092. Distinct from forcible entry and detainer as a statutory offence, yet bearing close relations to forcible entry and detainer at common law, stands *forcible trespass* on personalty, — distinguishable, however, from forcible entry and detainer at common law by two features: (1.) The latter must be directed against real interests exclusively, while the forcible trespass on personalty has for its object chattels of all classes; and (2.) Forcible entry and detainer at common law does not necessarily involve violence offered a person actually in possession, while such violence to such person is necessary to constitute forcible trespass to personalty a common law offence. It is virtually but an aggravated

[1] Com. *v.* Oliver, 2 Par. 420.

[2] State *v.* Gilbert, 2 Bay, 355.

[3] 1 Russ. on Cr. (5th Am. ed.) 303. See State *v.* Bordeaux, 2 Jones N. C. 241; State *v.* Caldwell, 2 Jones N. C. 468. Compare, as qualifying text, authorities cited infra, § 1103.

[4] Ibid.; 1 Russ. on Cr. (5th Am. ed.) 303.

[5] Rees *v.* Lawless, Little's Cas. (Ky.) 184.

[6] Penn. *v.* Robison, Addis. 14, 17.

assault, though, from the peculiar texture of the offence, the word assault need not appear in the indictment.[1]

To forcible entry force exceeding trespass is necessary.

§ 1093. On an indictment at common law for forcible entry, it is necessary to prove that the defendant entered with such force and violence as to exceed a bare trespass, and to give reasonable grounds for terror;[2] but where a party entering on land in possession of another, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is deemed forcible, whether he causes the terror by carrying with him an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance.[3]

A strong man went to the house of another, in his absence, and remained there against the will of the wife, using insulting language; the husband returned and ordered the intruder out, but he refused to go for some time, and then went into the yard, with a club in his hand, threatening and cursing. It was held, that this was sufficient to support an indictment for a forcible entry, in the presence of the husband, and a detainer.[4]

An entry "with strong hand," *or* "with multitude of people," is the offence described in the statute. It is not necessary, however, when the latter alternative is relied on that the entry

[1] R. *v.* Gardiner, 1 Russ. on Cr. 53; State *v.* Mills, 2 Dev. 420; State *v.* Phipps, 10 Ired. 17; State *v.* McDowell, 1 Hawks, 449. See infra, § 1112.

[2] R. *v.* Smyth, infra; R. *v.* Deacon, R. & M. 27; Com. *v.* Keeper of Prison, 1 Ashm. 140; Com. *v.* Conway, 1 Brewst. 509; Rees *v.* Com. 2 Brewst. 1100; State *v.* McClay, 1 Harring. 520, and cases cited at close of this note. That any force in a dwelling-house likely to produce terror may constitute the offence see R. *v.* Smyth, 5 C. & P. 201; 1 M. & R. 156; R. *v.* Deacon, R. & M. (N. P.) 27; Harding's case, 1 Greenl. 22; Penn. *v.* Dixon, 1 Smith's Laws, 3; Com. *v.* Taylor, 5 Binn. 277; People *v.* Smith, 24 Barb. 16; State *v.* Pollok, 4 Ired. 305; State *v.* Tolever, 5 Ired. 452; State *v.* Godsey, 13 Ired. 348; State *v.* Ross, 4 Jones (N. C.) 315, and cases cited supra.

[3] 1 Russ. on Cr. 5th Am. ed. 309; Penn. *v.* Robison, Add. 14, 17; Resp. *v.* Devore, 1 Yeates, 501; State *v.* Pollok, 4 Ired. 305; Bennett *v.* State, 1 Rice Dig. 340; State *v.* Cargill, 2 Brev. 445. Infra, § 1099.

[4] State *v.* Caldwell, 2 Jones (N. C.), 468.

should be committed by a very great number of people; three persons, following the analogy of riot, have been held enough to sustain the averment of "multitude."[1] And even where the entry is lawful, it must not be made with a strong hand, or with a number of assailants; where it is not lawful, it must not be made at all.[2]

Force may be inferred from facts.

§ 1094. An entry by breaking the doors or windows, &c., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute.[3] So an entry, where personal violence is done to the prosecutor, or any of his family or servants, or to any person or persons keeping the possession for him;[4] or even where it is accompanied with such threats of personal violence (either actual or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like) as are likely to intimidate the prosecutor or his family, and to deter them from defending their possession,[5] is a forcible entry within the statute. The issue is, Was there force sufficient to alarm, so as to coerce surrender of possession, or to provoke a breach of the peace?[6]

Rule does not apply to out-houses when house has been peaceably entered.

§ 1095. It has been intimated that as possession of a dwelling-house implies possession of its appurtenances, it is not indictable for a person who has peaceably and legally obtained possession of a dwelling-house forcibly to break open an out-house appertaining thereto.[7]

But when the property of the defendant in the execution is in the house of a third person, or in a smoke-house within the curtilage of said third person, a demand for admittance by the officer holding the execution, and a refusal upon the part of the person holding the property, are necessary

[1] State *v.* Pollok, 4 Ired. 305; State *v.* Simpson, 1 Dev. 504.

[2] Burt *v.* State, 2 Tr. Con. R. 489.

[3] See 1 Hawk. c. 64, s. 26.

[4] Ibid.

[5] 1 Hawk. c. 64, ss. 20, 21, 27; Milner *v.* Maclean, 2 C. & P. 17; Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Dudley, 10 Mass. 403; State *v.* Pollok, 4 Ired. 305; State *v.* Armfield, 5 Ired. 207.

[6] R. *v.* Smyth, 5 C. & P. 201; 1 M. & R. 155; Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Rees, 2 Brewst. 564; State *v.* Pollok, 4 Ired. 305.

[7] State *v.* Pridgen, 8 Ired. 84.

to justify the officer in breaking the door, and entering either house or smoke-house.[1]

§ 1096. An entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out, and then shutting the door upon him, or the like, without further violence,[2] or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence,[3] is not deemed a forcible entry.

Entry by trick not "forcible."

§ 1097. A peaceable entry may be followed, as will be seen, by a forcible detainer.[4] Thus where an intruder, having entered peaceably, said to the former possessor, "It will not be well for you, if you ever come upon the premises again by day or night," it was left to the jury whether this was a threat of personal violence, and so a forcible detainer within the statute: they having found it was, a conviction was held proper.[5] And keeping forcibly a lessee out of possession to which he is entitled may be a forcible detainer.[6] But a tenant entitled to possession may defend it by force adequate to the purpose.[7]

Peaceable entry may be followed by forcible detainer.

§ 1098. Where a party having a right enters or makes claim, and the other party afterwards continues to hold possession by force, this is considered a forcible entry in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry.[8]

Forcible continuance by wrongful occupier is forcible entry.

§ 1099. Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who

When there is right of entry,

[1] Douglass *v.* State, 6 Yerg. 525.

[2] Com. Dig. Forc. Ent. & D. 3; 1 Hawk. c. 64, s. 26.

[3] 1 Hawk. c. 64, s. 58; Burt *v.* State, 2 Tr. Con. R. 489.

[4] Infra, §§ 1102, 1103.

[5] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 1 Hall, 240; People *v.* Anthony, 4 Johns. 198.

[6] Com. *v.* Wisner, 8 Phil. 612.

[7] Com. *v.* McNeile, 8 Phil. 438; Com. *v.* Haxton, Lewis C. L. 282.

[8] 1 Hawk. c. 64, ss. 22, 34; Co. Lit. 251; Burt *v.* State, 2 Tr. Con. R. 489. Supra, § 1087; infra, § 1101.

If, when the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the mean time send persons to take possession of it peaceably, this is said to be a forcible entry. R. *v.* Smyth, 5 C. & P. 201.

violence is essential to offence.

use or threaten violence,[1] or who actually abet those who do, are guilty.

§ 1100. A landlord has no right to expel by violence even a tenant at will, and, as will be noticed more fully under another head, should he attempt it, he will be criminally responsible for the intrusion.[2] "If the landlord," said Lord Kenyon, "had entered with a strong hand to dispossess the tenant with force (after the expiration of the term), he might have been indicted for a forcible entry." [3] In a case immediately succeeding, the same judge declared it to be part of the law of the land that no man should assert his title with violence.[4] It is true, that on a subsequent day of the term he stated that the grounds of their opinion might be understood, so that it should not be considered a precedent for other cases where it did not apply. He then proceeded: "Perhaps some doubt may hereafter arise respecting what Mr. Sergeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title; but without giving any opinion concerning that dictum, one way or the other, but leaving it to be proved or disproved whenever the question shall arise, all that we wish to say is, that our opinion

Tenant at will cannot be expelled by force.

[1] 3 Bac. Abr. Forc. Ent. (B.)

[2] 1 Hawk. 274; 4 Blac. Com. 148; Taylor *v.* Cole, 3 T. R. 292; Newton *v.* Harland, 1 Man. & Gr. 644, 956; 1 Scott N. R. 474; Sampson *v.* Henry, 13 Pick. 36; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 401; though see Overdeer *v.* Lewis, 1 W. & S. 90; State *v.* Elliot, 11 N. H. 540. V. having been in possession of a house from May to October, the defendants called there, and insisting that V. had no title, proceeded to take the keys out of the room doors. Upon their doing so, V. gave them into custody for stealing the keys, but the magistrate refused to detain them. They then returned to the house, and having procured a sledge-hammer, forced the inner door of the hall, and some having entered that way, and some by a staircase window, they overpowered the prosecutor's opposition, and furnished with a hatchet and other weapons, after a struggle which caused a disorderly crowd to assemble, ejected the prosecutor and his servants. From the commencement of the proceedings till the conclusion, a female servant of the prosecutor's was in the kitchen: it was held, assuming the title of the prosecutor to have been bad, and that the defendants had acted by the order of those who had a good title to the premises, that the evidence was sufficient to support a conviction of the defendants for a forcible entry and riot. R. *v.* Studd, 14 W. R. 806; 14 L. T. N. S. 633 — C. C. R. Infra, § 1105.

[3] Taunton *v.* Costar, 7 T. R. 431.

[4] R. *v.* Wilson, 8 T. R. 357.

in this case leaves that question untouched." "But now," says Sir William Russell, "there is no doubt that in England a party is indictable for forcible entry into premises in which he has a legal title."[1] While this is the case, by a curious anomaly in the law three out of six judges in the Common Pleas, in a case already cited, held that the landlord was not responsible for a trespass, at the tenant's suit for removing the latter, even though such force was used as to subject the landlord to a criminal prosecution.[2] If this distinction be recognized, there can be no difficulty in reconciling with the law of forcible entry, the doctrine of the Supreme Court of Pennsylvania, that when a lease expires, the landlord may forcibly dispossess by night or by day the tenant whose lease has expired, with this limitation only, that he should use no greater force than might be necessary, and do no wanton damage. The plaintiff in such a case is "entitled to damages only for an injury he had suffered from unnecessary violence to his property."[3] Still, on the distinction above stated, the defendant is liable to a criminal prosecution, if he enter with violence or with a multitude of persons, so as to constitute or provoke a breach of the peace.[4] The reason of the distinction is this: The dispossessed party cannot complain in a civil suit of his dispossession, unless a personal assault was made on him with undue force, as he had no right to remain on the premises. And though there may have been a riot, he cannot sue for this, which is an offence, not against him, but against the public. The only remedy is a criminal prosecution.[5]

§ 1101. Yet where the prosecutor is a mere intruder, without color of title, past or present, and has entered by fraud or violence, or on a mere scrambling title, the

Owner may forcibly enter

[1] 1 Russ. on Cr. 6th Am. ed. 305. See also Newton *v.* Harland, 1 Man. & Gr. 664; 1 Scott N. R. 474; Butcher *v.* Butcher, 7 B. & C. 399; 1 M. & R. 220; Hilary *v.* Gray, 6 C. & P. 248; Turner *v.* Meymott, 7 Moore, 574; 1 Bing. 158; Pollin *v.* Brewer, 7 C. B. (N. S.) 371.

[2] Newton *v.* Harland, *supra.*

[3] Overdeer *v.* Lewis, 1 W. & S. 90. S. P., Rich *v.* Keyser, 54 Penn. St. 86. See R. *v.* Smyth, 1 M. & Rob. 156; 5 C. & P. 201.

[4] Com. *v.* Kensey, *ut supra.*

[5] That at common law the owner may take his property by force see supra, §§ 97–8; Penn. *v.* Robinson, Add. 14; Com. *v.* Rees, 2 Brewst. 564. See Aldrich *v.* Wright, 53 N. H. 398.

against a mere intruder.

owner may forcibly enter.[1] This has been seen to be the case when the possession is held by one claiming mere custody under the owner, but refusing entrance to the owner.[2] It was, therefore, rightly ruled by Lord Campbell, C. J., that a person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not acquire actual possession, but may be expelled by force.[3]

Legal right to enter necessary to writ of restitution.

§ 1102. For the purpose of obtaining restitution, it is necessary to prove that the prosecutor is still kept out of possession,[4] and it is plain that this right of possession on the part of the prosecutor must be legal, and that if he has no right to enter he cannot maintain a forcible detainer.[5]

Forcible detainer to be inferred from facts.

§ 1103. As has already been incidentally observed, there may be a forcible detainer, though the entry is peaceable. It is sufficient if it appear from the indictment that the party aggrieved had title, and was forcibly kept out of possession.[6] But where the entry was peaceable and the continued possession lawful, forcible detainer cannot be maintained.[7]

The same circumstances evincing violence which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, in a way indicating violence, or threatens in such connection to do some bodily hurt to the former possessor if he dare return, may be adjudged guilty of a forcible detainer, though no attempt be made to reënter.[8] But merely refusing to go out of the house,[9] or denying possession, by a tenant at will, to a lessor, is not a forcible holding within the meaning of the statutes.[10]

[1] Com. v. Keeper of Prison, 1 Ashm. 140; Com. v. Conway, 1 Brewst. 509. See infra, § 1104.

[2] Supra, § 1087. See Shotwell, ex parte, 10 Johns. 304; State v. Curtis, 4 Dev. & Bat. 222.

[3] Collins v. Thomas, 1 F. & F. 416.

[4] 1 Hawk. c. 64, s. 41; Burd v. Com. 6 S. & R. 252.

[5] See infra, § 1111.

[6] Com. v. Rogers, 1 S. & R. 124; Com. v. Wisner, 8 Phila. 612; Burt v. State, 3 Brev. 413; 2 Tr. Con. Rep. 489.

[7] Com. v. McNeile, 8 Phila. 438; State v. Godsey, 13 Ired. 348.

[8] People v. Rickert, 8 Cow. 226, and cases cited supra, § 1096.

[9] 1 Hawk. c. 64, s. 30. See Com. v. McNeile, 8 Phila. 438.

[10] See R. v. Oakley, 4 B. & Ad. 307; R. v. Wilson, 8 Ad. & El. 817.

As will presently be more fully seen, the offences are divisible.[1]

§ 1104. Under 5 Ric. 2, the prosecutor must aver a freehold, and under 21 Jac. 1, a leasehold; but, it seems, proof that he was in actual occupation of the premises, or in the reception of the rents and profits, is sufficient evidence of seisin.[2] At common law, however, no allegation beyond possession was necessary, when the object was only to obtain punishment for the violent invasion of the prosecutor's rights, and of course mere possession was sufficient to support the prosecution.[3] But a mere scrambling possession will not be enough to sustain an indictment even at common law.[4] Nor is surveying land, building cabins, and leaving them unoccupied, such possession as is necessary.[5]

At common law only possession is necessary to prosecution.

§ 1105. As we have seen, the defendant cannot go into evidence to disprove the title of the complainant,[6] or to establish his own, as the question is not one of civil right, but of public mischief.[7] Even where a tenant holds over beyond the period fixed by his lease, and the landlord makes forcible entry for any purpose, though the tenant cannot maintain a trespass, *quare clausum*, the landlord cannot justify a personal injury committed on the tenant in such entry.[8] If he attempts to dispossess his tenant by undue violence, he is criminally responsible for the consequences, and may be punished for the breach of the peace, though he is at the time merely asserting his civil rights.[9]

Title not at issue.

[1] Burd *v.* Com. 6 S. & R. 252. See infra, § 1110.

[2] Jayne *v.* Price, 5 Taunt. 326; 1 Marsh. 68; 4 Bl. Com. 148; 1 Hawk. 274; People *v.* Van Nostrand, 9 Wend. 52.

[3] 1 Hawk. 274; 4 Blac. Com. 148; R. *v.* Wilson, 8 T. R. 357; Taylor *v.* Cole, 3 T. R. 292; Newton *v.* Harland, 1 Man. & Gr. 654, 926; R. *v.* Child, 2 Cox C. C. 102; Harding's case, 1 Greenleaf, 31; Langdon *v.* Potter, 3 Mass. 215; People *v.* Leonard, 11 Johns. 504; Com. *v.* Kensey, 5 Penn. Law Jour. 119; State *v.* Anders, 8 Ired. 15; State *v.* Bennett, 4 Dev. & Bat. 43; State *v.* Speirin, 1 Brev. 119.

[4] See cases cited supra, § 1101; Shotwell, ex parte, 10 Johns. 304.

[5] Penn. *v.* Waddle, Addis. 41. See supra, § 1101.

[6] Dutton *v.* Tracy, 4 Conn. 79.

[7] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 1 Hall, 240; People *v.* Anthony, 4 Johns. 198; Resp. *v.* Schryber, 1 Dall. 68; Bennett *v.* State, 1 Rice S. C. Digest, 340.

[8] Sampson *v.* Henry, 13 Pick. 36; though see Overdeer *v.* Lewis, 1 W. & S. 90. Supra, § 1100.

[9] Taylor *v.* Cole, 3 T. R. 292;

It must be remembered, however, that the possession must be actual and not constructive. Two persons cannot be in possession of the same land at the same time (*i. e.* adversely); and whenever the unlawful entry of one with force necessarily dispossesses the other, an indictment for forcible entry may be maintained.[1]

Prosecutor may prove force.

§ 1106. The prosecutor is at common law not a witness to prove anything more than the force used; and he is inadmissible, therefore, to sustain an indictment for the purpose of restitution.[2] The wife, also, of the prosecutor is admissible to prove the force, but only the force.[3] Of course, in States where interest does not disqualify, these rulings do not apply.

II. INDICTMENT.[4]

Indictment must contain technical terms.

§ 1107. Greater force must be averred than is expressed by *vi et armis*.[5] The words, "and with strong hand," should never be omitted.[6]

For common law offence pos-

§ 1108. It is necessary, as has been stated, under the English statutes, to aver either a leasehold or a freehold in the prosecutor;[7] though proof of actual possession is suf-

Taunton *v.* Costar, 7 T. R. 427; Turner *v.* Meymott, 8 Eng. C. L. 280; 7 Moore, 574; Newton *v.* Harland, 2 Man. & Gr. 654, 956; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 401. See supra, § 1100.

[1] Burt *v.* State, 2 Tr. Con. R. 489.

[2] R. *v.* Beavan, R. & M. (N. P.) 242; R. *v.* Williams, 4 M. & Ry. 471; 9 B. & C. 549; Resp. *v.* Schryber, 1 Dall. 68; State *v.* Fellows, 2 Hayw. 340.

[3] Resp. *v.* Schryber, 1 Dall. 68.

[4] As to indictment generally see Wharton's Precedents, as follows: —

(489.) General frame of indictment at common law.

(490.) Another form of same.

(491.) Against one, &c., at common law, with no averment of either leasehold or freehold possession in the prosecutor.

(492.) Forcible entry, &c., into a freehold, on stat. 5 Rich. 2, c. 8.

(493.) Forcible entry into a leasehold, on stat. 21 Jac. 1, c. 15.

(494.) Forcible detainer, on stat. 8 Hen. 8, c. 9, or 21 Jac. 1, c. 51.

(495.) Forcible entry. Form in use in Philadelphia. First count, at common law.

(496.) Second count. Entry upon freehold.

(497.) Third count. Entry upon leasehold.

(498.) Breaking and entering a close, and cutting down a tree, under the Pennsylvania act.

[5] R. *v.* Wilson, 8 T. R. 357. See Harding's case, 1 Greenl. 27.

[6] Whart. Plead. & Prac. § 270; R. *v.* Baker, 11 Mod. 235; Com. *v.* Shattuck, 4 Cush. 141; State *v.* Whitfield, 8 Ired. 315. Yet for the mere common law offence convertible terms may be used. R. *v.* Bake, 3 Burr. 1731.

[7] Archbold's C. P. 566. So in New

ficient to support the allegation in the indictment that the complainant was possessed in fee simple.[1] At common law, as we have also noticed, mere possession is all that need be laid.[2] But as is elsewhere seen, an indictment stating a naked possession merely in the prosecutor, without laying any estate or interest in him, is not sufficient to authorize an award of restitution.[3] Such an allegation, however, will be sufficient to support an indictment for the forcible entry at common law as a breach of the peace;[4] though it has been said that as a forcible detainer is not an offence at common law, an indictment for that offence should always aver the prosecutor's estate in the premises.[5]

Possession only need be averred.

An allegation in the indictment that the prosecutor was disseised, necessarily implies a previous seisin.[6]

§ 1109. The indictment must describe the premises entered with the same particularity as in ejectment. Thus, an indictment of forcible entry into a messuage, tenement, and tract of land, without mentioning the number of acres, was held bad after conviction.[7]

Premises must be described as in ejectment.

Hampshire. State *v.* Pearson, 2 N. H. 550.

The proof as to the application of force must correspond with the indictment. Thus where an indictment laid the force against the seisin of A., it was ruled that evidence was not admissible of an entry on land leased by A. and B. to C., and of force against C. Resp. *v.* Sloane, 2 Yeates, 229; Penn. *v.* Grier, 1 Smith's Laws, 3. And as to other cases of variance see infra, § 1009.

[1] 4 Bl. Com. 148; 1 Hawk. 274; People *v.* Van Nostrand, 9 Wend. 50.

[2] Supra, § 1104.

[3] Infra, § 1111.

[4] Com. *v.* Taylor, 5 Binn. 277; Com. *v.* Kensey, 5 Penn. L. J. 119; 2 Pars. 114.

[5] Com. *v.* Toram, 6 Penn. L. J. 296; 2 Pars. 411.

An indictment charging that A. was "peaceably possessed in his demesne, as of fee," of certain lands, "and continued so seised and possessed" until B. "thereof disseised" him, and "him so disseised and expelled," did keep out, &c., was held good on error; Fitch *v.* Remp. 3 Yeates, 49; 4 Dall. 212; and so where the indictment stated that the prosecutor was seised in his demesne as of fee, and that his "peaceable possession thereof, as aforesaid, continued until," &c., the latter words being rejected as surplusage. Resp. *v.* Schryber, 1 Dall. 68.

An indictment stating that the prosecutor "was seised," without stating when he was seised, was held to be good. Ibid.

[6] Com. *v.* Fitch, 4 Dall. 212.

[7] M'Naire *v.* Remp. 4 Yeates, 326; Dean *v.* Com. 3 S. & R. 418.

Certainty to a reasonable intent is all that is required in the description.[1]

Entry and detainer are divisible.

§ 1110. Although a forcible entry and forcible detainer are charged in the same indictment, they are nevertheless distinct offences, and the defendant may be acquitted of one and convicted of the other. If one is defectively set out, he may be convicted of that which is well set out.[2]

Title is necessary to restitution.

§ 1111. To enable the court to award restitution on a conviction for forcible detainer, it is necessary that there should be an estate, either freehold or leasehold, averred in the prosecutor.[3] Thus where an indictment stated that A. "was lawfully and peaceably seised" of the premises,

[1] Torrence *v.* Com. 9 Barr, 184.

Where the indictment was for forcible entry and detainer of a messuage in possession of A. for a term of years, and the evidence was of forcibly entry into a field, and no lease was produced, it was held that the indictment could not be supported. Penn. *v.* Elder, 1 Smith's Laws, 3. And so where the indictment averred forcible entry on a *field*, and it was proved that the attack was on a house. State *v.* Smith, 2 Ired. 127; and see Resp. *v.* Sloane, 2 Yeates, 229.

Where the words were, "a certain messuage with the appurtenances, for a term of years, in the district of Spartanburg," it was adjudged that the place where was not described with sufficient legal certainty. State *v.* Walker, Brev. MS.

It is sufficient to describe the premises as "a certain close of two acres of arable land, situate in S. township, in the county of H., being a part of a larger tract of land adjoining lands of A. and B." Dean *v.* Com. 3 S. & R. 418.

"A certain tavern stand, with the appurtenances, including about five acres of land adjacent thereto, at the M. and U. cross-roads in E. township in A. county," is, it seems, a sufficient description of the premises to support an award of restitution in forcible entry and detainer. Torrence *v.* Com. 9 Barr, 184.

And so as to "all that piece of land containing seventy-six acres and one hundred and fifty perches, and the allowance of six per cent., it being part of a large tract known as the Peter Jackson improvement, adjoining lands of David Henderson on the east." Van Pool *v.* Com. 13 Penn. St. 391. See R. *v.* Studd, 14 W. R. 806; Atwood *v.* Joliffe, 3 New Sess. Cas. Q. B. 116.

When restitution is not claimed, it is enough to aver possession alone. That such is the case has been already stated, as here the defendant proceeds merely for the offence at common law. Supra, § 1108.

[2] People *v.* Rickert, 8 Cow. 226; People *v.* Godfrey, 1 Hall, 240; People *v.* Anthony, 4 Johns. 198; Com. *v.* Rogers, 1 S. & R. 124; Burd *v.* Com. 6 S. & R. 252; State *v.* Ward, 1 Jones (N. C.), 290. See Whart. Plead. & Prac. §§ 736 *et seq.*; Whart. Crim. Ev. § 129.

[3] R. *v.* Bowser, 8 D. P. C. 128; 1 Wil., W. & H. 345; R. *v.* Taylor, 7 Mod. 123; Resp. *v.* Campbell, 1 Dall. 354; State *v.* Speirin, 1 Brev. 119.

and that B., son of A., "was lawfully in possession of the same," and that "the defendant entered and expelled the said B. from possession of the premises, and forcibly disseised the said A. of the same, and the said B. so expelled and held out," &c., it was held that it was error to award restitution to A.[1] Yet it has in England been held sufficient for the purposes of restitution to aver that the estate was "in the possession of W. P., he, W. P., then and there being also seised thereof."[2]

Indictment for forcible trespass on personalty must aver violence.

§ 1112. Indictments for forcible trespass on personalty are rare at common law, since it is much simpler to indict for an assault, which, as has been seen,[3] is a usual ingredient in a forcible trespass. If, however, an indictment of this kind should be framed, it is necessary to aver actual possession in the prosecutor, and violence offered to him, or violent wresting of the chattel from him, so as to constitute a breach of the peace.[4] Yet it is enough to say that the defendant, "with strong hand," and against his will, took, &c., the chattel from the possession of the prosecutor, in whose possession it then and there was.[5] If sufficient violence to constitute a robbery is alleged, then the prosecution must try, not for forcible trespass, but for robbery. Under these circumstances, common law indictments for a forcible trespass have been rarely attempted.[6] It must be kept in mind, in considering this question, that a party has at common law the right to rescue even by force (if such force be not excessive) his property from the hands of another.[7] If, however, in doing this, he uses unnecessary force, or stimulates a riotous demonstration, he is indictable.[8]

[1] Burd *v.* Com. 6 S. & R. 252. See R. *v.* Depuke, 11 Mod. 273; Com. *v.* Toram, 5 Penn. Law Journ. 297; 2 Pars. 411; Torrence *v.* Com. 9 Barr. 184; Van Pool *v.* Com. 13 Penn. St. 391; State *v.* Bennett, 4 Dev. & Bat. 43; State *v.* Anders, 8 Ired. 15; but see R. *v.* Dillon, 2 Chit. 314, where it was held that "seised" was enough.

[2] R. *v.* Hoare, 6 M. & S. 266; R. *v.* Dillon, 2 Chit. 314.

[3] See supra, § 1092.

[4] State *v.* Mills, 2 Dev. 420; State *v.* Watkins, 4 Humph. 256.

[5] State *v.* Mills, *ut supra.*

[6] For a recent instance, where a prosecution of this class was sustained, see State *v.* McAdden, 71 N. C. 207.

[7] Supra, § 100. See State *v.* Covington, 70 N. C. 71.

[8] State *v.* Armfield, 5 Ired. 207; State *v.* McCanless, 9 Ired. 375; State *v.* Simpson, 1 Dev. 504. Supra, § 1100.

§ 1113. Of summary convictions by justices under 15 Rich. 2, c. 2; and 8 Hen. 6, c. 9, there are no reported American cases. In England it is held that to sustain the procedure there must be alleged and proved an unlawful entry as well as a forcible detainer.[1] Where a conviction stated that justices had convicted A. of forcible detainer upon their own view, and that afterwards a complaint was made to the justices that A. forcibly entered the premises, and that notice of such complaint was given to A., who received it, but said nothing, and then went on to allege that the justices received evidence on oath of the unlawful entry; it was held that the conviction was bad, for not showing that A. had been summoned to answer the charge of the unlawful entry, or that he had had an opportunity afforded him of defending himself against such charge.[2]

Practice to sustain summary convictions.

[1] Atwood *v.* Joliffe, 3 New Sess. Cas. Q. B. 116; R. *v.* Oakley, 4 B. & Ad. 307; 1 N. & M. 58; R. *v.* Wilson, 5 N. & M. 164; 3 Ad. & El. 817. As to procedure see R. *v.* Wilson, 3 N. & M. 753; 1 Ad. & El. 627.

[2] Atwood *v.* Joliffe, *ut supra*. See R. *v.* Studd, 14 W. R. 806.

CHAPTER XVIII.

CHEATS.

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- So generally as to defendant's *status*, § 1139.
- So as to pretension to supernatural power, § 1140.
- So as to pretence that defendant had delivered certain goods, or paid certain money, § 1141.
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  - That defendant represented a principal of means, § 1144.
  - That defendant was an auctioneer in search of a clerk, § 1145.
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  - That defendant was a certain payee, § 1147.
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And so of statement as to specific weight, § 1159.
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By statute conviction may be had of attempt under indictment for complete offence, § 1229.
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I. CHEATS AT COMMON LAW.[1]

§ 1116. CHEATS, punishable at common law, may in general be described to be such cheats (not amounting to felony) as affect, or may affect, the public at large, and are effected by deceitful or illegal practices, against which common prudence could not have guarded.[2]

[1] See Wh. Prec., as follows: —
(499.) Selling by false weight or measure.
(500.) Against a baker for selling loaves to poor persons under weight, and obtaining pay from them under the pretence that they were of full weight.
(501.) Cheating at common law by false cards.
(502.) Second count. Cheating at common law, at a game of dice called Passage.
(503.) Information. Passing a sham bank note, the offence being charged as a false token.
(504.) Obtaining goods by means of a sham bank note, as a misdemeanor at common law.
(505.) Cheat by means of a counterfeit letter.
See "Secreting Goods," &c., "False Personation," "Fraudulent Insolvency," "Factors," "False Pretences." And see also 7 Law Rep. (N. S.) 81.

[2] 2 East P. C. c. 18, s. 4, p. 821; 2 Hawk. P. C. c. 22, s. 1; 2 Russ. on Cr. 6th Am. ed. 275; U. S. *v.* Watkins; 3 Cranch C. C. 441; Cross *v.* Peters, 1 Greenl. 387; Com. *v.* Hearsey, 1 Mass. 137; Com. *v.* Morse, 2

§ 1117. Cheats affecting public justice, thus executed, have always been held misdemeanors. Thus where a person committed to jail under an attachment for a contempt in a civil cause counterfeited a pretended discharge, as from his creditor, to the sheriff and jailer,

Cheats affecting public justice indictable.

Mass. 139; Com. *v.* Warren, 6 Mass. 72; People *v.* Babcock, 7 Johns. 201; People *v.* Miller, 14 Johns. 371; Lambert *v.* People, 9 Cow. 588; People *v.* Stone, 9 Wend. 187; State *v.* Wilson, 2 Mill's Rep. Con. Ct. 135; State *v.* Vaughan, 1 Bay, 282; Hill *v.* State, 1 Yerg. 76; Com. *v.* Speer, 2 Va. Cas. 65; State *v.* Stroll, 1 Rich. 244; State *v.* Patillo, 4 Hawks, 348.

From Lord Macaulay's Report on the Indian Code we have the following: —

"The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and a cheat by deception. There is no offence in the Code with which we have found it so difficult to deal as that of cheating. It is evident that the practising of intentional deceit for purposes of gain ought sometimes to be punished. It is equally evident that it ought not always to be punished. It will hardly be disputed that a person who defrauds a banker by presenting a forged check, or who sells ornaments of paste as diamonds, may with propriety be made liable to severe penalties. On the other hand, to punish every defendant who obtains pecuniary favors by false professions of attachment to a patron; every legacy hunter who obtains a bequest by cajoling a rich testator; every debtor who moves the compassion of his creditors by overcharged pictures of his misery; every petitioner who, in his appeals to the charitable, represents his distresses as wholly unmerited, when he knows that he has brought them on himself by intemperance and profusion, would be highly inexpedient. In fact, if all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees, and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deceptions practised for the sake of gain, yet no judicious legislator would punish these deceptions. A very large part of the ordinary business of life is conducted all over the world, and nowhere more than in India, by means of a conflict of skill, in the course of which deception to a certain extent perpetually takes place. The moralist may regret this; but the legislator sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch; and therefore he does not think it necessary to interfere. It is enough

under which he obtained his discharge, he was held guilty of an offence at common law, in thus effecting an interruption of pub-

for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century.

"If, then, it be admitted that many deceptions committed for the sake of gain ought to be punished, and that many such deceptions ought not to be punished, where ought the line to run?

"It appears to us that the line which we have drawn is correct in theory; that it is not more inconvenient in practice than any other line must be which can be drawn while the civil law of India remains in its present state; and that it will be unexceptionable whenever the civil law of India shall be ascertained, digested, and corrected.

"We propose to make it cheating to obtain property by deception in all cases where the property is fraudulently obtained; that is to say, in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful. A few examples will show the way in which this principle will operate.

"A. intentionally deceives Z. into a belief that he is strongly attached to Z. A. thus induces Z. to make a will, by which a large legacy is left to A. Here A.'s conduct is immoral and scandalous. But still A. has a legal right on Z.'s death to receive the legacy. Even if the clearest proofs of A.'s insincerity are laid before a tribunal, even if A. in open court avows his insincerity, the will cannot, on that account, be set aside. The gain, therefore, which A. obtains under Z.'s will is not, in the legal sense of the expression, wrongful gain. He has practised deception. He has thus caused gain to himself and loss to others. But that gain is a gain to which the civil law declares him entitled, and which the civil law will assist him to recover if it be withheld from him. That loss is a loss with which the civil law declares that the losers must put up. A. therefore has not committed the offence of cheating under our definition.

"But suppose that the civil law should contain, as we think that it ought to contain, a provision declaring null a will made in favor of strangers by a testator who erroneously believed his children to be dead; and suppose that A. intentionally deceives Z. into a belief that Z.'s only son has been lost at sea, and by this deception induces Z. to make a will by which everything is left to A. Here the case will be different. The will being null, any property which A. could obtain under that will would be property which he had no legal right so to obtain, and to which another person had a legal right. The object of A. has therefore been wrongful gain to himself, attended with wrongful loss to another party. A. has, therefore, un-

lic justice; although the attachment not being for non-payment, the order was, in itself, a mere nullity, and no warrant to the sheriff for the discharge.[1] Obtaining the queen's bounty for enlisting as a soldier, by an apprentice reclaimable by his master, is also an offence at common law.[2] And so where a person, pre-

der our definition, been guilty of cheating.

"Again, take the case which we before put, of a buyer and a seller. They have told each other many untruths, but none of those untruths was such as, after the article had been delivered and the price paid, would be held by a civil court to be a ground for pronouncing that either of them possessed what he had no right to possess. Though the buyer has falsely depreciated the article, yet when he takes it and pays for it, the legal right to it is transferred to him, as well as the possession. Though the seller has falsely extolled the article, yet when he receives the price and delivers the article, the legal right to the price passes with the possession. However censurable, in a moral point of view, the deceptions practised by both may have been, yet those deceptions were intended to produce a distribution of property strictly legal. Neither the buyer nor the seller, therefore, has been guilty of cheating. But if the seller has produced a sample of the article, and has falsely assured the buyer that the article corresponds to that sample, the case is different. If the article does not correspond to the sample, the buyer is entitled to have the purchase-money back. The seller has taken and kept the purchase-money without having a legal right to take or keep it, and it may be recovered from him by a legal proceeding. His gain is therefore wrongful, and is attended with wrongful loss to the buyer. He is therefore guilty of cheating under the definition.

"So if the seller passes off ornaments of paste on the buyer for diamonds, the price which the seller receives is a price to which he has no right, and which the buyer may recover from him by an action. Here, therefore, the object of the seller has been wrongful gain, attended with wrongful loss to the buyer. The seller is therefore guilty of cheating.

"So if the buyer, intending to acquire possession of the goods without paying for them, induces the seller by deception to take a note which the buyer knows will be dishonored, the buyer is guilty of cheating. His object is to retain in his own possession money which he is legally bound to pay to the seller. The gain which he makes by retaining the money is wrongful gain, and is attended with wrongful loss to the seller. He is, therefore, within the definition.

"Whether the principle on which this part of the law is framed be a sound principle is a question which will be best determined by examining, first, whether our definition excludes anything that ought to be included; and, secondly, whether it includes anything that ought to be excluded."

[1] R. *v.* Fawcett, 2 East P. C. 862; and see O'Mealy *v.* Newell, 8 East, 364; 1 Russ. on Cr. 275, 6th ed.; and see, as to falsely personating bail, 1 Burn's J. P. 330.

[2] R. *v.* Jones, 2 East P. C. 822; 1 Leach, 174.

tending that he had power to discharge soldiers, took money of another to discharge him as a soldier.[1]

§ 1118. Independently, however, of cheats affecting the administration of public justice, frauds effected by any general false device or token, calculated to affect the public, are punishable at common law.[2] Thus, selling unwholesome provisions, without notice, has been held a misdemeanor, though perhaps the reason of this may

And so of cheats by false tokens and devices calculated to affect public.

[1] Serlestead's case, 1 Leach, 202.

[2] Sir J. Stephen's definition, Dig. C. L. art. 338, is as follows: —

"Every one commits the misdemeanor called cheating who fraudulently obtains the property of another by any deceitful practice, not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect, the public at large. But it is not cheating, within the meaning of this article, to deceive any person in any contract or private dealing by lies, unaccompanied by such practices as aforesaid."

The following are among the illustrations given by him: —

"Selling by a false weight or measure, even to a single person. R. *v.* Young, 3 T. R. 104.

"Selling clothing with the alnager's seal forged upon it. 2 Russ. Cr. 609.

"Selling a picture by means of an imitation of the name of a well-known artist inscribed upon it. R. *v.* Closs, D. & B. 460.

"Maiming one's self in order to have a pretext for begging. 1 Hawk. P. C. 55; 2 Russ. Cr. 609.

"Selling unwholesome bread as if it were wholesome. 2 East P. C. p. 822; R. *v.* Dixon, 3 M. & S. 11."

On the other hand, the following cases have been held not to be cheats at common law: —

"Receiving barley to grind, and delivering a mixture of oat and barley meal. R. *v.* Haynes, 4 M. & S. 214.

"Selling as a Winchester bushel a sack of corn which is not a Winchester bushel, but greatly deficient. Pinkney's case, 2 East P. C. 818."

In State *v.* Phifer, 65 N. C. 321, we have the following from Reade, J.: —

"At common law, to cheat by false symbol or token was a crime. What was such symbol or token was sometimes difficult to determine, and the decisions left it in some confusion. It was settled that it must be some *act* or *thing* as contradistinguished from mere *words*.

"A further question was made, in regard to which there were contradictory decisions, as to whether the symbol or token must not be of a public character calculated to impose upon the public generally — as false weights and measures — as contradistinguished from such as were used to impose upon a private or particular individual. To remedy this last difficulty the statute of Hen. VIII. was passed, which, reciting the mischief, that the practice had grown up of 'getting into possession goods and chattels, &c., by *privy* tokens and counterfeit letters in other men's names,' makes such *privy* tokens indictable. This statute, added to the common law, makes all cheats by false tokens, whether of a public or private nature, indictable. But still there must be a token as distinguished from mere words.

"But crime is fruitful in expedients. As trade increased and commerce

be that such an act is a nuisance as well as a cheat.[1] So, the defendant being indicted for changing corn and returning bad,

spread out over the world, and stranger had to deal with stranger, and it became impossible for vigilance and prudence to apply the tests of truth, — such as weights and measures, actual examinations, or diligent inquiry in business transactions, — *words* had to be trusted. And false words were as ready to be used as false tokens. And thus it became necessary to pass the statute of 30 George II., which makes cheating by '*false pretence*' indictable.

"Our statute is intended to embrace all that was indictable at common law under Hen. VIII. and 30 George II. The words of our statute are, 'any forged or counterfeited paper in writing or print, or by any false token, or other false pretence whatsoever.'

"We have already seen what are false tokens; it is now to be considered what are false pretences under 30 George II. and under our statute.

"The objection is taken, that false pretence means the same as false token, and that in no case will mere words, however false, make out a case of guilt. To sustain the objection, English authorities were cited; but we think they are misunderstood and misapplied. They are decisions under the common law and under Hen. VIII. and not under George II. But the case chiefly relied on to support the objection is to be found in our own reports. State *v.* Simpson, 3 Hawks, 620. In that case A. said to B., I want to see the judgment you have against me, to ascertain the amount and pay it off. And when the judgment was handed to him he kept it. This was held to be not a false pretence under our statute. We are inclined to think that it was not, for reasons which will be hereafter given. And, therefore, we are not under the necessity of overruling that case.

"But we cannot concur with the court in the reasoning and definitions. Judge Henderson, in delivering the opinion, said: 'Our own statute requires that the cheat should have been effected by means of some token or false *contrivance*;' . . . . for if a cheat practised by a bare and naked lie was designed to be brought within the statute, why insert in the specifications false writings, tokens, &c., or why insert any specifications at all? The words 'any false pretence whatsoever must, therefore, mean pretences of the like kind, something more than a naked lie, something of the same family with those specified.' There is no authority cited by the court, and the only authority cited in argument was East's P. C. title Cheat. An examination of East will show abundant authority to support the position that a naked lie will not do — that there must be some *token* — but they are cases at common law and under Hen. VIII. And the court seems to have given no consideration to the cases under George II., except to say incidentally that, whatever they are, they do not affect the case. The court evidently thought that our statute differed from George II., and was only in affirmance of the common law. The error probably arose from the fact that the case was argued on but one side, and the views and authorities presented directed the attention of the court to cases at common law and under Hen. VIII. If this be not so, and that case is to be considered

[1] 4 Blac. Com. 162; 2 East P. C. 822. Infra, § 1434.

it was considered maintainable; for, being a cheat in the way of trade, it is deemed an offence against the public.[1]

§ 1119. It is not, however, an offence at common law to sell provisions with short measure, where no false weight or token is used.[2] In an early case in Pennsylvania, it is true, an indictment was sustained against a baker, in the employ of the United States army, for baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, when in fact they severally weighed but sixty-eight pounds;[3] but here there was a false token placed by the defendant upon the barrels as a mass, and this false token was equivalent to a false measure. In 1855 the whole subject of selling under weight, to a public institution, was under consideration before the English Court of Appeals, and it was then held, that though such a sale is indictable as a false pretence, it is not cognizable at common law unless a false measure is used.[4]

But not by short measure without false token.

§ 1120. It is not indictable at common law for a miller, receiving good barley at his mill, to deliver a musty and unwholesome mixture of oat and barley meal, differing from the produce of the barley; and Lord Ellenborough, C. J., in a case of this class, said: "The allegation that the quantity (of meal) delivered was musty and unwholesome, if it had alleged that the defendant delivered it as an article for the food of man, might possibly have sustained the indictment; but I cannot say that its being musty and

Adulterations, to be indictable, must be latent, directed to the public generally.

as going to the length of saying that, under George II. and our statute, there must be a *token*, and that words will not do, we would feel obliged to overrule it.

"A false token was indictable at common law and under Hen. VIII. If, therefore, George II. intended no more, where was the necessity for the statute? And, surely, the attempt to distinguish our statute from George II. must fail. The words in George II. are 'false pretence.' In ours they are 'or other false pretence whatsoever.' No reason can be given why our statute should not embrace all that was embraced in George II. The mischief to be remedied was the same, and the words are substantially the same." See also State *v.* Jones, 70 N. C. 78.

[1] R. *v.* Wood, 1 Sess. Cas. 217. See infra, § 1127.

[2] R. *v.* Wheatly, 2 Burr. 1125; R. *v.* Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559; R. *v.* Young, 3 T. R. 104; Hartman *v.* Com. 5 Barr, 60; State *v.* Justice, 2 Dev. 199. See infra, § 1127.

[3] Resp. *v.* Powell, 1 Dall. 47. See 3 Rep. Con. Ct. 139.

[4] R. *v.* Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559; S. P., Hartman *v.* Com. 5 Barr, 60. See infra, § 1127.

unwholesome necessarily and *ex vi termini* imports that it was for the food of man; and it is not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller, observing the confidence of this his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it is, it seems no more than the case of a common tradesman who is guilty of fraud in a matter of trade or dealing."[1] Putting a stone, also, in a single pound of butter, has been held not indictable at common law, the offence not being of such a general character as to make it a common law cheat.[2]

Yet it is otherwise where an adulteration is latent, so that no suspicion is aroused by it, and in a mass, so as to address the public as such. Thus it has been held an indictable offence at common law for a baker to sell bread containing alum, which renders it noxious, although he gave directions to his servants to mix the alum in a manner that would have rendered it harmless.[3] And even *latency* is not a necessary requisite when the use of the adulterated product is compulsory. Thus an indictment will lie for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man.[4]

Cheats by public false news may be indictable.

§ 1121. Writers of false news are indictable for its publication, as an offence at common law, when such publication is likely to affect injuriously the public, or to provoke a breach of the peace; and it may also be held that the fabrication of false news, calculated to produce any public detriment, is an indictable offence.[5] Yet here again

[1] R. *v.* Haynes, 4 M. & S. 214. See also R. *v.* Eagleton, 33 Eng. L. & Eq. 545; 6 Cox C. C. 559.

[2] Weierbach *v.* Trone, 2 W. & S. 408. See Com. *v.* Warren, 6 Mass. 72; 2 Russ. on Crimes, 6th Am. ed. 276.

[3] R. *v.* Dixon, 4 Camp. 122; 3 M. & S. 11. Infra, § 1126.

[4] Treeve's case, 2 East P. C. 821. Infra, § 1434.

[5] See Stark. Libel, 546; 2 Russ. Cr. 278; State *v.* Williams, 2 Tenn. 108. Infra, § 1442. Under 3 Edw. 1, c. 34, spreading false news in order

must we apply the tests already given. The falsity must be *latent* (*e. g.* got up in such a way as not to manifestly excite the suspicions of the public), and it must be addressed to the public at large. In this way, the false but skilful dissemination of a report of the loss of a steamer, so as to make money out of the depression of the stock, would be a cheat at common law.

And so of false dice.

§ 1122. As long as there is no statute giving an illicit taint to the use of dice in public places, and hence nothing to legitimately throw suspicion upon those offering to play with dice, it is indictable at common law to employ false dice, offering to play with whomsoever may come.[1]

And so of false notes calculated to affect public at large.

§ 1123. As to false notes, also, must be invoked the tests of latency and publicity of aim, both of which must exist in an indictable common law cheat. In the case of a person offering to another a check on a bank where he has no funds, neither of these ingredients exists. The fraud is not so latent as not to call up inquiry, for the very fact of a man offering his own paper is notice putting the person to whom the paper is offered on his guard. The fraud is not addressed to the public at large, but only to the person invited to take the check. Hence, passing such a check on an individual is not a cheat at common law.[2]

But it is otherwise when there is used a false bank note so closely resembling genuine bank notes as to deceive the public at large. Here there is latency, for there is nothing on the face of the transaction to invite inquiry; and here the offence is addressed to the public at large, for no one gets up such notes to cheat solely a particular individual. We have here, therefore, the essentials of a cheat at common law.[3]

to pruduce disaffection is indictable. Steph. Dig. C. L. art. 95.

[1] R. *v.* Leeser, Cro. Jac. 497; R. *v.* Madox, 2 Roll. R. 107.

[2] R. *v.* Jackson, 3 Camp. 370; R. *v.* Wavell, 1 Moody, 224; R. *v.* Lara, 6 T. R. 565. See Ranney *v.* People, 22 N. Y. 413.

[3] Com. *v.* Boynton, 2 Mass. 77.

Thus, in Virginia, it has been held that the procuring goods, &c., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Company, there being no such bank or company, is a cheat punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary in such case to aver the *scienter* in the indictment. Com. *v.* Speer, 2 Va. Cas. 65; but see State *v.* Patillo, 4 Hawks, 348. So, where the defendants purchased goods from the prosecutor's clerk, and gave in payment an

§ 1124. The apparent obscurity in the cases of cheats by false personation is removed by the application of the same tests. If a pretender (*e. g.* Perkin Warbeck, or the Tichbourne claimant) palms himself off on a community as another person, and under the guise of his assumed character obtains credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also that he addresses his imposture to the public at large. The offence is then one aimed at the public generally, and is, supposing there is no notice to put others on their guard, aimed as much at the careful as the careless. Hence it is a cheat at common law. The same rule applies when a person, apparently a major, gets money from the public at large as a major, when really a minor; and when a married woman obtains general credit by pretending to be unmarried.[1] But suppose the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law.[2]

And so of false personation.

§ 1125. A false stamp or trade-mark, so made as to deceive the public generally, is clearly on this reasoning indictable.[3] More doubtful is an English ruling, that it is a cheat at common law for a painter falsely to put the name of an old master on a copy.[4] Yet this may be accepted on the supposition that the work was skil-

And so of false stamps and trade-marks, and authors' names.

instrument purporting to be a five dollar bill of the Bank of Tallahassee, in Florida, the blanks of which were filled up, except those opposite the words "Cashier" and "President;" but in these blanks an illegible scrawl was written, which, on careless inspection, might have been mistaken for the names of those officers; and the defendants knew, before they passed the instrument, that it was worthless; it was held, in South Carolina, that they were guilty, at common law, of cheating by a false token. State *v.* Stroll, 1 Rich. 244. And such is the law in Pennsylvania, in respect to a counterfeit bank note of another State. Lewis *v.* Com. 2 S. & R. 551.

[1] R. *v.* Hanson, Say. 229.

[2] See 1 East P. C. 1010.

[3] See 2 East P. C. 820; Whart. Confl. of Laws, § 326.

[4] R. *v.* Closs, Dears. & B. C. C. 460.

fully and subtly done, so as to give no notice of falsity, and the fraud was addressed to the public at large, by means of its adoption as a trade by the fabricator, enabling him to throw fraudulent pictures generally on the market.

§ 1126. Indictability, therefore, cannot be predicated of cheats where the falsity is not latent, and the fraud not addressed to the public at large; *e. g.* false warranties, reading false papers to an individual and obtaining his signature, and false pretences to an individual. In other words, if a cheat is not of such a general character as to address the public, and is not executed by means of latent false devices, it is not indictable at common law;[1] for, as has been seen, if, without false weights, a party sells to another a less quantity than he pretends to sell, it is no public offence.[2] Thus falsely warranting an unsound horse to be sound, knowing it to be otherwise, is no offence at common law, unless there be a conspiracy to defraud, and then an indictment might stand for a conspiracy.[3] Nor is it an offence to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy.[4]

But not cheats whose falsity is not latent, and addressed to the public at large.

On the same reasoning, the deceitful receiving of money from one man for the use of another, upon a false pretence of having a message and order to that purpose, is not an offence at

[1] U. S. *v.* Porter, 2 Cranch C. C. 60; U. S. *v.* Hale, 4 Ibid. 83; U. S. *v.* Watkins, 3 Ibid. 441; Ranney *v.* People, 22 N. Y. 413; State *v.* Stroll, 1 Rich. 244.

[2] R. *v.* Young, 3 T. R. 104; R. *v.* Eagleton, 33 Eng. L. & Eq. 540; 6 Cox C. C. 559; Hartman *v.* Com. 5 Barr, 60; State *v.* Justice, 2 Dev. 199. Supra, § 1121.

[3] R. *v.* Pywell, 1 Stark. 402; and see R. *v.* Codrington, 1 C. & P. 661.

[4] See 2 East P. C. c. 18, s. 5, p. 823; 1 Hawk. c. 71, s. 1; and see R. *v.* Paris, 1 Sid. 431; Com. *v.* Sankey, 22 Penn St. 390; Wright *v.* People, 1 Breese, 66; State *v.* Justice, 2 Dev. 199; *per contra*, State *v.* M'Leran, 1 Aiken, 311; Hill *v.* State, 1 Yerg. 76. See comments on these cases, 1 Bennett & H. Lead. Cas. 16.

Where two persons pretended, the one to be a merchant, the other a broker, and, as such, bartered bad wine for hats, it was considered that they were guilty of the offence of a conspiracy to cheat, but not of the offence of cheating. R. *v.* Mackarty, 2 Ld. Raym. 1179, 1184; 3 Ld. Raym. 325; 2 Burr. 1129; 2 East P. C. 824. It has been held, however, indictable to get a person to lay money on a race, and to prevail with the party to run booty; yet the ground of the decision appears to have been that the offence amounted to conspiracy. 6 Mod. 42. c.

common law in a private transaction, because it is accompanied with no manner of artful contrivance, but only depends on a bare naked lie; and it was supposed to be needless to attach punishment to such mischief, against which common prudence and caution may be a sufficient security.[1] On the same principle it was not indictable at common law to get possession of a note, under pretence of wishing to look at it, and then to carry it away, and refuse to return it;[2] nor to pretend to have money ready to pay a debt, and thereby obtain a receipt in discharge of the debt, without paying the money;[3] nor to obtain, in violation of an agreement, and by false pretences, possession of a deed lodged in a third person's hands as an escrow;[4] nor to obtain goods on credit by falsely pretending to be in trade, keeping a grocery shop, and by giving a note for the goods in a fictitious name;[5] nor to put a stone in a pound of butter so as to increase its weight;[6] nor to obtain money by falsely representing a spurious note of hand to be genuine.[7]

[1] 1 Hawk. c. 71, s. 2; 2 East P. C. 818.

[2] People *v.* Miller, 14 Johns. 371.

[3] People *v.* Babcock, 7 Johns. 201.

[4] U. S. *v.* Carico, 2 Cranch C. C. 446; Com. *v.* Hearsey, 1 Mass. 137.

[5] Com. *v.* Warren, 6 Mass. 72.

[6] Weierbach *v.* Trone, 2 W. & S. 408. Supra, § 1120.

[7] State *v.* Patillo, 4 Hawks, 348. See Com. *v.* Speer, 2 Va. Cas. 65; State *v.* Stroll, 1 Rich. 244.

Where a party obtained money of another, by pretending to come by the command of a third person to demand a debt, or the like, in his name, showing no voucher or token for his authority, it was holden not indictable, for it was the party's own fault to trust him; the language of the court being: "We are not to indict one man for making a fool of another; let him bring his actions." R. *v.* Jones, 2 Ld. Raym. 1013; 1 Salk. 379; 6 Mod. 105, S. C.; and see R. *v.* Bryan, 2 Strange, 866; R. *v.* Gibbs, 1 East, 173. It seems the same doctrine will hold good, though the defendant made use of an apparent token, which in reality was, upon the very face of it, of no more credit than his own assertion, and was not of a public nature. 2 East P. C. c. 18, s. 2; 2 Russ. C. & M. 3d ed. 283. See State *v.* Sumner, 10 Vt. 587; People *v.* Miller, 14 Johns. 371. Where an indictment charged that the defendant, deceitfully intending, by divers crafty means and subtle devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase, and delivered to A. a fictitious order for the payment of money, purporting to be a draft upon a banker for the amount, which he knew he had no authority to draw, and would not be paid, by which he obtained the tickets, and defrauded the prosecutor of the value; and it being objected in arrest of judgment that the defendant was not charged with having used any false token to accomplish the deceit; for that the banker's check, drawn by the defendant himself, en-

§ 1127. The reasons for the distinction between public and private cheats are thus given in a well known case where the defendant was convicted of selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. "This is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor when he received it, to see whether it held the just measure or not. Offences that are indictable must be such as affect the public; as if a man use false weights and measures and sell by them to all or to any of his customers, or use them in the general course of his dealing; so if there be any conspiracy to cheat, for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries; they are public offences. But in the present case it is a mere private imposition or deception. No false weights or measures are used; no conspiracy; only an imposition on the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of contract; for which non-performance the other may bring his action. So the selling an unsound horse for a sound one is not indictable. The buyer should be more upon his guard; and the distinction which is laid down as proper to be attended to in all cases of this kind is this: that in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, then it is an offence indictable."[1] The same position has since been repeatedly reaffirmed.[2]

Nature of distinction between public and private cheats.

§ 1127 *a*. Where, by means of the cheat, *possession* only of goods is obtained, the owner retaining the property,

When only possession

titled him to no more credit than his bare assertion that the money would be paid; the objection was held good, and judgment arrested. R. *v.* Lara, 6 T. R. 565; and see R. *v.* Flint, R. & R. 460. In short, the doctrine is, that at common law no indictment lies for an individual cheat, against which common prudence would have guarded. 2 Russ. on Cr. (6th Am. ed.) 286. See supra, § 1120.

[1] R. *v.* Wheatly, 1 W. Bl. 273; 2 Burr. 1125.

[2] Supra, §§ 1117–9.

is obtained, offence may be larceny.

and afterwards the property is feloniously appropriated by the taker, this is larceny; and if the indictment is for the cheat, there is at common law a merger in those jurisdictions where cheats are only misdemeanors.[1]

§ 1128. It has been said in Tennessee, under a statute, that an indictment for selling by false weights must specify the person to whom the sale was made.[2] But this, as a common law rule, is not only inconsistent with authority,[3] but with sound reason, if it means anything more than that when an overt act of cheating has been executed the person cheated is to be named, or averred to be unknown. For it is the essence of the common law cheat that it should be addressed to the public generally. The true course is to aver that the cheat was devised to defraud the public generally, and then to aver that it was operative in the particular case,[4] supposing that the cheat was consummated.[5]

Indictment for public cheat need not give party cheated.

§ 1129. Where the fraud has been effected by false tokens, and the offence is so charged, the false tokens must be specified and set forth, and it must appear that by them the goods were obtained.[6] It is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences.[7] But it is unnecessary to describe them more particularly than as they were shown or described to the party at the time, in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth show a false token.[8] To charge the defendant simply as a "common cheat" is clearly insufficient.[9]

Mode of cheating should be specified.

[1] Supra, § 964; infra, § 1344.

[2] State *v.* Woodson, 5 Humph. 55.

[3] R. *v.* Gibbs, 8 Mod. 58.

[4] R. *v.* Closs, Dears. & B. 460.

[5] See State *v.* Corbett, 1 Jones (N. C.), 264, which case simply holds that when a cheat is executed the execution must be set forth.

[6] R. *v.* Closs, Dears. & B. 460.

[7] 2 East P. C. c. 18, s. 13, p. 837.

[8] Ibid. p. 838. Infra, §§ 1213 *et seq.*

[9] State *v.* Johnson, 1 Chipm. 129.

II. STATUTORY CHEATS BY FALSE PRETENCES.

1. *General Rules of Construction.*

§ 1130. By statutes existing in the several States of the American Union the obtaining goods by false pretences is made indictable.[1]

[1] The statute of 30 Geo. 2, c. 24, the original from which most of our statutes are drawn, after reciting that divers evil-disposed persons had, by various subtle stratagems, &c., fraudulently obtained divers sums of money, &c., to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacts: —

Obtaining Goods, &c., by False Pretences. — "That all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders against law and the public peace," and shall be punished as therein required.

The statute of 7 & 8 Geo. 4, c. 30, s. 53, provides: —

Same, provided if Offence amount to Larceny there be no Acquittal. — "That if any person shall by any false pretence obtain from any other person any chattels, money, or valuable security, with intent to cheat or defraud any person of the same," such person shall be guilty of a misdemeanor, and punished as therein required: "*Provided, always,* That if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by *certiorari;* and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny on the same facts."

The distinction between the two statutes, it will be observed, consists in two features, and, with these exceptions, the interpretation given by the courts to the one may be considered as equally applying to the other. In the first place, by the 30 Geo. 2, c. 24, the subject matter, the obtaining of which by false pretences is made indictable, is limited to "goods, wares, or merchandise;" by the 7 & 8 Geo. 4, c. 29, s. 53, it comprises "any chattels, money, or *valuable security.*" In the second place, what constitutes the main point of difference, and what the preamble of the latter statute indicates when it states that a failure of justice frequently arises from the subtle distinction between larceny and fraud, is, that under the 30 Geo. 2, c. 24, whenever the offence on trial proved to amount to constructive larceny, the common law, by merging the misdemeanor in the felony, worked the acquittal of the defendant; whereas by the 7 & 8 Geo. 4, c. 29, s. 53, it is provided that by reason of such merger he shall not be entitled to acquittal.

By 24 & 25 Vict. c. 96, those statutes are modified in modes hereafter noticed.

Sir J. Stephen thus summarizes the English law on this topic: —

Before proceeding to an analytical examination of the constituent elements of the offence, it may not be out of place to notice some of its general features.

DIG. CR. L., ART: 329.

Obtaining Goods, &c., by False Pretences. — "Every one commits a misdemeanor, and is liable, upon conviction thereof, to five years' penal servitude as a maximum punishment, who

"(*a.*) [1] By any false pretence obtains from any other person any chattel, money, or valuable security, with intent to defraud; or who,

"(*b.*) [2] With intent to defraud or injure any other person by any false pretence, fraudulently causes or induces any other person to [3] execute any valuable security, or to write, impress, or affix his name, or the name of any other person,[4] upon any paper or parchment, in order that the same may afterwards be made or converted into, or used or dealt with as, a valuable security.

"It is not an offence to obtain by false pretences any chattel which is not the subject of larceny at common law, but it is immaterial whether such a chattel so obtained is or is not in existence at the time when the false pretence is made, if the thing, when made, is obtained by the false pretence.

"It is not an offence to obtain credit in a partnership account by false pretence as to the amount which a partner is entitled to charge against the partnership funds." To this is cited R. *v.* Evans, L. & C. 755, of which case Sir J. Stephen says he is "unable to follow the reasoning of this judgment."

The following American statutes may be here noticed: —

MASSACHUSETTS.

Obtaining by False Pretence, or Privy or False Token, Goods, &c., or the Signature to a Written Instrument, &c. — Whoever designedly, by a false pretence, or by a privy or false token, and with intent to defraud, obtains from another person any property, or obtains, with such intent, the signature of any person to a written instrument, the false making whereof would be punishable as forgery, shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding five hundred dollars, and imprisonment in the jail not more than two years; but the provisions of this section shall not apply to any purchase of property by means of a false pretence relating to the purchaser's means or ability to pay, when, by the terms of the purchase, payment for the same is not to be made upon or before the delivery of the property purchased, unless such pretence is made in writing, and signed by the party to be charged. Rev. Stat. (ed. 1860), c. 161, § 54.

False personation, and thereby receiving property, is made indictable in the same chapter, § 53.

Other forms of cheats are subsequently specified. Ibid. §§ 56 *et seq.*

[1] 24 & 25 Vict. c. 96, s. 88, S. as explained by the cases.

[2] Ibid. s. 90, S. This section was meant to cover such cases as R. *v.* Danger, D. & B. 307, and greatly extends the old law on the subject. See Mr. Greaves's note to the section in his edition of the Acts.

[3] Make, accept, indorse, or destroy the whole or any part of.

[4] Or of any company, firm, or copartnership, or the seal of any body corporate, company, or society.

§ 1131. In the first case reported on the subject,[1] Lord Kenyon said: "This indictment being founded on the statute 30 Geo. 2, c. 24, is different from a common law indictment. When it passed, it was considered to extend to every case where a party had obtained money by

Statutes are to be construed in accordance with object.

Police courts have jurisdiction. Rev. Stat. c. 116, §§ 13, 14.

As to Maine see State *v.* Mills, 17 Me. 211. In Connecticut, the statute (title 21, § 114, ed. 1835) embraces the provisions of 33 Hen. 8, 32 Geo. 2, and 52 Geo. 3; and the English decisions are there adopted. State *v.* Rowley, 12 Conn. 101.

NEW YORK.

Obtaining by False Token or Writing, or False Pretence, the Signature to a Written Instrument, or Money, Personal Property, &c. — Every person who, with intent to cheat and defraud another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof shall be punished by imprisonment in a state prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money, property, or thing so obtained, or by both such fine and imprisonment. 5 R. S. 677, § 53; 1 Fay's Dig. 272.

Same when the Thing Obtained is a Bank Note, &c. — If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any banking company, or moneyed corporation not in existence, the person convicted of such cheat may be punished by imprisonment in a state prison not exceeding seven years. In an indictment for obtaining the signature of a person to a written instrument, by false pretences, it need only appear that the instrument, on its face, is one calculated to prejudice the party who has signed it, though, on the facts stated in the indictment, it would be void for fraud. Ibid. sec. 54; 1 Fay's Dig. 272; People *v.* Crissie, 4 Denio, 525. See People *v.* Galloway, 17 Wend. 540.

Same when the Pretended Purpose is Charitable or Benevolent. — "Section fifty-three of article four of title three of chapter one of part four of the Revised Statutes shall be held to apply, in addition to those cases to which it is now applicable, to every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, for any alleged charitable or benevolent purpose whatsoever." Statutes, 1851, c. 144, § 1; 1 Fay's Dig. 272. For false personation see 1 Fay's Dig. 272; for cheats at auction, Ibid. 37; for frauds in sale of tickets, 2 Fay's Dig. 80.

PENNSYLVANIA.

Obtaining by False Token, Writing, or Pretence, Property, &c. — If any

[1] Young *v.* R. 3 T. R. 98.

falsely representing himself to be in a situation in which he was not, or any occurrence which had not happened, to which persons

person shall by any false pretence obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money, or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding three years: *Provided always*, That if, upon the trial of any person indicted for such a misdemeanor, it shall be proved that he obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. "The proviso is added to meet the case in which property, said to have been obtained under false pretences, has been obtained under circumstances really amounting to larceny. Without such a provision as this, in such case the defendant would be entitled to an acquittal of the misdemeanor, though subject afterwards to be tried for the felony." *Revisers' note.* Rev. Act, Bill I. § 114.

Obtaining Credit at Hotel by same, &c. — If any person, with intent to cheat or defraud, shall by any false or fraudulent representations, or by any false show of baggage, goods, or chattels which are calculated to deceive any hotel, inn, or boarding-house keeper, obtain lodging and credit in any hotel, inn, or boarding-house, and shall subsequently refuse to pay for his board and lodging, the person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three months, or both, or either, at the discretion of the court. Ibid. § 115.

VIRGINIA.

Obtaining by False Pretence or Token, Property, &c., or Signature to Paper. — If a [free] (the distinction as to races, &c., abolished by Act of 1865–6, p. 84) person obtain, by any false pretence or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of the larceny thereof; or if he obtain, by any false pretence or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years, or, at the discretion of the jury [if the accused be a white person, and of the court if he be a negro], and be confined in jail not more than one year, and be fined not exceeding five hundred dollars. The statute for punishing persons obtaining money or other property, which may be the subject of larceny, by any false pretence, makes the offence larceny. Code, c. 192, § 49, p. 796. And an indictment for the offence may be either in the form of indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny. Leftwich *v.* Com. 20 Grat. 716.

The cheats included in the statute which preceded this, as is remarked by Mr. J. A. G. Davis, in his excellent work on Criminal Law in Virginia, must be effected by counterfeit letters, or by privy tokens. In respect to the former, the statute appears only

of ordinary caution might give credit. The statute of the 33 Hen. 8, c. 1, requires a false seal or token to be used to bring the

to have confirmed the common law, which, as we have seen, rendered indictable all cheats accomplished by counterfeit letters or forgery. In respect to those of the latter description, a new class of cheats was hereby made criminal, the operation of the common law being confined in this respect to such cheats in private transactions as are effected by false tokens of a public nature, claiming public confidence, and calculated to deceive the people in general. A false "privy token" within the statute has generally been taken to denote some real visible mark or thing, — as a key, a ring, &c. A mere false affirmation is certainly not such. 2 East P. C. 826. The statute is almost in the words of that of 33 Hen. 8, c. 1, and has received the same interpretation.

Both the "privy tokens" and "counterfeit letters" must, as appears from this title to the preamble and the enacting clause, be made in other men's names, whereby some additional confidence and credit may be obtained by the party using them, beyond his own assertion, or that which is resolvable into it. The merely giving a man's own draft on a banker in whose hands the drawer has no funds is no more than his bare assertion that the money will be paid. Com. *v.* Speer, 2 Va. Cases, 65; Ibid. 146, 151.

The act in its terms only includes those cheats by which money, goods, or chattels are obtained, and not those by which *choses in action*, as bonds, bills, or other written securities for money, are acquired. 1 Va. Cases, 146; Davis's Criminal Law, 290.

But an indictment was held good which alleged the obtaining from the Bank of Virginia, by similar means, of "fifty dollars in money, current in the Commonwealth of Virginia," although it was contended that, as the preamble of the statute recited a preëxisting evil, &c., as the cause of its enactment, it could not extend to banks which did not exist in Virginia until many years after the date of the statute. Com. *v.* Swinney, 1 Va. Cas. 150, 151. See also State *v.* Patillo, 4 Hawks, 348.

In Vermont, under a statu e not dissimilar from that in Virginia, as given above, it was held that fraudulent and false representations of a man's property and resources were not indictable; the language of the statute being narrower than that of 30 Geo. 2. State *v.* Sumner, 10 Vt. 599. Subsequently, however, the statute was amended by introducing the words "false pretences."

The statute 33 Hen. 8 appears to have been recognized in New York; 12 Johnson, 293; 9 Wend. 188; in Massachusetts; Com. *v.* Warren, 6 Mass. 72; though not in Pennsylvania. Resp. *v.* Powell, 1 Dall. 47.

Under the South Carolina Act of 1791, an indictment was held ill which merely alleged that the defendant falsely, fraudulently, &c., pretending that a certain mulatto was a slave, did falsely, &c., cheat and defraud one A., by selling said mulatto to him for a slave, when said mulatto was free. State *v.* Wilson, Rep. Con. Ct. 135. But it is swindling, within the purview of this statute, to obtain horses from an ignorant man, by threats of a criminal prosecution, and also by threats of his life. State *v.* Vaughan, 1 Bay, 282. The same rule, however, does not apply when a blind horse is sold as a sound one. State *v.* Delyon, 1 Bay, 353; Code, 1849, c. 192, § 30.

person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. 2, c. 24, introduced another offence, describing it in terms exceedingly general. It seems difficult to draw the line, and to say to what cases the statute shall extend, and therefore we must see whether each particular case as it arises comes within it. In the present case, four men came to the prosecutor, representing a race as about to take place: that William Lewis should go to a certain distance within a limited time; that they betted on the event, and they should probably win: he was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit there are certain singularities which are not the subject of criminal law. *But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away.* Now this offence is within the words of the act, for the defendants have by false pretences fraudulently contrived to obtain money from the prosecutor, and I see no reason why it should not be held to be within the meaning of the statute." Ashhurst, J., said: "The statute 30 Geo. 2, c. 24, created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this

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Obtaining Money, &c., by False Pretences; Making Fraudulent Transfers of Property to Cheat Creditors. — That if any person, by any false pretence or pretences, shall obtain from any other person any money, goods, merchandise, or effects whatsoever, with intent to cheat and defraud such person of the same, or shall fraudulently make and transfer any bond, bill, deed of sale, gifts, grants, or other conveyances, to defeat his creditors of their just demands, such person, so offending, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars, or be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding ten days, or both, at the discretion of the court. Act of March 8, 1831; Swan's Stat. § 12, 286.

Selling or Conveying Land without Title. — That if any person or persons shall knowingly sell or convey any tract of land without having a title to the same, either in law or equity, by descent, devise, or evidence, by a written contract, or deed of conveyance, with intent to defraud the purchaser, every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than seven years nor less than one year. Act of March 7, 1835; Swan's St. §§ 33, 274.

statute was passed to protect the weaker part of mankind." Buller, J., remarked: "The ingredients of this offence are the obtaining money by false pretences and with intent to defraud. Barely asking another for a sum of money is not sufficient, but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within the statute."[1]

§ 1132. In a case of much importance in New York,[2] Walworth, Chancellor, when commenting in the Court of Errors on the law as above laid down, said: "I am aware from numerous cases which have come under my notice, judicially and otherwise, that the rule of morality established by the decisions under these statutes, and by the common law of Scotland, has been deemed too strict for those who, in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their little all, which, in many instances, was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any wilful misrepresentation or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York, or any other part of the State. Neither do I believe that any honest man will be in danger of becoming a tenant of the state prison if the statute against obtaining money, or other things of value, by false and fraudulent pretences, is carried into full effect, according to the principles of the decisions to which I have referred. But it may indeed limit and restrain the fraudulent speculations and acts of some, whose prin-

[1] See also the interesting and well-digested opinion of Recorder Vaux, in Hutchinson and Turner's cases, which are, in fact, the first instances in Pennsylvania in which the law was settled. Recorder's Decisions, 47, 75.

[2] People v. Haynes, 14 Wend. 546, 559.

ciples of moral honesty are regulated solely by the denunciations of the penal code. The law on this point, as laid down by the Supreme Court in this and numerous other cases, is unquestionably the settled law of the land, in conformity with both the spirit and the intent of a positive legislative enactment."

§ 1133. "It should be remembered, however," to quote from a judge whose opinions on criminal jurisprudence are entitled to peculiar weight, "that the term 'false pretence' is of great latitude, and may be made to embrace any and every false representation made by a party fraudulently obtaining property from another which a prosecutor will swear has induced him to part with such property. Is this act to have a range so wide and sweeping as this, or is it to be limited in its operation? and in what does such limitation consist? Although in ethics every misrepresentation is morally wrong, yet if so severe a standard of conduct is to be introduced into our criminal code, it is plainly to be seen that breach of contract and crime will be scarcely divided by an appreciable line, and that criminal tribunals will hereafter be employed in punishing infamously acts which have heretofore been understood as only creating civil liabilities. A rule of such extreme urgency might, in some instances, justly chastise a bad man; but it could not fail to be terribly abused by exasperated or reckless creditors, smarting under losses, and stimulated by the fierce spirit of revenge, for wrongs supposed or real."[1]

§ 1134. To the same effect remarks Rogers, J., of the Supreme Court of Pennsylvania, in a case of malicious prosecution: "The act is intended to punish a criminal offence, not to be used as a means of collecting debts, however just; and to suffer it to be perverted for that purpose will necessarily lead to great injustice and oppression. We are not without reason for believing that it has been already used as an instrument to wring money from the sympathy and fear of friends, as well as a means of extortion from the timid on pretended demands. A stranger from another or distant State may or has been compelled to pay unjust, or at least contested demands, rather than encounter the risk, expenses, and mortification of attending a prosecution for fraud, knowing that the charge may be supported by the oath of

[1] King, J., Com. v. Hutchinson, 2 Parsons, 309; 2 Penn. L. J. 242.

the prosecutor himself. When, therefore, we find that the creditor, instead of pursuing the supposed criminal to judgment, stops short on receiving the amount of his demand, and discharges the accused from any other proceeding, what is the rational inference? What are we to conclude but that his design was to collect his debt, rather than punish the offender in promotion (violation?) of the very object and intention of the act."[1]

2. *Character of the Pretences.*

§ 1135. The rule may be broadly stated, that any designed misrepresentation of existing conditions, by which a party obtains goods of another,[2] is within the statute.

Pretence that defendant was a person of wealth, and credit is within statute.

Whether or not the pretence that the defendant is a man of wealth and credit is enough to support an indictment is a question which does not appear in England to have received an express decision; though a case already cited[3] certainly goes a great way to establish the affirmative doctrine. In an early New York case,[4] it was held that fraudulently obtaining goods on such a pretence was indictable. And the same was held in a later case,[5] where the defendant represented himself to be in successful business as a merchant in Boston worth from $9,000 to $10,000 over and above all his debts; and, to give weight to this assertion, represented that he had never had a note protested in his life, and had then no indorsers: the truth appearing in evidence that he was at the time wholly insolvent.[6] And it may be generally said that a false averment of wealth and solvency is within the statute.[7]

[1] Prough *v.* Entriken, 11 Penn. St. 84 — Rogers, J.

[2] See State *v.* Phifer, 65 N. C. 321.

[3] R. *v.* Henderson, C. & M. 328.

[4] People *v.* Conger, 1 Wheel. Crim. Cas. 449; approved by Nelson, J., in People *v.* Haynes, infra.

[5] People *v.* Haynes, 11 Wend. 565.

[6] Ibid.

[7] Ibid.; People *v.* Kendall, 25 Wend. 399; Clifford *v.* State, 56 Ind. 245; State *v.* Timmons, 58 Ind. 98.

Where the defendant, then a minor, fraudulently obtained goods by falsely representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm, it was held he was within the statute, and his minority did not avail in a criminal action, although it would have in a civil. People *v.* Kendall, 25 Wend. 399. In Vermont a more restricted view is taken, based mainly on the distinctive limitations of the Vermont statute. State *v.* Sumner, 10 Vt. 587.

§ 1136. Whatever we may think on the last point, we may hold it settled that it is a false pretence under the statute to falsely pretend the ownership of specified assets on which credit is given.[1] Thus in one of the earliest cases under the Pennsylvania statute,[2] two distinct false pretences were averred: one, that the defendant had

And so that defendant possessed certain specified assets.

[1] See cases under § 1138.

[2] In this case, the first count averred the pretence to be, "that he, the said J. A. B., possessed a capital of eight thousand dollars; that the said eight thousand dollars had come to him through his wife, it being her estate; and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof he would be obliged to wait for a short time;" the second, "that he, the said J. A. B., possessed a capital of eight thousand dollars, which said eight thousand dollars had come to him through his wife, it being her estate;" and the third, "that he, the said J. A. B., was then and there possessed of eight thousand dollars." On demurrer, the pretences were held within the statute, and the court seemed to think that under the Pennsylvania act the construction was to be more liberal than that given by the English authorities. "A professed intent," said the chief justice, in stating the English doctrine, "to do an act which the party did not mean to do, as in R. *v.* Goodhall, R. & R. 461, and R. *v.* Douglas, 1 Mood. C. C. 262, is the only species of false pretences to gain property not indictable. These two cases, having been decided by the twelve judges, are eminently entitled to respect; but I think it at least doubtful whether a naked lie, by which credit has been gained, would not in every case be deemed within our statute, which declares it a cheat to obtain money or goods 'by any false pretence whatever.' Its terms are certainly more emphatic than those of either of the English statutes; but whether a false pretence of mere intent be within them or not, it is certain that a fraudulent misrepresentation of the party's means and resources is within the English statute, and *a fortiori* within our own. In R. *v.* Jackson, 3 Camp. 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. Of the same stamp is R. *v.* Parker, 8 C. & P. 825. But R. *v.* Henderson and another, 1 C. & M. 183, is still more to the purpose. The prisoners falsely pretended that one of them was possessed of £12, which he agreed to give for his confederate's horse, for which it was proposed that the prosecutor should exchange his mare; and this was held to be a clearly false pretence within the statute. Now the defendant is charged in the indictment before us with having wilfully misrepresented that he had a capital of eight thousand dollars, in right of his wife; that a part of it was already received; that another part would be received in the course of a month; and that the residue would be received shortly afterwards; and if, as was said in Mitchell's case, 2 East P. C. 936, a false pretence is within the English statute whenever it has been the efficient cause of obtaining credit, the false pretence before us is within our own." Com. *v.* Burdick, 2 Barr, 163; 5 Penn. Law Jour. 173.

in the hands of his guardians in New York an estate equal to two thousand dollars a year; the other that he would procure and bring on from New York money from his mother to pay the prosecutor. The first of these was held to be a false pretence under the statute.[1]

In a case decided by the Queen's Bench Division in 1877, C. was convicted of obtaining potatoes by falsely pretending that he was then in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor: "Sir, — Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c. P. S. — I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on." It was held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury, whether the writer intended the prosecutor to put that construction upon them. R. *v.* Cooper, L. R. 2 Q. B. D. 510; 36 L. T. 671; 13 Cox C. C. 617. See, to same effect, State *v.* Tomlin, 5 Dutch. 13.

[1] "In considering these pretences," said Judge King, "I will reverse the order, examining the last first. If the indictment rested solely on this, it could not be supported. Like the case of King *v.* Goodhall, and King *v.* Clifford, it is merely a promise for future conduct; a representation that the party could or would get the money from his mother, though he knew he could not. Com. *v.* Hutchinson, 2 Penn. L. J. 244; 2 Parsons, 309. But the representation that his guardian was a gentleman of fortune in New York, having property in his hands belonging to him equal to two thousand a year, is the assertion of the existence of a fact calculated to give him credit, and to impose upon a person of ordinary caution, and consequently within the act. It is quite as strong as the existence of the pretended bet in The King *v.* Young, or the pretence of Count Villeneuve, in the case by Justice Buller, by which Sir Thomas Broughton was induced to advance. Books of entries and precedents, though not of a direct authority, are still of some value in inquiries like the present; and in the Crown Circuit Comp. 176, a respectable work, we have the precedent of an indictment under the statute 30 Geo. 2, c. 24, where the false pretence consists in the defendant asserting himself to be a merchant of great fortune, who wanted to purchase horses to send abroad, and that he was a housekeeper. This precedent is adopted by Chitty (3 C. L. 768), except that his precedent charges several as being concerned in the cheat with the defendant in falsely representing himself as a wealthy merchant." Com. *v.* Hutchinson, 2 Penn. L. J. 244; 2 Parsons, 309.

Where the pretence was that the defendant owned real estate on Passyunk Road worth seven thousand dollars, and that he had personal property and other means to meet his

§ 1137. The same rule applies when the object is to obtain negotiable paper.[1] Thus where an indictment charged that N. represented to O. that he possessed certain specified valuable property, which he would sell him for four bills of exchange on Philadelphia, and that in consequence of this representation the bills were drawn by O., and that this representation was made knowingly and designedly, and with intent to cheat O. of his drafts, and that in fact N. possessed no such property as he pretended to have, this was held to present a false pretence under the statute.[2]

Same rule applies when object is to obtain negotiable paper.

§ 1138. It has further been held that a false representation that the defendant had money in the hands of a third person, absent at the time, sufficient to take up a note, to which, by means of the representation thus made, the prosecutor's signature was obtained, is within the statute.[3]

So when indorsement is thus obtained.

§ 1139. It is clear that a false representation of the *status* of the defendant brings him within the statute;[4] although where there is an original felonious intent the case may be larceny.[5]

So generally as to defendant's *status*.

§ 1140. A person who falsely makes claim to supernatural powers, and thereby obtains money or goods (*e. g.* as in case of gypsy fortune telling), is indictable for false pretences, when the party defrauded is thereby really imposed upon.[6]

So as to pretension to supernatural powers.

liabilities, and that he was in good credit at the Philadelphia Bank, the case was held within the statute. Com. *v.* McCrossin, 3 Penn. L. J. 219.

[1] Infra, § 1195.

[2] State *v.* Newell, 1 Mo. 177.

[3] People *v.* Herrick, 13 Wend. 87. Infra, § 1195.

It has been held an indictable pretence for a party falsely to represent that he had a capital of two thousand dollars, and thus obtain the property of the prosecutor. Com. *v.* Poulson, 6 Penn. L. J. 272; S. P., State *v.* Penley, 27 Conn. 587. See also State *v.* Reidel, 26 Iowa, 430; State *v.* Pryor, 30 Ind. 350; State *v.* Munday, 78 N. C. 460.

[4] R. *v.* Bull, 13 Cox C. C. 608; R. *v.* Burnsides, Bell C. C. 282; 8 Cox C. C. 370; Com. *v.* Drew, 19 Pick. 179; State *v.* Tomlin, 5 Dutch. 13; State *v.* Kube, 20 Wis. 217; and this where a spurious order is used. Tyler *v.* State, 2 Humph. 37.

[5] Supra, § 888.

[6] R. *v.* Giles, L. & C. 508; 10 Cox C. C. 44. See infra, § 1155; State *v.* Phifer, 65 N. C. 321. In R. *v.* Bunce, 1 F. & F. 523, thus obtaining money was held larceny. See supra, § 964.

§ 1141. False representations of delivery of goods are within the statute. Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded and thereupon obtained from the consignor sixteen shillings for carriage of them, it was held within the statute.[1] In another case, where the carrier falsely pretended that goods given to him for carriage had been delivered, but that he had left at home the receipt, the same rule was applied.[2]

So as to pretence that defendant had delivered certain goods or money.

False representations of payment for the prosecutor fall under this head. Thus where it was the duty of C., the prisoner, who was a servant of P., in the absence of their chief clerk, to purchase and pay for, on behalf of P., any kitchen stuff brought to his premises for sale, on one occasion C. falsely stated to the chief clerk that he had paid 2*s*. 3*d*. for kitchen stuff, which he had bought for his master, and demanded to be paid for it. The clerk on this paid him 2*s*. 3*d*. out of the money which his master had furnished him with to pay for the kitchen stuff. C. applied the money to his own use. It was held that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining by false pretences.[3] And where it was the duty of C., a servant, to ascertain daily the amount of dock dues payable by his master, and having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues, but where, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, he obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference, it was held that the case was one of false pretences.[4]

§ 1142. Where a person obtains goods under the false pretence that he is employed by A. B., who sent him for them, he is within the statute.[5] And this may be extended to all false pretences of agency.

So as to pretence that defendant was sent for certain goods.

[1] R. *v.* Coleman, 2 East P. C. 672.

[2] R. *v.* Airey, 2 East R. 30.

[3] R. *v.* Barnes, T. & M. 387; 2 Den. C. C. 59. Infra, § 1181.

[4] R. *v.* Thompson, L. & C. 233; 9 Cox C. C. 222. Supra, §§ 956–960. See Bonnell *v.* State, 64 Ind 498.

[5] R. *v.* Bulmer, L. & C. 476; 9 Cox

§ 1143. A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtaining one sovereign, with intent to defraud G. P. of the same. The second count laid the intent to be to defraud G. P. "of the sum of five shillings, parcel of the value of the said last mentioned piece of the current gold coin." It was proved that the defendant made the pretence, and thereby induced the prosecutor to buy, at the price of 5*s*., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign and received 15*s*. in change. It was further proved that the defendant was not Mr. H.; it was held that this was a false pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53, and that the intent was properly laid in the second count.[1]

So as to pretence of being a certain physician.

§ 1144. The defendant obtained the goods from the prosecutors by pretending that he wanted them for one J. S., whom he represented as living at N., and as a person to whom he would trust £1,000, and who went out twice a year to New Orleans to take goods to his sons. The jury found that all the representations were false, and that the prosecutors, believing that the defendant was connected with the said J. S., and employed by him to obtain the goods, contracted with the defendant and not with the supposed J. S., and delivered the goods to the defendant for himself and not for J. S. It was held that the defendant was, under these circumstances, rightly convicted of the offence charged in the indictment.[2]

So as to pretence that the defendant represented a principal of means.

§ 1145. The same result was reached when the evidence was that the defendant obtained a sum of money from the prosecutor by pretending that he carried on an exten-

So as to pretence that the

C. C. 492; R. *v.* Davis, 11 Cox C. C. 181; Com. *v.* Hulbert, 12 Met. 446; People *v.* Johnson, 12 Johns. 292; People *v.* Miller, 14 Johns. 371; McCorkle *v.* State, 1 Cold. (Tenn.) 333. In Chapman *v.* State, 2 Head, 36, it was held that to obtain a quart of whiskey on the pretence that the defendant was sent for it by another was, under the circumstances, not within the statute; but this was on the ground of the triviality of the act. *Contra*, R. *v.* Butcher, 8 Cox C. C. 77. If possession only be obtained, it may be larceny. Supra, § 888.

[1] R. *v.* Bloomfield, C. & M. 537.

[2] R. *v.* Archer, Dears. C. C. 449; 6 Cox C. C. 515; 33 Eng. L. & Eq. 528. As to exhibiting false business cards see Jones *v.* State, 50 Ind. 473.

sive business as an auctioneer and a house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk; the jury finding that the prisoner was not carrying on any such business at all.[1]

defendant was an auctioneer in search of a clerk.

§ 1146. Where an attorney, having appeared for J. S., who was fined £2 on a summary conviction, called on the wife of J. S., and told her that he had been with D. L., who was fined £2 for a like offence, to Mr. B. and Mr. L., and that he had prevailed on Mr. B. and Mr. L. to take £1 instead of £2, and that if she would give him £1 he would go and do the same for her; and she thereupon gave him a sovereign, and paid him for his trouble; and it was proved that the attorney had never applied to Mr. B. or Mr. L. respecting either of the fines, and that both were paid in full; the case was likewise held within the statute.[2]

So as to pretence that defendant was a certain attorney.

§ 1147. Where a man assumes the name of another to whom money is required to be paid, this is a pretence within the meaning of the act.[3]

So that defendant was a certain payee.

§ 1148. Where the prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she had refused to ratify, in consequence of which he threatened her with an action, and thus obtained money from her; and where, during the whole transaction, it appeared he had a wife; the indictment presented two pretences: 1st. That he was unmarried. 2d. That he was entitled to bring an action against her for a breach of promise. It was held (Lord Denman, C. J., and Maule, J.) that the case was within the statute, and that the fact of the prisoner paying his addresses to the prosecutrix was sufficient evidence to prove the first pretence;[4] and it was held an indictable offence for a married man to pretend he was unmarried, and thus to obtain from a woman he courted money to furnish a house.[5] But a mere promise to marry is insufficient.[6]

So that defendant was unmarried, thereby obtaining money.

[1] R. *v.* Crab, 11 Cox C. C. 85 — C. C. R.

[2] R. *v.* Asterley, 7 C. & P. 191.

[3] R. *v.* Story, R. & R. 81. See R. *v.* Barnard, 7 C. & P. 784; R. *v.* Hamilton, 9 Ad. & El. 276; R. *v.* Archer, *ut supra*; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Daniels, 2 Parsons, 332.

[4] R. *v.* Copeland, C. & M. 517.

[5] R. *v.* Jennison, 9 Cox C. C. 158; L. & C. 157.

[6] R. *v.* Johnston, 2 Mood. C. C. 254.

§ 1149. That the defendant was, as to personal *status*, *e. g.* infancy or coverture, invested with rights which he did not in fact possess,[1] is a pretence under the statute. This principle, which has been elsewhere noticed in other relations,[2] leads to the conclusion that a minor having nothing in his appearance or otherwise to put parties dealing with him on their guard, who pretends to be of full age, and hence legally responsible, is liable to be prosecuted for false pretences,[3] and that the same rule applies to a married woman passing herself off as unmarried, or the converse.[4]

So that defendant had certain legal rights which he did not possess.

§ 1150. It has been frequently held that to present a false claim of indebtedness may be a false pretence.[5] Thus where the secretary of an Odd Fellows' Society falsely pretended to a member of the society that the sum of 13*s.* 9*d.* was due by him to the society for fines incurred by him as a member, by means of which such secretary

So that defendant had certain claims against prosecutor.

[1] See R. *v.* Simmonds, 4 Cox C. C. 277.

[2] See supra, § 1124; and also Wh. Con. of L. §§ 113, 119.

[3] See, however, Price *v.* Hewett, 8 Exch. 146; Liverpool Loan Ass. *v.* Fairhurst, 9 Exch. 422; Wright *v.* Leonard, 11 C. B. (N. S.) 258; Goode *v.* Harrison, 5 B. & Ald. 147, where it is argued that no action on the case lies against a minor under similar circumstances.

[4] There are, indeed, no direct adjudications on these points, but the following is on the same principle: —

An indictment charged that the prisoner was living separately from her husband, and receiving an income from him for her separate maintenance under a deed of separation, which stipulated that he should not be liable for her debts; and that she falsely pretended to U., a servant of W., that she was living under the protection of her husband, and was authorized to apply to W. for goods on the credit of her husband, and that he was willing to pay for them; and that she wanted them to furnish a house in his occupation. It was proved that on the 4th of August she called at W.'s shop, and on being served by U., selected certain goods, and, being asked for a deposit, said it was a cash transaction, that her husband would give a check as soon as the goods were delivered. The deed was proved, and it was also shown that the annuity covenanted to be paid by the husband was duly paid, and that the house which she gave as her address, and which was found shut up after the goods had been sent to it, had been taken by her whilst in company with a man with whom she had been living as his wife from the middle of July till the end of August. It was held that there was sufficient evidence to support a conviction. Supra, § 71; R. *v.* Davis, 11 Cox C. C. 181 — C. C. R. See also R. *v.* Jennison, supra, § 1148.

[5] R. *v.* Cooke, L. R. 1 C. C. 295; 12 Cox C. C. 11; R. *v.* Leonard, 3 Cox C. C. 284; R. *v.* Bull, 13 Cox C. C. 608.

fraudulently obtained from him such sum of money, it was held to be a false pretence within the statute 7 & 8 Geo. 4, c. 29.[1]

§ 1151. To extort money by a false statement of an existing prosecution is within the statute. Thus it was held a false pretence to extort money by pretending falsely to the prosecutor that his daughter had committed a public offence, that a warrant had been issued for her, and that the defendant had come with the warrant.[2] But it has been said to be otherwise when the payment is made to illegally compound the offence.[3]

So that the defendant could settle a prosecution falsely pretended to be pending against prosecutor.

§ 1152. The unauthorized assumption of the dress of an Oxford student, thereby obtaining money, is a false pretence under the statute.[4] And so of the assertions that the defendant was a clergyman of standing,[5] and an officer of the dragoons.[6] At the same time it should be remembered that there must be in such case an intent to defraud; and that no indictment will hold for a misstatement based on an honest mistake of law.[7]

And so of assumption that defendant was an "Oxford student," or "clergyman," or "officer."

§ 1153. An indictment, it has been ruled in New York, will not lie when the money is parted with as a charitable donation, although the pretences moving the gift are false and fraudulent.[8] And a statute was passed to cover the supposed deficiency. In Massachusetts and England a sounder view has been taken, it having been there expressly held that a begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence under the statute.[9]

False begging letters may be within statute.

§ 1154. Supposing a "puff" to mean a loose exaggeration of value, to make it an indictable false pretence would bring almost every sale within the statute, for there are

A false pretence to be distin-

[1] R. v. Woolley, 1 Den. C. C. 559; 4 Cox C. C. 193. See R. v. Byrne, 10 Cox C. C. 369.

[2] Com. v. Henry, 22 Penn. St. (10 Harris), 253. Infra, §§ 1164-5.

[3] Infra, § 1189, *sed quære.*

[4] Infra, § 1170.

[5] Thomas v. People, 34 N. Y. 351; Bowler v. State, 41 Miss. 570.

[6] R. v. Hamilton, 9 Ad. & El. (N. S.) 271. See R. v. Jennison, 9 Cox C. C. 158; L. & C. C. C. 157; People v. Cooke, 6 Parker C. R. 31.

[7] Beattie v. Lord Ebury, L. R. 7 Ch. Ap. 777.

[8] People v. Clough, 17 Wend. 351.

[9] Com. v. Whitcomb, 107 Mass. 486; R. v. Jones, 14 Jur. 533; 1 Eng. L. & Eq. 533; T. & M. 270; 4 Cox C. C. 198.

Distinguished from a puff.

few sales about which there is not some affirmation, either express or implied, that is not exactly true.[1] Some features must be specified, therefore, which distinguish the mere *puff* from the false pretence. And the first to be here noticed is that the *puff* is a general estimate, loosely given as a matter of opinion for which there may be probable grounds, whereas a false pretence is a false statement of a fact known to be false. Thus it is a mere puff, and not indictable, to say of a flock, "This is a first rate flock;" but to say that a certain lameness, observed by a purchaser, is not disease, but the result of an accident, which statement the defendant knows to be untrue, is a false pretence.[2] So it is a mere puff, and not indictable, to say lumpingly of an article in gross, that it is of a certain weight; but to pretend to have weighed it, and to have found it to be of a particular weight greater than it actually is, is a false pretence.[3]

§ 1155. We may therefore hold generally, that mere exaggerated praise is not a false pretence.[4] Thus to say of a horse that he is a "first class animal," or "a fine trotter," is a puff which is not indictable; but the statute applies where the defendant makes a specific false state-

Mere exaggerated praise not a false pretence.

[1] See State *v.* Estes, 46 Me. 150; State *v.* Webb, 26 Iowa, 262.

[2] People *v.* Crissie, 4 Denio, 525. As to "brag," and loose talk, see infra, § 1170.

[3] R. *v.* Ridgway, 3 F. & F. 838. Infra, § 1159.

[4] People *v.* Jacobs, 35 Mich. 36. Infra, § 1193.

Illusiveness has been laid down as the test of the falsity of the pretence. Is the thing offered, by means of which the deceit operates, illusory? If it be an equivalent to the thing obtained, and if it be that which the party taking it practically calls for, then an indictment cannot be sustained. Cases, also, may happen when proof of a *real* equivalent obtained will work an acquittal, though the equivalent *named* would be illusory. Thus Barnum, to adopt an illustration of Merkel, for a series of years announced "Washington's nurse" as among his curiosities on exhibition, and the part was personated by an old negress named Joyce Heth. She was not really Washington's nurse, and a person paying money to see her, if he paid money for nothing else, paid money without a true equivalent. But was the money truly paid for seeing Washington's nurse? Was it not really paid for the excitement of the show, with a consciousness that each particular item in the show — the "nurse," the mermaid, the woolly horse — might be a deception? If so, though the particular items were illusory, there was a real equivalent, and no indictment could be sustained for obtaining the admission money on false pretences.

ment as to specific soundness;[1] and when he falsely pretends to the prosecutor that a certain horse is the famous horse "Charley," which it is not.[2] And it is a mere "puff" to say of a mixture that it is "good," or "first class;" but it is an indictable false pretence to declare falsely that it is a non-explosive burning fluid.[3]

But otherwise as to false sample.

§ 1156. But while it is not indictable to say of a particular article that it is "good;" to sell it by a false sample is indictable.[4] Thus A. bought cheese of B. at a fair and paid for it. Before he bought it, B., offering cheese for sale there, bored two of the cheeses with an iron scoop, and produced a piece of cheese, called a taster, at the end of the scoop, for A. to taste; he did so, believing it to have been taken from the cheese, but it had not, and was from a superior kind of cheese, and fraudulently put by B. into the scoop, the cheese bought by A. being very inferior to it. It was held that B. was indictable for obtaining the price of the cheese from A. by false pretences.[5]

Opinions as to quality are not always pretences.

§ 1157. As to false quality, more difficult questions arise.[6] In an English case, the prisoner induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A." (a known class of plated spoon), and that the foundations were of the best material. The spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced on them. It was held by the court (Willes, J., dissenting, and Bramwell, B., doubting) that obtaining the money by the false representation as to the quality of the spoons was not an indictable offence within the statute against false pretences, as the article the prisoner delivered to the pawnbroker was the same in specie as he had professed it to be, though of inferior quality to what he had stated.[7] This decision may be

[1] R. v. Keighley, Dears. & B. 145, and other cases cited infra, § 1160.

[2] State v. Mills, 17 Me. 211.

[3] Greenough, in re, 31 Vt. 279. See infra, § 1192.

[4] Cowles v. State, 50 Ala. 454.

[5] R. v. Abbott, 2 C. & K. 630; 1 Den. C. C. 273; R. v. Goss, 8 Cox C. C. 262; Bell C. C. 208.

[6] As to value see R. v. Williamson, 11 Cox C. C. 328.

[7] R. v. Bryan, 40 Eng. L. & Eq.

justified on the ground that the statement as to "Elkington's A." was regarded on both sides as only a conjectural estimate, and that "best" material is a term which might be interpreted in several ways. Much less defensible is a decision by Chambers, C. S., that pretending a chain to be gold, when in fact it was only a cheap amalgam, is not within the statute.[1] This, however, is now practically overruled.[2] And it is now settled that selling with a false affirmation of quality may be a false pretence.[3]

§ 1158. The use of a false brand or trade-mark is indictable. Thus a false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company, and that the number 18, part thereof, indicated that the watch was made of 18-carat gold, is within the statute, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition.[4]

But use of false brand is within statute.

The same conclusion was reached in a case already noticed where the evidence was that B. was in the habit of selling baking powders, wrapped in printed wrappers, entitled "B.'s Baking Powders," and having his printed signature at the end, and the prisoner had printed a quantity of wrappers in imitation of those of B., only leaving out B.'s signature, and sold spurious powders wrapped up in these labels as B.'s powders.[5]

§ 1159. On the question of false weight, we again encounter the distinction already noticed. If a man, selling an article by weight, falsely represents the weight to be

False statement as to specific

589; Dears. & B. C. C. 265; 7 Cox C. C. 312.

[1] R. *v.* Lee, 8 Cox C. C. 233.

[2] R. *v.* Suter, 10 Cox, 577; R. *v.* Roebuck, 36 Eng. L. & Eq. 631; D. & B. 24; 7 Cox C. C. 126; and see R. *v.* Ball, C. & M. 249.

[3] R. *v.* Ardley, L. R. 1 C. C. 301; R. *v.* Foster, 13 Cox C. C. 393.

[4] R. *v.* Suter, 10 Cox C. C. 577 — C. C. R. See supra, §§ 1116 *et seq.*

In R. *v.* Ardley, L. R. 1 C. C. 301, 40 L. J. M. C. 85, it was noticed that if the prisoner, in R. *v.* Bryan, had represented the spoons as being in fact Elkington's manufacture when he knew they were not, he would have been rightly convicted; and in R. *v.* Suter, supra, where the jury had found that the prisoner represented a chain as in fact 18-carat gold when he knew in fact that it was nothing of the sort, he was held rightly convicted. Roscoe's Cr. Ev. p. 487.

[5] R. *v.* Smith, Dears. & B. C. C. 566; 8 Cox C. C. 32; 4 Jur. (N. S.) 1003. See supra, § 690.

greater than it is, and thereby obtains payment for a quantity greater than that delivered, he is indictable for obtaining money by false pretences.[1] It is otherwise, however, if he is selling the article for a lump sum, and merely makes the false representation as to the weight in order to induce the purchaser to conclude the bargain.[2] The test is, is the article *sold by weight*, and is a deliberate false statement made that it is of a particular weight? If so, there is a false pretence. Thus the prisoner having contracted to sell and deliver to the prosecutrix a load of coals at 7*d.* per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket showing such to be the weight, which he said he had made out himself when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was his due. It was held that the prisoner was indictable for obtaining the 2*s.* 4*d.* by false pretences.[3] And the same result was reached in a case where the defendant declared that he sold a parcel as 14 tons of coal, when in fact it was but 8 tons, heaping it so as to swell its bulk.[4] weight is within the statute.

In another case a baker had contracted with the guardians of a parish to deliver loaves of a certain weight. The relieving officer gave the poor applicants tickets, which they were to take to the baker. He was to give them loaves on their presenting the tickets to him, and afterwards return the tickets, as his vouchers once a week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets with loaves short of the contract weight. It was held that though this was not a fraud indictable

[1] R. *v.* Goss, 8 Cox C. C. 263; Bell C. C. 208; R. *v.* Ragg, Bell C. C. 215; 8 Cox C. C. 262.

[2] R. *v.* Ridgway, 3 F. & F. 838 — Bramwell.

[3] R. *v.* Sherwood, 40 Eng. L. & Eq. 584; Dears. & B. C. C. 251; R. *v.* Lee, L. & C. C. C. 449; 9 Cox C. C. 460; R. *v.* Ridgway, 3 F. & F. 838.

[4] R. *v.* Goss, supra; R. *v.* Ragg, supra.

at common law, the baker, by returning the tickets for these loaves to the relieving officer, was guilty of falsely pretending that the loaves were of full weight; and though he only obtained credit for their amount in the books of the relieving officer (as the time of payment had not arrived before detection), yet that the baker might be indicted for attempting to obtain money by the false pretence, as the making the false pretence was an act done with the intent of obtaining the money, and was sufficiently proximate to the obtaining it to be considered an attempt, since no other act remained to be done by the baker to entitle him to receive the money.[1]

False statement as to property offered for loan may be within statute.

§ 1160. When we come to false statements as to property on which money is to be raised, we apply the same test. Is the statement of value a mere conjectural opinion? If so it is not a false pretence.[2] Is it an exact statement as to some particular fact about such property essential in determining its value? Then it may be a false pretence. Hence a false statement as to the soundness of a horse may be a false pretence.[3] The principle was extended to real estate in a case where A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money upon A.'s signing an agreement for a mortgage, depositing his lease and executing a bond as collateral security. It was held that A. was properly convicted of obtaining money by false pretences.[4] And the same distinction applies to the mortgage of personal property to which the defendant has no title,[5] and to a false allegation that a particular mortgage was a first lien.[6] The same limitations are applicable generally to the pretence that certain land is unincumbered.[7]

[1] R. v. Eagleton, 33 Eng. L. & Eq. R. 540; Dears. C. C. 515; 6 Cox C. C. 559. Infra, § 1231.

[2] Supra, § 1192.

[3] R. v. Keighley, D. & B. 145; State v. Stanley, 64 Me. 157; People v. Crissie, 4 Denio, 525. Supra, § 1155.

[4] R. v. Burgon, 36 Eng. L. & Eq. 615; Dears. & B. C. C. 11; 7 Cox C. C. 131.

[5] Com. v. Lincoln, 11 Allen, 233; State v. Newell, 1 Mo. 248. This and the following case are in some States (*e. g.* Massachusetts) specifically indictable by statute.

[6] People v. Sully, 5 Parker C. R. 142.

[7] State v. Dorr, 33 Me. 498.

§ 1161. But a warranty which is a mere statement as to matters open to the vendee is not a false pretence.[1] Thus where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it with the usual covenant of title, Littledale, J., held that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as a false pretence.[2] Such warranties, in fact, are mere matters of form, and considered as such; or, if they are inducements to purchase, are only so because they are promises by the vendor to hold the vendee harmless.[3] But if a warranty is couched in the shape of a positive false statement of a material latent fact, which statement leads to the purchase, it is a false pretence.[4]

And so of false warranty when not a mere matter of opinion.

§ 1162. Obtaining goods by giving in payment a check upon a banker with whom the party keeps no account, and which he knows will not be paid, is clearly within the statute.[5] So where one in a fictitious name delivered to a person, to sell on commission, spurious lottery tick-

And so of negotiating worthless or spurious paper.

[1] Infra, § 1192; State v. Young, 76 N. C. 258.

[2] R. v. Codrington, 1 C. & P. 661.

[3] R. v. Codrington, *ut supra;* State v. Chunn, 19 Mo. 233.

[4] R. v. Kenrick, 5 Q. B. 49; Dav. & M. 208; R. v. Abbott, infra; State v. Dorr, 33 Me. 498; State v. Stanley, 64 Me. 157; State v. Jones, 70 N. C. 75; State v. Munday, 78 N. C. 460; State v. Newell, 1 Mo. 248. See infra, § 1180.

[5] R. v. Freeth, R. & R. 127; R. v. Jackson, 3 Camp. 370; 2 East P. C. 940; R. v. Parker, 2 Mood. C. C. 1; 8 C. & P. 825; Smith v. People, 47 N. Y. 303; Com. v. Collins, 8 Phila. 609; Maley v. State, 31 Ind. 192.

In R. v. Hazelton, L. R. 2 C. C. 134; 13 Cox C. C. 1, the prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain checks were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave checks on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited, except a few shillings. Various checks of his had been refused payment, and he would not have been permitted to overdraw. He did not intend when he gave the checks to the prosecutor to meet them, but intended to defraud. It was ruled that there was evidence of the false pretence that the checks were good and valid orders for the payment of their amount.

On this case Sir J. Stephen (Dig. C. L. art. 330) comments as follows: "There was some slight difference of

ets purporting to be signed by himself, and received from the agent the proceeds of the sale, he was held liable to indictment

opinion (or rather of expression) amongst the judges in this case. The judges were anxious to point out that to give a check on a bank where the drawer has no balance is not, necessarily, an offence, as he may have a right to overdraw or a reasonable expectation that, if he does, his drafts will be honored. These considerations would seem to affect, not the falseness of the pretence, but the defendant's knowledge of its falsehood, and his intent to defraud."

The opinions of the judges were as follows: —

Kelly, C. B.: "I am of opinion that the conviction must be affirmed. Two questions arise in the case. The first is whether, on the facts and documents proved, the prisoner has expressly or impliedly fraudulently made the representations on which the goods were obtained; the second, whether any one of the representations alleged is a false pretence within the statute. The indictment alleged three false representations: First, that the prisoner falsely pretended that he then had money to a certain amount in the bank; secondly, that he then had authority to draw a check upon the bank for that amount; thirdly, that a certain paper writing was a good and valid order for the payment of that amount. If the case had rested upon the first pretence alone, there would have been considerable difficulty in supporting the conviction, because there are many cases in which no such representation can be implied from the mere giving of a check as a general rule, for persons of undoubted substance and respectability often draw checks exceeding the balance to their credit at their bankers, and which are paid by the bankers. We may, therefore, put that representation out of the case. The second alleged pretence is, that the prisoner then had authority to draw a check upon the bank for the amount. That is an important representation, and arises when a man gives a check in payment for goods or in satisfaction of any other demand; and I think that false representation was proved in this case. But if there is any doubt about the case, it is removed when we look at the third pretence, that the paper writing produced by the prisoner was a good and valid order for the payment of the sum therein mentioned. The case of Reg. *v.* Parker expressly decides that that is a false pretence within the statute. Then comes the main question: is it to be implied from the facts proved that the prisoner made all or any of these false representations? As regards the second and third false pretences, it is perfectly clear that the prisoner knew at the time when he gave the checks that he had no authority to draw checks for the amounts specified therein, and that he well knew that they would not be paid. Those false pretences were, therefore, proved, and the conviction must be affirmed."

Lush, J.: "I am of the same opinion. I also think that the mere giving of a check does not convey a representation that the drawer has money to the amount of the check in the banker's hands at the time of giving it. Many persons give checks exceeding their balance at the bank at the time, in the expectation of their being able to pay in money to meet them before they are presented. In this case the prisoner ordered and obtained goods, saying he wished to pay

for obtaining such agent's goods by false pretences.[1] And so generally as to the passing of spurious notes or coin if goods or money be obtained thereby.[2] But where the prisoner passed the note of a country bank which he knew had stopped payment, it appearing that one of the partners was solvent, Gaselee, J.,

ready money; invoices were made out and discount deducted, and prisoner gave checks for the amount. I think that amounted to a representation that the checks were equivalent to cash, and, therefore, that the false pretence that the checks were good and valid orders for the payment of money was proved."

Brett, J.: "I am of the same opinion. The learned common sergeant in this case doubted, upon the decided cases, whether in point of law a man who gives a check in payment, under the circumstances before mentioned, does by the mere fact of giving the check, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment. The question reserved for us is, therefore, pointed to that part of the necessary proof on the trial of an indictment for false pretences, — the proof of a false representation of a fact which, if it had not been false, would have been an existing fact. The common sergeant has pointed to the facts on which he wants the opinion of this court. Now, the meaning of a representation to another person cannot depend upon the state of mind of the person making the representation, but must depend on what idea he conveys to the mind of the other person. It is common knowledge that persons have authority from a bank to draw checks to a considerable amount, when they have no money at the bank. I am of opinion, therefore, that the mere giving of a check does not convey a representation that the drawer has money at the bank. Then, as to the second false representation, that the prisoner had authority to draw upon the bank for the amounts in the checks. Now, if the giving of a banker's check does not mean that, what does it mean? Then, as to the third false representation, but for the case of Rex *v.* Parker, I should have doubted whether the mere giving of a check was a representation of an existing fact, that the check was a good and valid order for the payment of money."

Quain, J.: "I am of the same opinion. I think that the giving of the checks in this case amounted to a representation that they were good and valid orders for the payment of the sums therein mentioned, on the authority of Rex *v.* Parker, which was decided by a majority of the judges. The only difference in the facts is, that the prisoner in that case had no funds at all at the bank, whereas in this he had a few shillings."

Pollock, B.: "I am also of opinion that this conviction should be affirmed. I think that there was evidence that the prisoner made the false representation thirdly charged; that the checks when given were good and valid orders for the payment of the sums specified therein."

[1] Com. *v.* Wilgus, 4 Pick. 177. Infra, § 1170.

[2] R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 227; R. *v.* Jarman, 38 L. T. (N. S.) 460; 14 Cox C. C. 111; R. *v.* Dowey, 11 Cox C. C. 115; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Nason, 9 Gray, 125; and cases cited infra, § 1164.

held that he could not be convicted for obtaining money under false pretences.[1] And evidence that the bank has paid a dividend is of weight, as showing the note is of some value.[2]

Generally, however, it is enough to prove in such case that the bank was broken, and unable to pay; and that these facts the defendant knew.[3] Nor does it make any difference that the note was on its face defective, and that the prosecutor could read.[4]

And so of uttering post-dated check.

§ 1163. Even a post-dated check is within the statute, if the defendant falsely declares or implies that the check is genuine and good.[5] Thus, where the prisoner was charged with falsely pretending that a post-dated check, drawn by himself, was a good and genuine order for £25, and of the value of £25, whereby he obtained a watch and chain; and the jury found that before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the check was drawn, and that he had a right to draw the check, though he postponed the date for his own convenience, all of which was false; and that he represented that the check would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he had the funds to pay it; he was held to be properly convicted.[6]

[1] R. *v.* Spencer, 3 C. & P. 420.

[2] R. *v.* Evans, Bell C. C. 187; 8 Cox C. C. 257.

[3] See infra, § 1165.

[4] R. *v.* Jessop, Dears. & B. C. C. 442. Infra, § 1189.

[5] Lesser *v.* People, 73 N. Y. 78; S. C., 12 Hun, 668.

In this case the facts were as follows: On the 28th of August the prisoner, having bargained for goods of complainant, sent out from complainant's residence, where he was, a friend who was with him to get, as he said, the money to pay for the goods. The friend soon after returned with a check on a bank, purporting to be drawn by one Steinbach, and dated August 29. This, prisoner represented to be a valid security, and attention being called to the fact that it was dated the 29th, stated that this was done because it was so late in the day and the bank was closed. No account was kept at the bank by any Steinbach, and the check was worthless. The check was taken and prisoner and his friend took away the goods. It was held by the Court of Appeals, affirming the judgment of the court below, that the offence constituted a false pretence, and the fact that the check was post-dated would not be ground to set aside a conviction for obtaining goods under false pretences.

[6] R. *v.* Parker, 8 C. & P. 825; 2 Mood. C. C. 1. See infra, § 1174.

§ 1164. As the person who advances money on a forged check parts absolutely with his property in the money paid, it is not larceny but false pretences so to obtain money or goods.[1]

Obtaining money by forged paper not larceny but false pretences.

Such has been held to be the law in a case where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket, and obtained the amount stated therein, no purchase having been in fact made.[2]

Cases, however, can be readily conceived, where the defendant brings the order ostensibly for a third person, in which, as only *possession* of the money or goods is passed to the defendant by the prosecutor, the defendant is guilty of larceny, if he fraudulently appropriates the *property*.[3]

It may happen, however, that where forgery is a felony, and false pretences a misdemeanor, the latter, when the two coalesce, may merge at common law in the former.[4]

3. *Falsity of the Pretences.*

§ 1165. It is generally impossible to prove an absolute negative, and it is sufficient, therefore, for the prosecution to approximate, as far as is in its power, to such negative, leaving it to the defendant, if he can, to break this down by proving the affirmative fact.[5] This may

Only strong probability of falsity need be shown.

That passing half a bank note may be a false pretence see R. *v.* Murphy, 13 Cox C. C. 298.

[1] R. *v.* Prince, L. R. 1 C. C. 150; 11 Cox C. C. 173; so as to obtaining goods by forged or flash notes or coin; R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592; 4 Cox C. C. 227; R. *v.* Byrne, 10 Cox C. C. 369; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Stone, 4 Met. 43; Com. *v.* Nason, 9 Gray, 125; Tyler *v.* State, 2 Humph. 37; though see R. *v.* Evans, 5 C. & P. 553; Cheek *v.* State, 1 Cold. (Tenn.) 172.

[2] R. *v.* Barnes, 2 Den. C. C. 59.

[3] Supra, § 964.

[4] Infra, § 1344.

[5] See Whart. on Ev. § 356; Whart. on Cr. Ev. § 321.

P., the prosecutor, lent money to C. at interest, on the security of a bill of sale on furniture, a promissory note of C. and another person, and a declaration made by C. that the furniture was unincumbered. The declaration was untrue at the time it was handed to P., C. having a few hours before given a bill of sale for the furniture to another person, but not to its full value. It was held that there was evidence in support of the prosecution. R. *v.* Meakin, 11 Cox C. C. 270.

But where it appeared that C., on engaging an assistant from whom he

be illustrated by cases where the note of a broken bank is passed. The prosecution must, as has been seen,[1] prove that the bank is broken; and if it appear that, though the bank has stopped, there are still solvent parties who are liable for its paper, there can be no conviction on a count alleging the note to be worthless.[2] Yet where the pretence is that a note is worth its nominal value, or that it is good, it is not necessary for the prosecution, where the bank is insolvent, to negative every possibility of payment by showing that all the stockholders of the bank had paid in their stock.[3]

The same position, *i. e.* that proximate proof is enough, was reached where the allegation was that B. obtained twenty yards of carpet by falsely pretending that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him about some carpet, and had asked him to procure a piece of carpet, whereas no such person had been at him about any carpet, or had any such person asked him to procure any piece of carpet. The evidence was that B. obtained twenty yards of carpet by stating to the prosecutor, who was a shopkeeper in a village, that he wanted some carpeting for a family living in a large house in the village, who had had a daughter lately married; that B. afterwards sold the carpeting so obtained to two different persons, and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent B. to the prosecutor's shop for the carpet. It was held, that there was a sufficient false pretence proved and negatived, and the case of the prosecution was made out.[4] And where a postman falsely pretended that the sum of 2*s.* was payable on a post letter intrusted to him for delivery, whereas 1*s.* only was payable, it was held that the offence was complete when he made the pretence, and therefore the absence of any evidence to show

received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt, it was ruled that the indictment could not be sustained, upon either of the representations. R. *v.* Williamson, 21 L. T. N. S. 444 — Byles.

[1] See supra, § 1162.

[2] R. *v.* Spencer, 3 C. & P. 420; R. *v.* Evans, Bell C. C. 187; 8 Cox C. C. 257.

[3] Com. *v.* Stone, 4 Met. 43.

[4] R. *v.* Burnsides, Bell C. C. 282; 8 Cox C. C. 370.

positively that he did not pay over the extra 1*s.* to the superior officer was immaterial to his guilt or innocence.[1]

§ 1166. The burden of approximating a negative is on the prosecution, though when this is done, any matter peculiarly within the defendant's knowledge is to be supplied by the defence.[2] In other words, while the prosecution must make out all the elements of its case, this is to be done inferentially as closely as possible; and when a reasonable certainty is reached, it is for the defendant to produce the affirmative proof requisite to break down the prosecution's approximate negative.[3] Thus, in a Mississippi case, it was correctly held error, on an indictment against a person for pretending to be a Baptist minister in good standing, to charge the jury "that if the accused made the false representations as stated, and thereby obtained the money, they will find him guilty, unless the accused has shown the truth of these representations."[4] Yet it would have been sound law to have told the jury, that if, from the evidence of the prosecution, it was to be inferred with reasonable certainty that the defendant was not a Baptist minister, the burden was on him, by producing his license, or proving his authority, to show that he was what he thus pretended to be.

Burden of negative is on prosecution.

§ 1167. The pretence must be squarely negatived.[5] Thus it is not enough, in order to prove the insolvency of a partnership, to show the private indebtedness of particular partners.[6]

But pretence must be squarely negatived.

§ 1168. While each particular pretence on which conviction is sought must be thus negatived, it is not necessary to negative *all* the pretences. Any one proved and negatived, if it supplied a preponderating motive, is sufficient to convict.[7]

Sufficient to disprove one pretence.

§ 1169. When the pretence is false, it is no defence that the defendant expected to pay when he should be able.[8]

Expecting to pay no negation.

[1] R. *v.* Byrne, 10 Cox C. C. 369.
[2] See Whart. Crim. Ev. § 321.
[3] See Whart. Crim. Ev. §§ 321–2, 329, 341.
[4] Bowler *v.* State, 41 Miss. 570.
[5] R. *v.* Kelleher, 14 Cox C. C. 48.
[6] Com. *v.* Davidson, 1 Cush. 33.
[7] Infra, §§ 1176, 1218; Whart. Crim. Ev. § 131; Beasley *v.* State, 59 Ala. 20; State *v.* Vorbeck, 66 Mo. 168.
[8] R. *v.* Naylor, L. R. 1 C. C. 4; 10 Cox C. C. 149.

4. *Pretences need not be in Words.*

§ 1170. The conduct and acts of the party will be sufficient, without any verbal assertion,[1] and even a letter imperfectly setting forth a pretence may be supplemented by proof of facts constituting the pretence.[2] Where a man assumed the name of another to whom money was due on a genuine instrument, it was held indictable.[3] Where, as we have already seen, a person at Oxford, who was not a member of the University, went to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, it was held within the act, though not a word passed as to his *status*.[4] And so where the defendant, an employee in a hospital, wrote to a manager for linen, not saying in words that it was for the hospital, but knowingly creating that impression in the manager's mind.[5]

Conduct is a sufficient pretence.

The same result was reached in an English case, where the evidence was that hewers and putters in a colliery had tokens differently marked, which they placed on the tubs of coal drawn up the pit, and which were then taken off and put into a box, and their wages calculated according to the number of tokens sent up by them. The putter fetched the empty tub to the hewer, and took it when full to the station to be drawn up to the bank; before the tub was filled he placed his token on it, to denote the sum he was entitled to for his labor in putting and removing the tub to the station, and the hewer put his token also, to denote the amount he was entitled to for hewing the coal

[1] R. *v.* Giles, L. & C. 502; 10 Cox C. C. 44.

[2] R. *v.* Cooper, L. R. 2 Q. B. D. 510; 36 L. T. 671.

[3] R. *v.* Story, R. & R. 81; R. *v.* Barnard, 7 C. & P. 784. See supra, § 1161.

[4] Supra, § 1153. See Com. *v.* Daniels, 2 Parsons, 332.

[5] R. *v.* Franklin, 4 F. & F. 94.

In an English case determined in 1877, the prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service he knowingly and fraudulently delivered up, as part of his uniform, to an officer of the company, a great-coat belonging to a fellow-servant, and so obtained the wages due to him. It was ruled that he was properly convicted of obtaining the money by false pretences. R. *v.* Bull, 36 L. T. (N. S.) 376; 13 Cox C. C. 608.

and filling the tub. A hewer removed the putter's token after the tub was brought to him and substituted one of his own, and then put an additional token of his own for hewing and filling the tub. The tub was then drawn up, and the two tokens thrown into the box. The contents of the box were then taken away by the token-man, and the accounts of the different workmen made up according to the number of tokens found with their initials on. In that way the hewer obtained money for hewing and filling two tubs of coals instead of one only. It was held, that this amounted to an indictable false pretence.[1]

Silence in acquiescing in another's statements may amount to a false pretence.[2]

[1] R. v. Hunter, 10 Cox C. C. 642; 16 W. R. 342 — C. C. R.

[2] See Whart. Crim. Ev. § 679. The fact that I stand by while B. is lending money to A., when I know A. is insolvent, will not make me liable to B. unless I do something to corroborate A.'s statements of his solvency. There is no causal relation between my silence and B.'s loan. It is otherwise with my silence when such silence is in any way an affirmation of A.'s statements. But to action, in this sense, words are not necessary. As we have seen, the man who buys goods in a military uniform, which he is not entitled to wear, and who gets these goods on the credit of the uniform, under circumstances which make credit of this kind reasonable, is as responsible as if he said, "I am a military man."

On the other hand, suppression of facts by one of the parties to a contract does not impose criminal liability, unless there is an active (as distinguished from a passive) negation of facts. The Rothschilds incurred no criminal liability when they bought large masses of consols on the receipt of private intelligence, which they kept to themselves, of the defeat of Napoleon at Waterloo. I may believe a particular piece of china, which I offer to buy at a farm-house, to be of peculiar antiquarian value, but I am not indictable if I conceal this belief from the owner. If the opposing view were to obtain, no bargain could be closed without exposure to criminal prosecution. We all of us have reasons, personal to ourselves, for every bargain we make. It is difficult for us always to detail these reasons; if we did, it would often expose us to the placing the goods at an exorbitant price. If everything is thus to be told, it would require the man of caution and sagacity, who, before entering on any business, examines all the attainable facts, to deliver to the other contracting party a lecture which, if nothing were suppressed, might occupy days. It would make every one the guardian, in business, of every one else. See Merkel's Criminalistische Abhandlungen, and see 5 South. Law Rev. 374.

A mere use of another's error will not make a false pretence, unless there is something done by the deceiving party to confirm such error. Otherwise, a person selling stock in the market, he possessing exclusive information (honorably acquired) of circumstances calculated to make the

5. *They need not be by the Defendant personally.*

§ 1171. Where two persons are jointly indicted for obtaining goods by false pretences, made designedly and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence, and direction of the other, made the false pretences charged, warrants the conviction of both.[1]

Pretence by one confederate is pretence by all.

stock less valuable, would be indictable. In no case, in fact, where there is a sale, is the information of the parties the same; hence, if the concealing of information is a false pretence, there is no sale which would not be open to an indictment for false pretences.

Yet there are, undoubtedly, cases in which suppression of a fact by a vendor is an indictable false pretence. A jeweller, for instance, sells a spurious ring as of true metal. He may not say, "This is gold," but he asks for it the price of gold, and from his whole conduct the assertion that it is gold is implied. He is as much indictable for false pretences as if he had actually said, "This is gold." Suppose, however, that the sale is not of a gold ring, but of a mass of bullion, at a time when specie payments are suspended. If the bullion is sold as gold, but is of base metal, then an indictment lies. But an indictment does not lie because it turns out that the vendor had secret information from which he had reason to conclude that gold would materially fall in value soon after the sale. The distinction is this: By the usage of trade, he who sells an article as of a particular class warrants it to be of that class, so that he becomes responsible if it is spurious; but if the article be genuine, there is no warranty as to its value.

In interpreting words when used as false pretences, we must take them in the sense in which they are understood by the person deceived. The deceiver cannot shelter himself by the pretext that the words had a double meaning, and that they might, in one sense, be truthful, though not in the sense in which they were accepted.

He who enters into a bargain of any kind implies, —

I. The existence of all conditions essential to the validity of the transaction on his part, so far as such conditions are, or ought to be, within his knowledge. Thus, he who calls for the payment of a debt implies the existence of a right on his part to make the demand. He who takes a receipt implies that he made a payment to which the receipt corresponds.

II. The existence of analogous conditions in the other party. He, for instance, who buys a particular article implicitly expresses the opinion that the seller is capable of disposing of the article.

III. A bargaining party also implies the existence of the conditions on which the other party depended when entering into the transaction. Thus,

[1] R. *v.* Moland, 2 Mood. C. C. 271; Com. *v.* Harley, 7 Met. 462; Cowen *v.* People, 14 Ill. 348; Whart. Crim. Ev. § 102. Infra, §§ 1202, 1211–2.

An allegation in the indictment that the defendants obtained goods of A., B., and C., partners in trade, by false pretences made to them, is supported by proof that the defendants made the alleged false pretences to their clerk and salesman, who communicated them to B., and that the goods were delivered to the defendants in consequence of those false pretences.[1] And it is not necessary, in order to convict the defendants in such case, to prove that they, or either of them, obtained the goods on their own account, or derived, or expected to derive, personally, any pecuniary benefit therefrom.[2]

the manufacturer who delivers to his customers particular articles implies the existence of qualities which go to make up the value of the goods when ordered. The grocer who delivers a package to a purchaser calling for a pound of coffee implies that the package contains the article called for, in the required quantity. Of this kind of implicit assertion Mittermaier gives us the following illustration: "A customer sees an ornament, exquisitely elaborated, set with cut stones; he supposes they are jewels, and offers $100 for the ornament; the vendor sees the error of the purchaser, but does not undeceive him, and takes the money." This is a case of obtaining money on false pretences. The offering of $100 for an ornament which would not be worth one-tenth that sum if the stones were not jewels, is equivalent to a statement by the purchaser that they were jewels, and to a silent admission by the vendor to the same effect. At the same time, it must be remembered that a bare entrance into a particular transaction is not in itself such an affirmation of the opinion of the other contracting party as to amount to a false pretence, even though the transaction be entered into fraudulently. It is possible to take an attitude of absolute "non-committalism" as to such expressions, and it would be absurd to treat a refusal to affirm as an affirmation. A. — to take another of Mittermaier's cases — imagines that he has made a large sum in a speculation in which he was engaged; exhilarated with his supposed good fortune, he pays a debt of 500 florins; the creditor takes the money, knowing at the time that the debtor is in error as to the success of the speculation, but without undeceiving him. Putting aside the fact that obtaining payment of a debt cannot be made, by itself, indictable, there is in this case no assent by the party receiving the money to assumptions by the other party which are essential incidents of the bargain.

[1] Com. v. Harley, 7 Met. 462. An indictment charged K. and P. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was that K. and P., acting together, were the chief parties by whom the false pretences had been made. It was held, that the acts of P. were the acts of K., and admissible against him upon the indictment. R. v. Kerrigan, 9 Cox C. C. 441.

[2] Com. v. Harley, 7 Met. 462; R. v. Moland, 2 Mood. C. C. 271; Cowen v. People, 14 Ill. 348; but see infra, § 1202.

§ 1172. The prosecutor, however, cannot prove false pretences made by a third person, alleged to have been made by the procurement of the defendant, without first showing that the defendant instigated such person to make them;[1] nor can the defendant, who fraudulently negotiates spurious paper, be convicted under the statute for the subsequent act of the purchaser of such spurious paper, done innocently and without the defendant's knowledge or instigation, in obtaining money on such paper.[2]

Confederacy must be first shown.

6. *They must relate to a Past or Present State of Things.*

§ 1173. A false pretence, under the statute, must relate to a past event or existing fact. Any representation in regard to a future transaction is excluded.[3] Thus, for instance, a false statement that a draft, which the defendant exhibits to the prosecutor, has been received from a house of good credit abroad, and is for a valuable consideration, on the faith of which he obtains the prosecutor's goods, is within the law; a promise to deposit with him such a draft at some future time, though wilfully and intentionally false, and the means of the prosecutor's parting possession with his property, is not. So a pretence that the party would do an act that he did not mean to do (as a pretence that he would pay for goods on delivery) was ruled by all the judges not to be a false pretence, within the statute of Geo. 2;[4] and the same rule is

Promises or predictions are not false pretences.

An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial, it was proved that the prisoner made the false pretences set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to the firm; and it was held that there was no variance between the indictment and the proof, as the words, "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage. R. *v.* Kealey, 1 Eng. L. & Eq. 585; 2 Den. C. C. 68.

[1] Per Bronson, C. J., People *v.* Parish, 4 Denio, 153.

[2] Infra, § 1202.

[3] R. *v.* Lee, L. & C. C. C. 309; R. *v.* Goodhall, R. & R. 461; R. *v.* Woodman, 14 Cox C. C. 179; Dillingham *v.* State, 5 Oh. St. 280; Colly *v.* State, 55 Ala. 85; State *v.* Evers, 49 Mo. 542; Ryan *v.* State, 45 Ga. 128; Keller *v.* State, 51 Ind. 111; Snyder, in re, 17 Kans. 542; McKenzie *v.* State, 6 Eng. (Ark.) 594; Johnson *v.* State, 41 Tex. 65.

[4] R. *v.* Goodhall, R. & R. 461; R. *v.* Wakeling, Ibid. 504; R. *v.* Oates,

distinctly recognized in this country.[1] Thus, to take as an illustration an English case, on an indictment for obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well known practice was for buyers to engage a room at a public house, and that the prisoner conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief. It was held, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, a conviction could not be sustained.[2]

§ 1174. But a concurrent promise does not neutralize accompanying false pretence. If there be the false statement of an existing fact, the adding to this of false promises does not take the case out of the statute, when the false pretence was the preponderating influence.[3] And this holds, even though the prosecutor would not have yielded to the pretence without the promise.[4] And it is even said by Crompton, J., that the pretence need not necessarily be of some alleged existing fact, capable of being disproved by positive testimony, but may depend on the *bonâ fide* intention and willingness of the defendant at the time of entering into a contract to perform it, or to do some act at a future period.[5]

But false pretence is not neutralized by concurrent promise.

Dears. C. C. 459; 29 Eng. L. & Eq. 552. See Glackan *v.* Com. 3 Metc. (Ky.) 232.

[1] Com. *v.* Drew, 19 Pick. 179; Com. *v.* Lincoln, 11 Allen, 233; People *v.* Haynes, 11 Wend. 565; 14 Ibid. 546; Com. *v.* Burdick, 2 Barr, 163; Burrow *v.* State, 7 Eng. (Ark.) 65; Glackan *v.* Com. 3 Metc. (Ky.) 232. Supra, § 1136.

[2] R. *v.* Burrows, 11 Cox C. C. 258. Where the prosecutor lent £10 to the prisoner, induced by his false pretence that he was going to pay his rent, and the proof was that if the prisoner had not told him that he was going to pay his rent the prosecutor would not have lent the money; it was held that this was not such a false pretence of an existing fact as to warrant a conviction. R. *v.* Lee, 9 Cox C. C. 304.

[3] R. *v.* Jennison, Leigh & Cave, 157; 9 Cox, 158; R. *v.* West, 8 Cox C. C. 12; R. *v.* Asterley, 7 C. & P. 191; State *v.* Rowley, 12 Conn. 101. Of this principle a striking illustration is given supra, § 1163; and as to promises to marry see supra, § 1148.

[4] R. *v.* West, 8 Cox C. C. 12; R. *v.* Fry, 7 Cox C. C. 394; D. & B. 449.

[5] R. *v.* Jones, 6 Cox C. C. 467.

7. They must have been the Operative Cause of the Transfer.

§ 1175. Where, in Massachusetts, one of the representations proved was that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant.[1] The same view generally obtains, it being held that there must be causal relation between the pretence and the transfer.[2]

Unless operative, not within statute.

§ 1176. But it is not necessary to a conviction that the false pretence alleged should have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party.[3] And this is true even though the prosecutor would

Yet it need not be the sole motive.

[1] Com. *v.* Davidson, 1 Cush. 33. See R. *v.* Gardner, 7 Cox C. C. 136; D. & B. 40; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Herschell, Thacher's C. C. 70; Schleisinger *v.* State, 11 Oh. St. 669.

[2] R. *v.* Dale, 7 C. & P. 352; People *v.* Miller, 2 Parker C. R. 197; State *v.* Tomlin, 5 Dutch. 14; State *v.* Timmons, 58 Ind. 98. Infra, § 1227.

The cases usually given on this point are those where the prosecutor was, at the time when the false pretence was uttered, entirely aware of its falsity. Suppose, however, he was firmly convinced, before the utterance, of the truth of the statements of which the false pretence consisted, and that the false pretence in no way confirmed or strengthened him in this belief; can it be said that he parted with his goods on the faith of the false pretence? Or, to put the case in the concrete: A. is firmly of the belief that B. is a rich man, worth $100,000. B. comes to A., and says, "Lend me $10,000; I am worth that sum." B.'s statement that he is worth $10,000 has no effect on A., who is already convinced of B.'s great wealth, outside of this declaration. B. lends A. the money. Supposing that A.'s statement was knowingly false, can he be convicted of obtaining money on false pretences? Certainly not, if his statement was not the operative cause of the loan.

Falsehoods told by a party as to matters not part of the consideration of a bargain, and which were not operative in its concoction, are not false pretences under the statute. This applies peculiarly to false statements as to motives which induce the party to sell or to buy.

[3] R. *v.* Hewgill, Dears. 315; 24 Eng. Law & Eq. 556; R. *v.* English, 12 Cox C. C. 171; Com. *v.* Coe, 115 Mass. 481; People *v.* Haynes, 14 Wend. 546; People *v.* Herrick, 13 Wend. 87;

not have surrendered the goods solely on the pretence alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive.[1]

§ 1177. If the pretences were not made use of until after the bargain was consummated, it cannot be said, with truth, that it was by force of them the property was obtained.[2] Thus, in a New York case, a purchase of merchandise was made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods put on board a steamboat designated by the purchaser, to be forwarded to his residence: it was held that the sale was complete at this point, and the goods became the property of the purchaser. Hence, where, after such delivery, the vendor, on receiving information inducing him to suspect the solvency of the purchaser, expressed an intention to reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay, by means of which the vendor abandoned his intention, and the purchaser was then indicted, charged with the offence of having obtained the goods by false pretences, these representations being the alleged false pre-

Must have been before bargain closed.

Thomas *v.* People, 34 N. Y. 351. See People *v.* Stetson, 4 Barb. 151; State *v.* Mills, 17 Me. 211; State *v.* Dunlap, 24 Me. 77; State *v.* Thatcher, 35 N. J. 445; Fay *v.* Com. 28 Grat. 912; Smith *v.* State, 55 Miss. 513; Snyder, in re, 17 Kans. 542. See Bowler *v.* State, 41 Miss. 570; and infra, § 1218.

In R. *v.* Steels, 11 Cox C. C. 5, a conviction was sustained under an indictment which alleged that C., the prisoner, obtained a coat by falsely pretending that a bill of parcels of a coat, value 14*s.* 6*d.*, of which 4*s.* 6*d.* had been paid on account, and that 10*s.* only was due, was a bill of parcels of another coat of the value of 22*s.* The evidence was that C.'s wife had selected the 14*s.* 6*d.* coat for him, subject to its fitting him, and had paid 4*s.* 6*d.* on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and C. was then measured for one to cost 22*s.* When that was made it was tried on by P., who was not privy to the former part of the transaction. C., when the coat was given to him, handed the bill of parcels for the 14*s.* 6*d.* and 10*s.*, saying, "There is 10*s.* to pay." The bill was receipted, and the prisoner took the 22*s.* coat away with him. P. stated that believing the bill of parcels to refer to the 22*s.* coat, he parted with that coat on payment of 10*s.*, otherwise he should not have done so. R. *v.* Steels, 17 L. T. N. S. 666; 11 Cox C. C. 5 — C. C. R.

[1] Supra, § 119.

[2] State *v.* Church, 43 Conn. 471; State *v.* Vanderbelt, 3 Dutch. 328; State *v.* Tomlin, 5 Dutch. 14.

tences: it was ruled that the sale being complete before the representations were made, the defendant could not be considered guilty of the crime charged against him.[1] So where a carrier, having ordered a cask of ale, said, after he had possession of it, "This is for W:" it was held that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained.[2]

Verification by prosecutor may be a defence.

§ 1178. When the prosecutor resorts to verification, this may be a defence. The prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding it withstood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge. It was held, that if the money had been obtained on the statement made by the prisoner, he might have been convicted of obtaining it by false pretences; but that, as the prosecutor relied entirely upon his own examination, and not upon the false statement, the prisoner was properly found guilty of only an attempt to commit that offence.[3] Yet this result would not be reached if the parties are reversed: a jeweller making the false pretence as to material, and an ignorant purchaser resorting to some imperfect verification of his own. In the last case the inference would be that the vendor's false pretence would be operative; in the first case the contrary.

Pretence must have been direct cause, and property must have been transferred.

§ 1179. The pretence must operate as the direct cause of the transfer; and therefore, where it does not, the statute does not apply. This was the reasoning in an English case where the prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various

[1] People v. Haynes, 11 Wend. 565; 14 Wend. 546. See R. v. Dale, 7 C. & P. 352. Infra, § 1227.

[2] R. v. Brooks, 1 F. & F. 502 — Wightman.

[3] R. v. Roebuck, 36 Eng. L. & Eq. 631; D. & B. 24; 7 Cox C. C. 126. Infra, § 1182.

articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence.[1]

When statements were made on different occasions, it is for the jury to say whether they were so connected as to form one transaction.[2]

The prosecutor must have intended to part with his right of property in the goods, and not merely with his possession.[3]

No defence that the goods were obtained mediately through a contract.

§ 1180. As will be hereafter seen,[4] the goods must have been obtained for defendant and in accordance with his directions; if so it is no defence that they were obtained mediately through a contract which the defendant's false pretence induced the prosecutor to make. At this point it is to be observed that the cases are plain to the effect that it matters not whether the goods were obtained immediately by the false pretence, or mediately by a contract to which the false pretence induced the prosecutor to consent, provided there be a causal relation between the contract and the false pretence.[5]

[1] R. v. Gardner, 36 Eng. L. & Eq. 610; 7 Cox C. C. 136; D. & B. 40; R. v. Hamilton, 9 Ad. & El. (N. S.) 271; and see infra, § 1202.

[2] R. v. Welman, 20 Eng. L. & Eq. 588; Dears. C. C. 188; 6 Cox C. C. 153.

[3] Infra, § 1203; supra, § 888.

[4] Infra, § 1202.

[5] R. v. Abbott, 1 Den. C. C. 273; 2 C. & K. 630; R. v. Dark, 1 Den. C. C. 276; R. v. Kenrick, 1 D. & M. 208; 5 Q. B. 49; R. v. Greathead, 14 Cox C. C. 108; Com. v. Davidson, 1 Cush. 33; Com. v. Hooper, 104 Mass. 549; Com. v. Hutchison, 114 Mass. 325; Com. v. Jeffries, 7 Allen, 549; State v. Newell, 1 Mo. 248. Infra, § 1229. Thus, to obtain a "trade" by a false pretence is indictable. State v. Stanley, 64 Me. 157. It is otherwise when only credit on account was obtained, which was afterwards made operative by a distinct transaction. R. v. Wavell, 1 Mood. C. C. 224. Infra, § 1198.

Of this Sir J. Stephen gives the following illustrations, Dig. C. L. art. 331: —

"A. draws a bill upon B. in London, and gets it discounted by C. in Russia, by falsely pretending, by means of a forged authority, that he is authorized to draw upon B. for the amount of the bill. A. does not attempt to obtain money by false pretences from B., though he meant that C. should forward the draft to B., and should obtain payment of the amount, and though his act, if done in England, would have been an obtaining by false pretences from C. R. v. Kilham, L. R. 1 C. C. 261.

"A., by falsely pretending to be a naval officer, induces B. to enter into a contract to board and lodge him at a guinea a week, and under this con-

§ 1181. Delivery by servant of false accounts of payments is a pretence. Where the foreman of a manufactory, who was in the habit of receiving from his master money to pay the workmen, obtained from him, by means of false written accounts, more than he had really paid them, or they had earned, it was held within the statute; and all the judges, after much deliberation, agreed, that *if the false pretence created the credit*, the case was within the statute; and they considered that, in this case, the defendant would not have obtained the credit but for the false account which he had delivered, and therefore that he was properly convicted.[1]

False accounts of payments may be a pretence.

§ 1182. The prosecutor in a trial for obtaining an indorsement by false pretences may testify to the influence of the defendant's representations in inducing him to indorse.[2]

Prosecutor witness to prove preponderating influence.

§ 1183. It is an essential ingredient of the offence that the party alleged to have been defrauded should have believed the false representations to be true, for if he knew them to be false, he cannot claim that he was influenced by them.[3]

Necessary that prosecutor should have believed the representations.

8. *Intent.*

§ 1184. While an intention to defraud is inferrible from the guilty act, and need not be substantively proved,[4] such an intention is necessary to the offence.[5] Thus, a surveyor of highways, having authority to order gravel for the roads, in ordering gravel as usual, and applying it to his

Intent to be inferred from facts.

tract is supplied with food for a week. This is not obtaining food by false pretences, as the supply of food in consequence of the contract is too remotely the result of the false pretence to become the subject of an indictment. R. *v.* Gardner, D. & B. 40."

[1] R. *v.* Witchell, 2 East P. C. 830; Bonnell *v.* State, 64 Ind. 498. Supra, § 1141, but see infra, § 1215.

[2] People *v.* Miller, 2 Parker C. R. 197.

[3] R. *v.* Dale, 7 C. & P. 352; R. *v.* Mills, 40 Eng. L. & Eq. 562; 7 Cox C. C. 263; D. & B. 205; Com. *v.* Hulbert, 12 Met. 446; People *v.* Stetson, 4 Barb. 151. Supra, §§ 1176–7.

[4] See infra, § 1226; R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271. See also R. *v.* Bloomfield, C. & M. 537; People *v.* Herrick, 13 Wend. 87; Bowler *v.* State, 41 Miss. 570. As to proof of intent see supra, §§ 101–122; Whart. Crim. Ev. §§ 53, 734. That knowledge of falsity is not to be inferred from independent and detached false statements to others see People *v.* Spielman, N. Y. Ct. App. 1879; Wh. Cr. Ev. § 48.

[5] Fay *v.* Com. 28 Grat. 912.

own use, is not liable to a charge of obtaining it by false pretences, nor for larceny, unless it appears that he did not mean to pay for it.[1]

That the pretence was used to obtain a just debt has been ruled to be a defence.[2]

As has been already fully seen, whenever a guilty act is deliberately performed, we may logically infer a guilty intent,[3] and it is always admissible to fortify this presumption by showing guilty preparations, or other acts from which the intent may be gathered, even though the latter acts constitute independent offences, provided they are part of a system with that on trial.[4] Thus, upon an indictment for obtaining goods by falsely pretending that the buyer owed but little, and had ample means to pay all his debts, and that his note for $250 was good, it is competent for the State to prove that within three days after he mortgaged the greater part of his personal property to another, as bearing upon his intent in making such representations.[5]

But such proof is inadmissible if relating to a disconnected transaction. Thus when C. was indicted for obtaining a specific sum of money from P. by false pretences, and the evidence was that he was employed by his master to take orders but not to receive moneys, and he was proved to have obtained the specific sum from P. by representing that he was authorized by his master to receive it; proof of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being in any way connected with the transaction under trial, was held not admissible for the purpose of proving the intent when he committed the acts charged in the indictment.[6]

It does not negative the intent to defraud, that the defendant intended to pay for the articles obtained when able,[7] or that he

[1] R. *v.* Richardson, 1 F. & F. 488 — Wightman.

[2] Infra, § 1197; State *v.* Hurst, 11 W. Va. 54.

[3] See supra, § 122; Whart. Crim. Ev. § 734.

[4] See Whart. Crim. Ev. §§ 53 *et seq.*, 734, 753.

[5] State *v.* Call, 48 N. H. 126; S. P., Trogden *v.* Com. 7 Rep. 411 (Va. 1878). See Wh. Crim. Ev. § 53.

[6] R. *v.* Holt, 8 Cox C. C. 411; Bell C. C. 280.

[7] R. *v.* Bowen, 13 Q. B. 790.

In Com. *v.* Coe, 115 Mass. 481, Wells, J., said:—

"The offence consists in obtaining property from another by false pre-

paid in part, at the time, for the articles obtained,[1] or that a trap was laid for him by the prosecutor.[2]

9. *Scienter.*

Defendant must be shown to have known the falsity.

§ 1185. Falsity, in the sense of the statutes, must be subjective as well as objective; the statement must not only be false in fact, but false to the knowledge of its utterer.[3] It should be remembered, however, that proof of knowledge of a negative is circumstantial and inferential. In what way this proof is constituted has been already partially considered.[4]

10. *Prosecutor's Negligence or Misconduct.*

Prosecutor not required to show prudence beyond his opportunities.

§ 1186. We have seen that to a cheat at common law it is essential that the fraud should be latent.[5] It was in part to meet this difficulty that the statute of false pretences was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretence may be if it succeeds in defrauding. Thus, in a leading case, Lord Denman, C. J., said, in answer to the statement that the false pretences, to become the subject of indictment, should be such as would deceive a man of average intelligence, "I never could see why that should be. Suppose a man had just enough (fraud) to impose upon a very simple person, and defraud him; how is it to be determined

tences. The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. Com. *v.* Tenney, 97 Mass. 50; Com. *v.* Mason, 105 Mass. 163. The offence is complete when the property or money has been obtained by such means, and would not be purged by subsequent restoration or repayment. Evidence of ability to make the repayment is therefore immaterial and inadmissible. The possession of the means of payment is entirely consistent with the fraud charged. The evidence offered on this point did not touch the question of falsity and fraud of the means by which the loan was obtained, and was properly rejected." Supra, § 887.

[1] R. *v.* Eagleton, Dears. 515; 33 Eng. L. & Eq. 540.

[2] Infra, § 1190; supra, § 149.

[3] R. *v.* Philpotts, 1 C. & K. 112; R. *v.* Henderson, 2 Mood. C. C. 192.

[4] See supra, §§ 1165–6.

[5] See supra, § 1120.

whether the degree of fraud is such as will amount to a misdemeanor?"[1] Hence, the fact that the prosecutor did not possess or apply peculiar prudence is no defence when the prosecutor was really imposed upon.[2]

§ 1187. To this rule, however, some exception has been taken. Thus, in New York, it was once laid down that a representation, though false, is not within the statute unless calculated to deceive persons of ordinary prudence and discretion.[3] So, in Pennsylvania, it was said: "Broad, however, as is the phrase 'for any false pretence whatever,' it still has a legal limit beyond which it cannot be carried in this or any other case. It extends no farther than to a case where a party has obtained money or property by falsely representing himself

Exceptions to above rule.

[1] R. v. Wickham, 10 Ad. & El. 34.

[2] Supra, § 1156; R. v. Woolley, 1 Den. C. C. 559; R. v. Ball, 2 Russ. on Cr. 289; C. & M. 249; R. v. English, 12 Cox C. C. 171; Com. v. Henry, 22 Penn. St. 253; Smith v. State, 55 Miss. 513; Colbert v. State, 1 Tex. Ap. 314; though see Com. v. Wilgus, 4 Pick. 177; State v. Simpson, 3 Hawks, 620.

In Com. v. Coe, 115 Mass. 481, the presiding judge in charging the jury suggested the inquiry whether the person defrauded would have lent the money if he had known that the security offered, a certificate of stock, was forged and worthless; and then instructed them that, if he would not, and was in fact induced to make the loan by the delivery of the certificate, and his belief in its genuineness, and the jury find the other facts constituting the offence, it would be sufficient; and added: "And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality." The defendant excepted to "the part of the instructions relating to the obtaining of money or property upon a loan by means of false pretences." It was ruled by the Supreme Court that there was no ground for exception. "The judge," said Wells, J., "cannot fairly be supposed to have intended, by these propositions, to suggest the inquiry whether Ferris" (the party defrauded) "would have made the loan if he had known or supposed that Coe was guilty of fraudulently altering the certificate which he offered to him for security. Nor can we suppose that the jury would understand it in that way. If the attention of the judge had been called to the possible danger that the jury might so understand and misapply his remarks, they would undoubtedly have been qualified and explained. But there was no suggestion of the kind at the time; and no exception appears to have been taken to the instructions in this respect. On the contrary, the exception to this part of the instructions was expressly limited to that which related to 'the obtaining of money or property upon a loan.' The objection, therefore, as now made, ought not to prevail."

[3] People v. Williams, 4 Hill, 9.

to be in a situation in which he is not, or any occurrence which has not happened *to which persons of ordinary caution might give credit.* Where the pretence is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act."[1] And the same opinion has been expressed in Arkansas.[2] In Pennsylvania, however, this exception has been qualified, it being now held that "it is no less a false pretence that the party imposed upon might, by common prudence, have avoided the imposition."[3] And in New York the position first taken has been somewhat modified. "Though the language of the statute, 'by any other false pretence,' is exceedingly broad," says Jewett, J., in a later case, "and in its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think it should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artfully contrived story, which would naturally have an effect upon the mind of the person addressed, — one which would be equal to a false token or false writing, — an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard."[4]

His contributory negligence to be decided by the jury.

§ 1188. It is submitted, however, that whether the prosecutor "had the means of detection at hand," or whether "the pretences were of such a character as to impose upon him," are questions of fact, to be left to the jury, as

[1] Com. v. Hutchinson, 2 Penn. L. J. 242. See also State v. Estes, 46 Me. 150; Com. v. Spring, 5 Clarke (Penn.), 89; Com. v. Haughey, 3 Metc. (Ky.) 223; State v. De Hart, 6 Bax. 222.

[2] Burrow v. State, 7 Eng. (Ark.) 65.

[3] Com. v. Henry, 22 Penn. St. 256 — Woodward, J.

[4] People v. Crissie, 4 Denio, 529. See R. v. Roebuck, supra, § 1158; R. v. Mills, supra, § 1183; People v. Stetson, 4 Barb. 151; infra, § 1189; and People v. Sully, 5 Parker C. R. 142.

they must necessarily vary with the particular case. If fraudulent and false pretences were used, and goods obtained by them, the prosecutor's capacity and opportunities must be considered in determining his culpability.[1] It must also be remembered that the statute assumes some defect in caution, for if there were perfect caution no false pretences could take effect.[2] With this view accords a well considered English case, in which it was held that the offence was made out where the defendant fraudulently offered a £1 Irish bank note as a note for £5, and obtained change as for a £5 note, even though the person from whom the change was obtained could read, and the note itself upon the face of it clearly afforded the means of detecting the fraud.[3] And it must be remembered that the question of carelessness is to be determined from the prosecutor's stand-point. To obtain from a jeweller money, by exhibiting a spurious jewel, might not be within the statute, while it would be within the statute for the jeweller to offer the same spurious stone to an ignorant customer.[4]

termined by his lights.

[1] See supra, § 147; Savage *v.* Stevens, 126 Mass. 207.

[2] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271; R. *v.* Woolley, 1 Den. C. C. 559; T. & M. 280; Greenough, in re, 31 Vt. 279; People *v.* Haynes, 14 Wend. 546; Cowen *v.* People, 14 Ill. 348. Gross carelessness is to be determined by the capacity of the prosecutor. The weaker the mind, the less stringent the rule. Ibid.; R. *v.* Woolley, 1 Den. C. C. 559; Temp. & M. 280. Mr. Vaux's collection of "Recorder's Cases" gives an amusing illustration of this kind of false pretence, *i. e.* the "humbugging." A Colonel J. S. Jones seized the opportunity of the presence, in Philadelphia, of the President of the United States and the Governor of Pennsylvania, to announce a concert for the joint benefit of the "Dartmoor prisoners" (certain relics of the War of 1812, well known at that time in Philadelphia on all public celebrations), and of a volunteer company of which he was the head. Inflated with the belief of the immensity of the attraction, Jones proceeded to a man named Sutton, who kept an oyster cellar, and communicated to him the most extravagant statements of the crowds who were expected to attend, and of the great advantage to Sutton, if he could secure the situation of refreshment provider. This all might have passed without risk, but Jones went further, and informed Sutton that he, Jones, had already received seventy-five dollars for the refusal of the place. This suggestion was at once effectual, and Sutton paid down seventy-five dollars in cash. The result was that the concert was wretchedly attended, "only nineteen dollars and fifty cents were received at the door," and Colonel J. S. Jones was bound over for obtaining the money.

[3] R. *v.* Jessop, D. & B. 442; 7 Cox C. C. 399.

[4] See supra, § 1178.

§ 1189. Yet, on the other hand, carelessness so gross as to amount to a consent to fraud, estops the prosecutor from maintaining a prosecution.[1] Thus, in Massachusetts, in 1865, it was held that obtaining money from the prosecutor on the ground that on a former occasion he had not given due change, was not within the statute.[2] And in North Carolina, in 1877, a pretence that "certain cotton was good middling," was held not within the statute, in a case where the prosecutor had on hand the means of detection.[3]

Carelessness amounting to consent estops prosecutor.

§ 1190. If the defendant obtain the money by a false pretence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence, if the prosecutor waived none of his legal rights.[4] It is otherwise, of course, when the prosecutor is aware of the falsity of the pretences, and does not *bonâ fide* part with the possession of the goods. And carelessness or complicity amounting to consent, as we have just seen, estops the prosecutor.[5]

Trap set by prosecutor is no defence.

§ 1191. There may be cases where both parties employed false representations; but if so, while each can be convicted on an independent prosecution, neither can set up the other's guilt as a defence to an indictment against himself.[6]

That prosecutor made false representations is no bar.

[1] See Bonnell *v.* State, 64 Ind. 498. Supra, §§ 143–9.

[2] Com. *v.* Norton, 11 Allen, 266.

[3] State *v.* Young, 76 N. C. 258.

It was held in New York, on a demurrer, that an indictment for obtaining a watch from a person, upon the false representation that the defendant was a constable and had a warrant against such person, issued by a justice of the peace, for the crime of rape, and that he would settle the same if the person defrauded would give the defendant the watch, could not be sustained. The reasoning of the court seems to have been, that if the prosecutor was guilty of rape, he was in some degree "*particeps criminis*" with the prisoner, and hence could make out no case; and if he was not guilty, the pretences were not sufficiently reasonable to impose upon a prudent man of average intelligence. People *v.* Stetson, 4 Barb. 151, 152; S. P., McCord *v.* People, 46 N. Y. 470. See People *v.* Williams, 4 Hill (N. Y.), 9. But this is not law where the prosecutor is simply the victim of ignorant terror, and endeavors under its influence to buy off a supposititious prosecution. Com. *v.* Henry, 22 Penn. St. 253. Supra, § 1151; R. *v.* Asterley, 7 C. & P. 191.

[4] R. *v.* Ady, 7 C. & P. 140. See supra, §§ 149, 917, 1039.

[5] Supra, § 149.

[6] Com. *v.* Morrill, 8 Cush. 571; though see *contra*, McCord *v.* People, 46 N. Y. 470.

The same remark applies, as has been seen, to cases where a trap was laid to catch the defendant in case he should attempt the cheat.[1]

§ 1192. That gross credulity is no defence is illustrated by the prosecutions sustained against conjurors and fortune tellers. Nothing but gross credulity could be imposed on by such pretenders; yet it is on behalf of those thus imposed on that prosecutions have been sustained.[2]

Nor is prosecutor's gross credulity.

§ 1193. While a false affirmation may be within the statute, such is not the case with loose talk,[3] or the statement of vague conjectural opinion.[4] Thus, where a servant went into the prosecutor's store, and said he wanted some money for his master to buy some wheat, and the prosecutor gave him ten pounds, this was held not within the statute.[5] And so where the indictment alleged that the defendant falsely pretended that a sum of money, parcel of a certain larger sum, was "due and owing" to him for work which he had executed for the prosecutors, this was held not to be an allegation of a false pretence of an existing fact, as the allegation in the indictment might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law, and therefore the indictment was bad.[6] A loose statement, also, that a third person owed the defendant, without saying how much, has been held not to be an adequate pretence.[7]

But "brag" and loose talk are not within statute.

§ 1194. That the prosecutor was indebted to the defendant in an amount equal to the value of a chattel obtained by the false pretences is no defence.[8] But it is otherwise

Indebtedness of prosecutor

[1] Supra, § 1190.

[2] R. v. Giles, L. & C. 502; 10 Cox C. C. 44. See State v. Phifer, 65 N. C. 321; and supra, § 1140.

[3] Supra, § 1154; R. v. Hamilton, 9 Adol. & El. (N. S.) 271; Com. v. Henry, 22 Penn. St. 253; State v. Phifer, 65 N. C. 321; Johnson v. State, 41 Tex. 65.

[4] R. v. Williamson, 11 Cox C. C. 328. See State v. Tomlin, 5 Dutch. 14. See supra, §§ 1154, 1160, as to "puffs."

[5] R. v. Smith, 2 Russ. on Cr. 312; Com. v. Barker, 8 Phil. 613.

[6] R. v. Oates, 29 Eng. L. & Eq. 552; Dears. C. C. 459; and see also R. v. Wakeling, R. & R. 504, where the defendant, as an excuse for not working, said he had "no shoes," upon which a pair was given to him.

[7] State v. Magee, 11 Ind. 154.

[8] People v. Smith, 5 Parker C. R. 490. See supra, § 884.

to defendant no defence.

when money is paid in satisfaction of a debt actually due.[1]

11. *Property included by Statutes.*

Negotiable paper within statute.

§ 1195. Under the New York statute, making it indictable to obtain by false pretences "signatures to a written instrument," it is necessary, to constitute the offence, that the instrument should be of such a character as likely to work a prejudice to the signer, though the fact that it would have been void for fraud will be no defence.[2]

An indorsement of a negotiable promissory note is within the statute.[3]

It is not necessary that any actual loss should be sustained by the maker of the signature fraudulently obtained.[4]

Thing obtained must be of some value.

§ 1196. Value, however, is a necessary essential of the article, in order to bring it within the statute. Thus in Pennsylvania it was held that obtaining a receipt in discharge of a debt, by means of a worthless note of a broken bank, is not within the 21st section of the Act of 12th July, 1842, the reasoning of the court being apparently that the receipt was a thing of no account, not being an extinguishment of the debt.[5]

[1] Infra, § 1197.

[2] People *v.* Crissie, 4 Denio, 525; People *v.* Galloway, 17 Wend. 540.

[3] People *v.* Chapman, 4 Parker C. R. 56; State *v.* Thatcher, 35 N. J. L. 445; State *v.* Blauvelt, 38 N. J. L. 306; Ellars *v.* State, 25 Oh. St. 385. *Contra*, R. *v.* Danger, D. & B. 307. Infra, § 1838.

[4] State *v.* Pryor, 30 Ind. 350. Infra, § 1200.

[5] Moore *v.* Com. 8 Barr, 260.

G., secretary of a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer as follows:—

"Bolton United Burial Society, No. 23.

"Bolton, September 1st, 1853.

"Mr. A. Entwistle, Treasurer,—

Please pay the bearer £2 10*s.*, Greenhalgh, and charge the same to the above society.

"Robert Lord.

"Benjamin Beswick, President."

It was held that this was a valuable security under the 7 & 8 Geo. 4, c. 29, s. 53, as explained by the 5th section of the same statute. R. *v.* Greenhalgh, 25 Eng. L. & Eq. 570; Dears. C. C. 267; 6 Cox C. C. 257.

A railway ticket is a "chattel," and the obtaining it by false pretence from a servant of the company, so as to enable the holder to travel on the line, is an obtaining a chattel by false pretence, within the stat. 7 & 8 Geo. 4, c. 29, s. 53. R. *v.* Boulton, 2 C. & K. 917; S. C., 1 Den. C. C. 508. But see as to this point supra, § 878.

Value, however, is to be inferred from facts.[1] But no special value need be averred, unless required by statute.[2]

§ 1197. A false representation, as has been already incidentally noticed, which induces a party to pay an honest lawful debt is not within the statute.[3] And where an indictment charged that T., who held a promissory note against J., which was due, called for payment,

Money paid in satisfaction of debt not within statute.

[1] Com. *v.* Coe, 115 Mass. 481. See supra, § 955.

[2] Infra, § 1221.

[3] Com. *v.* McDuffy, 126 Mass. 467. In this case, Lord, J., said: "The only question in this case upon which we feel called upon to give an opinion is whether the instructions requested by the defendant, or either of them, should have been given. Those prayers for instructions were as follows: '1. If McDuffy only received, at the time of the settlement with Sweetser, money enough to pay what was actually due him, then this indictment cannot be maintained. 2. If McDuffy made representations only for the purpose of getting the money due him, and not for the purpose of obtaining money not due him, then this indictment cannot be maintained.' These instructions were not given in terms, but instead thereof the court 'did rule that if the defendant made the false representations for the purpose of obtaining money that he believed to be due to him, and believed that he had a right so to obtain the money, the indictment could not be sustained.' It is not easy to understand why, in view of the law as stated by the presiding justice, evidence of the exact amount of indebtedness to the defendant was excluded; for such evidence would be apparently competent upon the issue of the defendant's belief. Nor do we see how the question whether the defendant believed that he had a right so to obtain the money can of itself be a decisive test of his guilt or innocence. We understand the word right to signify legal right and not moral right, although its use might perhaps tend to mislead the jury, and lead them to suppose that, in order to acquit the defendant, he must have believed that he had a moral right to lie and deceive for the purpose of obtaining what was justly due him. We do not, however, decide the case upon any criticism of the particular form of language in which the instruction was given, nor upon any apparent inconsistency between the instructions given and the rules previously laid down as to the admissibility of evidence. We understand the broad and naked question to be presented, whether the offence of obtaining property by false pretences can be committed when the party charged obtains no more than is rightly due him by whatever fraudulent means or devices he thus obtains it. We are not aware that the precise question now presented has ever been considered by this court; and we have not been able to find any decision in any court of last resort that a party may be convicted of the crime of obtaining property by false pretences, when he has obtained nothing in value which he would not be entitled to as of right. Com. *v.* Drew, 19 Pick. 179; Com. *v.* Jeffries, 7 Allen, 568; Rex *v.* Williams, 7 C. & P. 354; People *v.* Thomas, 3 Hill, 169; Com. *v.* Henry, 22 Penn. St. 253; People *v.* Getchell, 6 Mich. 496; Com. *v.* Thompson, 3 Penn. Law Jour. 250; People

and with intent to defraud J. falsely represented the note to have been lost or burned up, whereby the latter was induced to pay it; it was held insufficient to sustain a conviction, as not showing any legal injury resulting to J.[1]

Credit on account will not sustain indictment.

§ 1198. It has been held that merely obtaining credit was not within the statute in its original shape.[2] Thus where, to induce his bankers to pay his checks, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, the statute was held not to cover the case, because he only obtained credit, and not any specific sum on the bill.[3] But when the money or goods ultimately pass on the credit so obtained, the statutory offence is consummated,[4] and even for the credit, the defendant may be convicted of an attempt.[5]

v. Genning, 11 Wend. 18; 2 Russ. on Cr. 312; 1 Bishop's Crim. Law, § 525; 2 Ib. § 442. We are, of course, not to be understood as deciding that a mere pretence of indebtedness, by the person from whom the property is obtained, is sufficient; nor is anything which we decide to be construed as in conflict with the well established rule of law, that a party is to be presumed to intend all the natural and ordinary consequences of his acts, and fraud and falsehood are always evidence tending to show that the party had a dishonest purpose; and the question for the jury to decide is, whether, upon all the facts and circumstances, the defendant had an intent to defraud and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations and succeeded by means of such representations. We think, therefore, that the defendant should have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that, if proved, the defendant was entitled to an acquittal, and for this reason the exceptions must be sustained." S. P., Com. *v.* Thompson, Lewis C. L. 197; Com. *v.* Henry, 22 Penn. St. 253; State *v.* Hurst, 11 W. Va. 54.

In R. *v.* Williams, 7 C. & P. 354, C. owed D. a debt, of which D. could not get payment. S., a servant of D., obtained from C.'s wife two sacks of malt, saying that D. had bought them of C. S. knew this to be false, but took the malt to D., his master, so that he could be paid the debt due him from C. It was ruled that if S. did not intend to defraud C., but merely to put it into his master's power to compel C. to pay him a just debt, S. ought not to be convicted of obtaining the malt by false pretences.

[1] People *v.* Thomas, 3 Hill (N. Y.), 169.

[2] R. *v.* Eagleton, Dears. C. C. 515; 6 Cox C. C. 559.

[3] R. *v.* Wavell, 1 Mood. C. C. 224. See R. *v.* Bryan, 2 F. & F. 567.

[4] R. *v.* Kenrick, 5 Q. B. 49; R. *v.* Abbott, 1 Den. C. C. 273. Supra, § 1180.

[5] Supra, §§ 173–199.

§ 1199. The statute includes the obtaining of a chattel not in existence when the pretence was made, if the pretence is continuous.[1] Thus where the defendant, by false pretences, induced the prosecutor to enter into a contract to build and deliver a van for a certain sum of money, and the prosecutor, on the faith of those pretences, built and delivered the van in pursuance of the original order, although there was a question as to countermanding the order after the building, and before the delivery, the offence was held to be made out. It was ruled that, to bring the case within the statute, it is not necessary that the chattel should be in existence when the false pretence is made, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; and that the question whether the pretence is or is not such a continuing one is one of fact for the jury, and that here there was evidence from which the jury might infer that it was such a continuing one.[2]

Goods not at the time in existence are within statute.

§ 1200. When the goods have been obtained, an intent to defraud need only be proved, and not an actual defrauding;[3] and hence it is not necessary to charge loss or damage to the prosecutor, the offence being complete when the goods are obtained by false pretences with intent to cheat and defraud.[4]

Actual injury to owner need not be proved.

§ 1201. We must in this relation recall the doctrine already laid down in respect to larceny, that the prosecution fails if it appear that the goods obtained, at the time of obtaining, belonged to the defendant, either jointly or severally.[5] This rule applies equally to prosecutions for false pretences, in all cases involving partnership accounts.[6]

Goods must not have belonged to the defendant personally, or as a member of a firm.

§ 1202. It has been already seen that the pretences need not be made, or the goods obtained, by the defendant personally, but that it is sufficient if he is represented in

Goods must have been ob-

[1] R. *v.* Martin, L. R. 1 C. C. 56; 10 Cox C. C. 383.

[2] Ibid.

[3] R. *v.* Bloomfield, C. & M. 537.

[4] People *v.* Herrick, 13 Wend. 87. See parallel rulings in forgery and larceny, supra, §§ 696, 714, 739, 887. But see, on the question of *lucri causa*, Com. *v.* Harley, 7 Met. 462.

[5] See supra, § 935.

[6] R. *v.* Evans, L. & C. 252; 9 Cox C. C. 238.

tained for defendant, and in accordance with his directions.

this respect by agents directed by himself.[1] At the same time, the defendant is not criminally responsible for acts of independent third parties in the subsequent use, without any privity with him, of instruments of fraud constructed by him.[2] And the goods must be obtained for himself.[3]

[1] See supra, § 1171.

[2] See supra, §§ 160–9, 1179.

[3] Thus in an English case, tried in 1853, the prisoner, who had a circular letter of credit for £210 from a bank at New York, authorizing him to draw for that sum on the Union Bank of London, in favor of certain named correspondents in foreign countries, went to St. Petersburg, and having fraudulently altered the figures in the letter of credit, so as to make it appear to be a letter of credit for £5,210, presented it so altered to W. & Co., St. Petersburg, one of the specified correspondents, and drew in their favor on the Union Bank a check for the sum of £1,200. This check was cashed for the prisoner by W. & Co., who sent it to London, and had it presented at the Union Bank; but the bank, discovering the fraud, refused to pay it. It was held that the prisoner was not indictable for an attempt to obtain £1,200 by false pretences from the Union Bank, since, if W. & Co. had obtained payment, it would not have been in pursuance of the prisoner's wish or desire; and they would have obtained the money for their own and not for the prisoner's use or benefit, and therefore there would have been no obtaining of any money by him. Lord Campbell, C. J., said: "I am of opinion that this conviction cannot be sustained. The question is, whether, supposing the Union Bank had honored the check, the prisoner could have been indicted under this act of parliament for obtaining money by false pretences. I am clearly of opinion that he could not. I do not proceed on the ground of the offence having been committed beyond the jurisdiction of the criminal courts of this country; for a person abroad may, by the employment as well of a conscious as an unconscious agent, render himself amenable to the law of England, when he comes within the jurisdiction of our courts. But I am clearly of opinion that this would not have been an obtaining money by false pretences within the meaning of the statute. I think the act means that the money should be obtained according to the wish, or to gain some object, of the party who makes the false pretence. Here the obtaining it was not to gain any object of the prisoner; no advantage could arise to him from the check being honored. (But see on this point Com. *v.* Harley, 7 Met. 462. Supra, § 1171.) He had gained his full object when he was in St. Petersburg. It was a matter of perfect indifference to him whether Wilson & Co. did or did not obtain payment from the Union Bank. It would have been much more for his benefit had the check been lost at sea on its passage from St. Petersburg to London. As has been observed by my brother Coleridge, the object of the statute was, that in cases where there were nice distinctions between larceny and fraud, the party should not go unpunished; and it was with a view to the case of larceny that this enactment has been adopted by the legislature. Now, with regard to larceny, we must always see that, in

§ 1203. While it is immaterial whether the property was obtained by an absolute or a conditional sale,[1] yet the statute does not apply where only the *use* of a chattel passes, as in cases of bailment or hiring,[2] or where possession only passes, not property.[3] And if only *possession* passes and not *property*, and the property is afterwards feloniously appropriated, then the party taking may be guilty of larceny, in which case the cheat ordinarily merges in the felony.[4]

Property must pass, and not mere use of chattel.

§ 1204. Unless the statute otherwise provide, property not larcenous may not be covered by the statute, and hence the words "money," "goods," "property," have been held not to include "dogs"[5] or "land."[6]

Property not larcenous not within statute.

12. *Where the Offence is triable.*

§ 1205. Cheats by false pretences being often, from their very nature, spread over several jurisdictions, it may become important to determine before what court the offence is to be tried. In answering this question, the following points will be of use: —

§ 1206. Where a false pretence is uttered in A., and the money obtained in B., the venue is to be laid, according to the better view, in B.[7] This, in England, is finally settled

Venue, in cases of conflict, to

the act alleged to constitute the offence, the person committing had some advantage, not necessarily a pecuniary advantage, but the gratification of some wish, otherwise it would not be larceny. We are pressed by the finding of the jury, that the prisoner meant Wilson & Co. to present the check. That merely amounts to this, that the prisoner foresaw and anticipated that the check would be presented for payment at the Union Bank; not that he wished it. In one sense, indeed, he may be said to have meant it; for a man is said to intend what is the natural consequence of what he does; but that is a subtlety of law that cannot be drawn in to show that it was the real wish of the prisoner that the check should be presented. To allow it to have that effect here would be confounding two different classes of offences. There has been a gross fraud, but no obtaining of money by false pretences." R. *v.* Garrett, 22 Eng. Law & Eq. 607; 6 Cox C. C. 260; Dears. C. C. 232. Supra, § 279; infra, § 1207. See also People *v.* Parish, 4 Denio, 153.

[1] Com. *v.* Lincoln, 11 Allen, 233.

[2] R. *v.* Kilham, L. R. 1 C. C. 261. See R. *v.* Crossley, 2 M. & Rob. 17; Cline *v.* State, 43 Tex. 494.

[3] State *v.* Anderson, 47 Iowa, 142.

[4] Supra, § 964. As to merger see R. *v.* Martin, London Law Times, Dec. 13, 1879, p. 109. Infra, § 1344.

[5] R. *v.* Robinson, 8 Cox C. C. 115; Bell C. C. 34.

[6] State *v.* Burrows, 11 Ired. 477.

[7] See supra, § 288. In Stewart *v.* Jessup, 51 Ind. 413, it was held that the place where the goods were obtained alone had jurisdiction. In

be laid in place where goods are obtained.

by statute, which, however, is in this respect only affirmatory of the common law.[1] In several instances it has been held that the forum that first takes cognizance of the offence, whether it be the forum of the uttering of the pretence, or that of the forwarding of the goods, attaches to itself jurisdiction.[2]

§ 1207. When the pretences were uttered in one place, and the goods obtained by an agent in another place, the principal

Norris *v.* State, 25 Oh. St. 217, it was held that the place where goods were delivered to a carrier had jurisdiction.

The English rulings are as follows:

C., the defendant, in a begging letter, which contained false pretences, and was addressed to P., who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the defendant's address in Kent. It was ruled that the venue was rightly laid in Middlesex, as C., by directing the money order to be sent by post, constituted the postmaster in Middlesex agent to receive it there for him. R. *v.* Jones, 1 Den. C. C. 551; 4 New Sess. Cas. 353.

In a later case C., the defendant, wrote and posted in Y. a letter containing a false pretence to P., who re-received it in Y. P. in Y. posted to C. in X. a letter containing the money obtained by the false pretence, and which the prisoner received in X. It was held, that under 7 Geo. 4, c. 64, s. 12, which authorizes the trial in any jurisdiction where the offence is begun or completed, the prisoner might be tried for the offence of obtaining the money by false pretence at the Y. quarter sessions; part of the offence being the making the false pretence, and the false pretence being made to P. in Y., where the letter containing the false pretence was delivered to him by the post-office authorities, whom C. made his agents for that purpose. R. *v.* Leech, Dears. C. C. 642; 7 Cox C. C. 100. And it has been generally held, that one who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county of obtaining. R. *v.* Stanbury, 9 Cox C. C. 94; L. & C. 128. Compare R. *v.* Cooke, 1 F. & F. 64.

[1] Supra, § 288; Pearson *v.* McGowran, 5 D. & R. 616; 3 B. & C. 700.

[2] Supra, § 263. See this ruled as to the forum in which the pretences were uttered in Skiff *v.* People, 2 Parker C. R. 139; R. *v.* Cooke, 1 F. & F. 64; R. *v.* Leech, 36 Eng. L. & Eq. 539; Dears. C. C. 642; 7 Cox C. C. 100; and as to the forum in which the money was obtained in R. *v.* Jones, 1 Den. C. C. 551; 4 Cox C. C. 198, where the county in which money was mailed to the defendant, living in another county, was said to have jurisdiction. In R. *v.* Garrett, 22 Eng. L. & Eq. 607; 6 Cox C. C. 260; Dears. C. C. 232; People *v.* Adams, 3 Denio, 190; 1 Comst. 173; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1, it was held that the place of the receipt of the property has jurisdiction, although the pretence on which the money was obtained was uttered in another State. Supra, § 288.

may be tried in the latter place.[1] Hence, as we have just seen, a non-resident principal, who in a foreign land utters a false pretence, is responsible in the land in which such false pretence is used to obtain goods by an agent under the principal's directions, though such principal was not personally present in the latter land until after the goods were obtained.[2]

Principal indictable in place of agent's act.

§ 1208. Unless made so by statute, the common law doctrine of asportation has no application to cheats by false pretences.[3]

Doctrine of asportation does not apply.

13. *Indictment.*[4]

§ 1209. All the parties concerned in the offence may be joined as co-defendants.[5] And, as has already been seen, evidence under a joint indictment that one of them, with the concurrence and approval of the other, made the

Several defendants may be joined.

[1] Supra, § 279.

[2] Supra, §§ 248, 279; and also People *v.* Adams, and R. *v.* Garrett, supra, § 1203; R. *v.* Jones, 1 Den. C. C. 551; 4 Cox C. C. 198.

[3] R. *v.* Stanbury, L. & C. 128; 9 Cox C. C. 94.

[4] For form, see Wh. Prec., as follows: —

(528.) General frame of indictment.
(529.) Form used in Massachusetts.
(530.) Same in New York.
(531.) Pretence that defendant was agent of a lottery, &c.
(532.) Obtaining money by personating another.
(533.) Pretence that defendant was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, whereby he induced the prosecutor to buy a bottle of ointment, &c., for which he received a sovereign, giving 15*s.* in change.
(534.) Against a member of a benefit club or society, for obtaining money belonging to the rest of the members under false pretences.
(535.) Another form for same, coupled with a production to the society of a false certificate of burial.
(536.) First count. Pretence that a broken bank note was good.
(537.) Pretence that a flash note was good.
(538.) Pretence that a worthless check or order was good.
(539.) Another form for same.
(540.) Obtaining goods by check on a bank where the defendant had no effects.
(541.) Pretence that defendant was the agent of A. B., and as such had been sent by A. B. to C. D., to receive certain money due from the latter to the former.
(542.) Pretending to be clerk of a steamboat, and authorized to collect money for the boat.
(543.) Pretence made to a tradesman that defendant was a servant to a customer, and was sent for the particular goods obtained.
(544.) Another form for same.
(545.) Pretence that the defendant

[5] 1 Gabbett Crim. Law, 214, 215.

false pretences charged, warrants the conviction of both.[1] Parties who have concurred and assisted in the fraud may be convicted

was entitled to grant a lease of certain freehold property.

(546.) Pretence that the defendant was authorized agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandise.

(547.) Pretence that prisoner was an unmarried man, and that having been engaged to the prosecutrix, and the engagement broken off, he was entitled to support an action of breach of promise against her, by which means he obtained money from her.

(548.) Pretence that defendants were the agents of P. N., who was the owner of certain stock and land, &c., the latter of which was in fact mortgaged.

(549.) That defendant possessed a capital of eight thousand dollars, which had come to him through his wife, it being her estate, and that a part of it had already come into his possession, and a part would come into his possession in the month then next ensuing, &c.

(550.) Second count. That defendant had a capital of $8,000, which came through his wife.

(551.) Third count. That defendant had a capital of $8,000.

(552.) Pretence that defendant was well off and free from debt, &c.

(553.) Second count. Setting forth the pretence more fully.

(554.) Pretence that certain property of the defendant was unincumbered, and that he himself was free from debts and liabilities.

(555.) Pretence that defendant had then purchased certain property, which it was necessary he should immediately pay for.

(556.) Pretence that a certain draft for $7,700, drawn by a house in Charleston on a house in Boston, which the defendant exhibited to the prosecutor, had been protested for non-payment; that the defendant had had his pocket cut, and his pocket-book, containing $195, stolen from it; that a draft drawn by a person in Philadelphia, which the defendant showed the prosecutor, had been received by the defendant in exchange for the protested draft, and that the defendant expected to receive the money on the last mentioned draft.

(557.) Pretence that a certain watch sold by defendant to prosecutor was gold.

(558.) Obtaining money by means of a false warranty of the weight of goods.

(559.) Obtaining money by a false warranty of goods.

(560.) Falsely pretending that goods were of a particular quality.

(561.) Pretence that a certain horse to be sold, &c., was sound, and was the horse called "Charley."

(562.) Pretence that a horse and phæton were the property of a lady then shortly before deceased, and that the horse was kind, &c.

(563.) Second count. Like the first, except that the offering for sale was alleged to have been by T. K., the elder, only.

(564.) Other pretence as to the value and history of a horse, which the prisoners sold to the prosecutor.

(565.) Pretence that one J. P., of the

[1] Supra, § 1171; Com. v. Harley, 7 Met. 462.

as principals, though not present at the time of making the pretence and obtaining the money or goods.[1]

§ 1210. An indictment averring that the defendant did "falsely and *feloniously* pretend," &c., is at common law bad.[2] In those States, however, as in New York, where the offence is a felony, the averment is of course essential. "Designedly" should always be inserted.[3] The word "pretend" is indispensable, though the word "falsely," according to the English practice,[4] is not essential, the truth of the pretences being subsequently negatived. It is much safer, however, to insert it, and its omission has been held in this country fatal.[5]

Technical averments necessary.

city of Washington, wanted to buy some brandy, &c.; that said J. P. kept a large hotel at Washington, &c.; that defendant was sent by said J. P. to purchase brandy as aforesaid, and that defendant would pay cash therefor, if the prosecutor would sell him the same. First count.

(566.) Second count. That defendant was requested by one J. P., who kept a large hotel in Washington city, to purchase some brandy for said J. P., and that if prosecutor would sell defendant two half pipes of brandy, defendant would pay prosecutor cash for the same shortly after delivery.

(567.) Third count. That defendant had been requested by one J. P. to purchase for him some brandy; that he (the said J. P.) kept a large hotel in Baltimore, &c.

(568.) Pretence that one of the defendants having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he received a sum of money to redeem them; with counts for conspiracy.

(569.) For pretending to an attesting justice and a recruiting sergeant that defendant was not an apprentice, and thereby obtaining money to enlist.

(570.) For obtaining more than the sum due for carriage of a parcel by producing a false ticket.

(571.) Pretence that defendant had no note protested for non-payment; that he was solvent, and worth from nine to ten thousand dollars.

(572.) Obtaining acceptances on drafts, by pretence that certain goods had been purchased by defendant and were about to be shipped to prosecutor.

(573.) Obtaining acceptances by the pretence that defendants had certain goods in storage subject to prosecutor's order.

(574.) Receiving goods obtained by false pretences, under the English statute.

[1] R. *v.* Moland, 2 Mood. C. C. 276. See supra, § 223.

[2] R. *v.* Walker, 6 C. & P. 657.

[3] State *v.* Baggerly, 21 Tex. 757. In Wharton's Precedents, 239, 1st ed., "designedly" was accidentally omitted. It is important that it should be in all cases supplied.

"Knowingly" is essential in Texas. Maranda *v.* State, 44 Tex. 442. See generally infra, § 1224.

[4] R. *v.* Airey, 2 East, 30.

[5] Hamilton *v.* State, 16 Fla. 288.

Party injured must be described as in larceny.

§ 1211. The party injured must be described with the same accuracy as has been shown to be requisite in larceny.[1] Any variance in his name is at common law fatal. What are variances are elsewhere considered.[2]

Pretence to agent is pretence to principal.

§ 1212. Pretences alleged to have been made to a firm are proved by showing that they were made to one of the firm;[3] and a pretence made use of to an agent, who communicates it to his principal, and who is influenced by it to act, is a pretence made to the principal.[4] A pretence made to A. in B.'s hearing, by which money is obtained from B., may be laid as a pretence made to B.[5] Money paid by or to an agent is rightfully laid as money paid by or to a principal.[6] And so where money is paid to the wife for the husband.[7]

Pretences must be averred specially.

§ 1213. The pretences must be specially averred,[8] though their omission is now in England cured by verdict. But at common law they must be accurately and adequately set forth, so that it may clearly appear that there was a false pretence of an existing fact.[9]

[1] See supra, § 977.

[2] Whart. Crim. Ev. § 91.

[3] Stoughton *v.* State, 2 Oh. St. 562.

[4] Supra, § 1171; Whart. Crim. Ev. § 102; R. *v.* Lara, 1 Leach C. C. 647; 6 T. R. 565; Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley, 7 Met. 462. See also R. *v.* Keeley, 2 Den. C. C. 68; R. *v.* Tully, 9 C. & P. 227; R. *v.* Dewey, 11 Cox C. C. 115; Com. *v.* Bagley, 7 Pick. 279; Com. *v.* Mooar, Thach. C. C. 410; Stoughton *v.* State, 2 Oh. St. 562; Britt *v.* State, 9 Humph. 31; Whart. Crim. Ev. §§ 91 *et seq.*

[5] R. *v.* Dent, 1 C. & K. 249.

The money of a benefit society, whose rules were not enrolled, was kept in a box, of which E., one of the stewards, and two others, had keys; the defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, five pounds; it was held that in an indictment the pretence might be laid as made to E., and the money as the property of "E. and others," obtained from E. R. *v.* Dent, 1 C. & K. 249.

[6] Whart. Crim. Ev. §§ 94–102.

[7] R. *v.* Moseley, Leigh & C. 92. See R. *v.* Carter, 7 C. & P. 134; Sandy *v.* State, 60 Ala. 58. Infra, § 1227.

[8] R. *v.* Mason, 2 T. R. 581; R. *v.* Henshaw, L. & C. 444; R. *v.* Goldsmith, 12 Cox C. C. 479; L. R. 2 C. C. 74; State *v.* Jackson, 39 Conn. 229.

[9] Ibid.; R. *v.* Henshaw, L. & C. 144; 9 Cox C. C. 472; Bonnell *v.* State, 64 Ind. 498.

The pretences were held inadequately stated in an indictment in which the first count charged that C. unlawfully did falsely pretend to P. that he, C., was sent by W. for an order to go to T. for a pair of shoes, by means of which false pretence he

§ 1214. If the pretences explain themselves, and require no innuendoes,[1] it is enough to state them in the terms in which they were expressed to the prosecutor at the time of the fraud.[2] But verbal exactness is not re-

Substantial variance is fatal.

did obtain from T. a pair of shoes, of the goods and chattels of T., with intent to defraud P. of the price of the said shoes, to wit, nine shillings, of the moneys of P. The second count charged that he falsely pretended to P. that W. had said that P. was to give him, the defendant, an order to go to T. for a pair of shoes, by means of which false pretence he did obtain from T., in the name of P., a pair of shoes of the goods of T., with intent to defraud T. of the same. R. *v.* Tully, 9 C. & P. 227 — Gurney; though compare R. *v.* Brown, 2 Cox C. C. 348 — per Patteson.

An indictment was also held defective in a case where it was charged that C. falsely pretended to P., whose mare and gelding had strayed, that he, C., would tell him where they were, if he would give him a sovereign down. P. gave the sovereign, but the prisoner *refused* to tell. It was said that the indictment should have stated that he pretended he knew where they were. R. *v.* Douglas, 1 M. C. C. 462.

In a case already cited on the merits, the indictment charged that C., contriving and intending to cheat P., on a day named, did falsely pretend to him that he, C., then was a captain in her Majesty's fifth regiment of dragoons; by means of which false pretence he did obtain of P. a valuable security, to wit, an order for the payment of £500, of the value of £500, the property of P., with intent to cheat P. of the same; whereas in truth he (C., the defendant) was not, at the time of making such false pretence, a captain in her Majesty's regiment; and the defendant, at the time of making such false pretence, well knew that he was not a captain. This was held sufficient after conviction and judgment. It was held not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security; nor how the particular pretence was calculated to effect, or had effected, the obtaining; and it was further held that the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain at the time of his making such pretence, which was the fact denied; and it was unnecessary to aver expressly that the security was unsatisfied, at any rate since 7 Geo. 4, c. 64, s. 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. Hamilton *v.* R. (in error) 9 A. & E. (N. S.) 271; 10 Jur. 1028; 16 L. J. M. C. 9; 2 Cox C. C. 11.

D. was one of many persons employed whose wages were paid weekly at a pay-table. On one occasion, when D.'s wages were due, C. said to a little boy, "I will give you a penny if you will go and get D.'s money." The boy innocently went to the pay-table,

[1] See infra, §§ 1220, 1303.

[2] 2 East P. C. c. 18, s. 13, pp. 837, 838. See Com. *v.* Hulbert, 12 Met. 446; Glackan *v.* Com. 3 Metc. (Ky.), 232; State *v.* Webb, 26 Iowa, 262. Infra, § 1219. If they are not self-explaining, their meaning must be supplied. Infra, § 1220.

quired, as it is enough if the effect be substantially given;[1] nor need all that was said be stated if the operative pretence is averred.[2] But a variance between the indictment and the evidence, as to the effect of the pretences, will be fatal;[3] though it is not necessary to set out, as in forgery, the tenor of a bad note by which property is obtained.[4] But if set out, a variance may be fatal.[5]

In bargains relation of pretence to bargain must be averred.

§ 1215. The relation of the fraud to the bargain, in cases of sale, must appear.[6] Thus it was held insufficient, in an indictment for the sale of a spurious watch as genuine, aver merely that S., the defendant, falsely pretended to to the prosecutor "that a certain watch which he, the said S., then and there had, was a gold watch, by means whereof said S. then and there unlawfully, &c., did obtain from said B. (the prosecutor) sundry bank bills, &c., of the value, &c., with intent the said B. then and there to cheat and defraud of the same; whereas in truth and fact said watch was not then and there a gold watch, and said S. then and there well knew that the same was not a gold watch, to the damage," &c.[7] "The indictment," said Dewey, J., "does not allege any bargain nor any colloquies as to a bargain for a watch; nor any propositions of

and said to the treasurer, "I am come for D.'s money;" and D.'s wages were given to him. He took the money to C., who was waiting outside, and who gave the boy the promised penny: it was ruled that C. could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, C., had authority from D. to receive his money, or of obtaining it from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretences to the boy; though he might be convicted on a count charging him with fraudulently obtaining it from the treasurer by falsely pretending to the treasurer that the boy had this authority. R. v. Butcher, Bell C. C. 6; 8 Cox C. C. 77.

[1] R. v. Scott, cited in R. v. Parker, 2 Mood. C. C. 1; 8 C. & P. 825; State v. Call, 48 N. H. 126. Infra, § 1219.

[2] R. v. Hewgill, Dears. C. C. 351; Cowen v. People, 14 Ill. 348.

[3] R. v. Plestow, 1 Camp. 494; R. v. Bulmer, L. & C. 476; 9 Cox C. C. 492; State v. Locke, 35 Ind. 419.

[4] Infra, § 1217.

[5] Infra, § 1233.

[6] R. v. Reed, 7 C. & P. 848; R. v. Martin, L. R. 1 C. C. 56; State v. Philbrick, 31 Me. 401; Com. v. Jeffries, 7 Allen, 549; Enders v. People, 20 Mich. 233; State v. Orvis, 13 Ind. 569; State v. Anderson, 47 Iowa, 142.

[7] Com. v. Strain, 10 Met. 521; S. P., Com. v. Lannan, 1 Allen, 590.

B. to buy, or of the defendant to sell, a watch; nor any delivery of the watch, as to which the false pretences were made, in the possession of B., as a consideration for the money paid the defendant. It seems to us that when money or property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment, and that the false pretence should be alleged to have been with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."[1]

In fine, when the case is one of sale or exchange, the indictment should set forth the sale or exchange, and aver that the false pretences were made with a view to effect such sale or exchange, and that by reason thereof the party was induced to part with his property.[2] In New York the law is less stringent;[3] and where an indictment for obtaining property under false pretences charged that the prisoner, with an intent to defraud one A. G., Jr., did "falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen, of the goods and chattels of the said A. G., Jr., that," &c., "by which said false pretences he," the prisoner, "then did unlawfully obtain from the said A. G., Jr.," the oxen mentioned; it was held that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pretences made, and the latter's belief therein, and that the indictment was not defective in that particular.[4]

[1] Com. v. Strain, supra. See Com. v. Nason, 9 Gray, 125; Com. v. Jeffries, 7 Allen, 549. As to bad pleading of false agency see R. v. Henshaw, L. & C. 444.

[2] R. v. Reed, 7 C. & P. 848; State v. Philbrick, 31 Me. 401; Enders v. People, 20 Mich. 233.

[3] Skiff v. People, 2 Parker C. R. 139. See R. v. Martin, L. R. 1 C. C. 56.

[4] Clark v. People, 2 Lansing, 330. See, to same effect, State v. Vanderbilt, 3 Dutch. 328. Infra, § 1227.

An indictment alleged that G. designedly and unlawfully did pretend to N. that A. wanted to buy cheese of N., and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill on the Globe Bank, in the city of New York, was a good bill, and of the value of ten dollars; by means of which false pretences said G. unlawfully obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver coins amounting to and of the value of six dollars, with intent to

§ 1216. The amount of property stated by the defendant to belong to him must be proved as laid. Thus where the averment was that the defendant represented a firm, of which he was a member, to be then owing not more than three hundred dollars, and evidence was given of a representation by him that the firm did not then owe

Defendant's allegation of property must be proved as laid.

cheat and defraud; whereas the said A. did not want to buy cheese of said N., and had not sent G. to him for that purpose, and the paper was not a good bill of the Globe Bank, in the city of New York, and was not of the value of ten dollars, but spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences set forth were such as might have been effectual in accomplishing a fraud on N., in the manner alleged; that neither the omission to allege that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment bad; and that there was no objection to the indictment on the ground of duplicity. Com. *v.* Hulbert, 12 Met. 446.

In Com. *v.* Coe, 115 Mass. 481, elsewhere noticed, we have the following from Wells, J.: "The indictment alleges that the defendant falsely pretended that a certain certificate of shares of corporate stock was good and genuine and of value as security for a loan of money which Ferris was induced to make to him thereon. The pretended certificate is set forth, and purports to be a certificate that the said John Ferris is the owner of the shares of stock which it represents.

"1. One objection raised by the motion to quash is that the indictment does not show how Coe could pledge such stock, or use it to secure a loan from Ferris, or in any way defraud Ferris by means of it; Ferris being already the apparent owner. The transaction represented by the indictment, if genuine, would be simply that the borrower prepares his security by causing the shares of stock, whether owned by himself or procured from others for the purpose is immaterial, to be transferred to the name of the proposed lender, and a certificate issued accordingly. Upon procuring the loan, the delivery of the certificate completes the security. The certificate, although previously made in the name of the lender, does not become his in fact until the loan has been perfected and the certificate delivered to him in pursuance of its purpose. If the certificate is forged, or false and fraudulent in its preparation, it is manifest that he is defrauded when induced to take it as genuine and advance money in reliance upon it. The offer of the certificate for such a purpose is a representation that it is what it purports to be upon its face. Cabot Bank *v.* Morton, 4 Gray, 156; Commonwealth *v.* Stone, 4 Met. 43. The indictment sufficiently sets forth in what manner Ferris was defrauded by means of the certificate.

"2. The certificate is an instrument complete in itself, and requires no further allegations to fully set forth the right or contract of which it is a symbol, as was necessary in Commonwealth *v.* Ray, 3 Gray, 441, and Commonwealth *v.* Hinds, 101 Mass. 209. And besides, this offence consists in the use of false tokens, and not the forgery of a written instrument.

"3. It is unnecessary that the indictment should set forth in its terms,

more than four hundred dollars; this was held to be a fatal variance.[1]

or by description, the check received for the loan. It is presumed to have been given and received as payment of the sum of money agreed to be lent. Its designation as a 'check and order for the payment of money' sufficiently indicates its character; and as a description of the property obtained by the false pretences, would be good. Commonwealth *v.* Brettun, 100 Mass. 206. But there is also in the indictment an allegation that the defendant did obtain the sum of seven thousand dollars, of the property of said Ferris.

"4. It is indeed alleged that the defendant procured, and Ferris was induced to part with, the money as a loan only. But it is also alleged that he thereby did obtain it with intent to cheat and defraud. If so obtained, it is none the less a fraud because obtained in the form of a loan. Commonwealth *v.* Lincoln, 11 Allen, 233.

"5. Such representations relate only to the validity and value of the security, and not to the means or ability of the party to pay; and are therefore not within the exception requiring a writing. Gen. Sts. c. 161, § 54.

"6. The allegation that the certificate 'was of the tenor following,' must be referred to the time when the false representation was made, of which it constitutes the main part. The copy correctly sets forth its tenor.

"As to the objections taken at the trial:—

"1. The indorsements upon the certificate form no part of it. They are not required to be set out, either as a part of the means of deceit, or as a description of the false token used. Their appearance upon the certificate when produced does not therefore occasion a variance.

"2. It is only necessary that the indictment set out the false representations upon which the property was obtained. That a genuine note was given is a matter of evidence, bearing upon the question whether the money was in fact obtained by means of the false certificate. The note forms no part of the offence charged, either by way of description or otherwise; and no allegation in regard to it is necessary. The offence is the same, with or without the presence of that fact. No variance comes from its appearance in the evidence.

"3. The allegation of the indictment that the certificate was not a good, valid, and genuine writing and certificate of ownership of stock, but was false, forged, and counterfeit, and of no value, is sustained by the evidence. Even if it might have been of some value as a means of securing to the holder the one share for which it was originally issued as a genuine and valid certificate, proof of such value does not constitute a variance. It is not a descriptive allegation.

"4. Evidence of the possession and use of other altered and false certificates by the defendant, about the same time, whether before or afterwards, was competent to show that his possession of those, for the use of which he was indicted, was not casual and accidental. They were all between the dates of the transactions charged in the two counts. They were admitted and allowed to be used only to show guilty knowledge. For this purpose the evidence was admissi-

[1] Com. *v.* Davidson, 1 Cush. 33. See Todd *v.* State, 31 Ind. 514.

A pretence that the prisoner "had in Macon seven thousand dollars" is not sustained by proof of a pretence "that he had seven dollars less than seven thousand in a bank in Macon."[1]

Spurious or bad note or coin need not be set out at large.

§ 1217. In an indictment setting forth that a bad and spurious note or coin had been passed by the prisoner on the prosecutor, it is not necessary to set forth the note at large or specifically to describe the coin.[2] "When the setting out the instrument in the indictment," said Wilde, C. J., "cannot afford the court information, it is unnecessary that it should be set out. Here it is alleged that a certain piece of paper was unlawfully and falsely represented by the prisoner to be a good and valid promissory note, whereas it was not so. It appears to me that all the cases show that where the instrument has been required to be set out in the indictment,

ble; and the instructions sufficiently guarded its use. Com. *v.* Stone, 4 Met. 43, 47; Com. *v.* Price, 10 Gray, 472; Com. *v.* Edgerly, 10 Allen, 184.

"5. The fact that the certificate was offered and received as security for the loan furnishes some evidence upon which it was competent for the jury to find that Ferris was thereby induced to part with his money. It is not necessary that there should have been any explicit declaration or express words to that effect, at the time of the negotiation. It was for the jury to determine how far the testimony of Ferris, that he 'had every confidence in' the defendant, in reply to the question if he did not rather trust Coe than any security, was a denial of reliance upon the security.

"6. The instruction upon this last point would be objectionable if it bore the significance which the defendant ascribes to it. The presiding judge suggested the query, whether, if Ferris had known it to be a forged and worthless piece of paper, he would have made the loan as he did; and then proceeded to say, 'If he would not, and was in fact induced to make the loan by the delivery of the certificate, and his belief in its genuineness and value,' and the jury find the other facts constituting the offence, it would be sufficient; adding also, 'And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality.'"

An indictment alleging that the prisoners falsely pretended to A. that some soot which they then delivered to A. weighed one ton and seventeen cwt., whereas it did not weigh one ton seventeen cwt., but only weighed one ton and thirteen cwt., they well knowing the pretence to be false, by means of which false pretence they obtained from A. 8*s.*, with intent to defraud, is good, and sufficiently describes an indictable false pretence. R. *v.* Lee, L. & C. 418; 9 Cox C. C. 460. See supra, § 1159.

[1] Langtry *v.* State, 30 Ala. 537.

[2] Supra, §§ 1129, 1162; infra, § 1222; R. *v.* Coulson, 1 Den. C. C. 592; 4 Cox C. C. 227; T. & M. 332; State *v.* Boon, 4 Jones (N. C.), 463; State *v.* Dyer, 41 Tex. 520.

something has turned on the construction of the paper."[1] But the purport or generic designation must be accurately stated.[2] Thus if an indictment for attempting to obtain money under false pretences charges the attempt to have been by means of a paper writing purporting to be an order for money, and the instrument cannot be considered as stated in the indictment to be such an order, it is bad.[3]

When pretences are divisible, only part need be proved.

§ 1218. It is not necessary to prove the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough.[4] And the principle derives support from the practice in the analogous cases of perjury and blasphemy.[5]

Verbal accuracy not required.

§ 1219. As has been already seen, if the effect of the pretences be rightly laid, a variance as to expression is immaterial.[6]

Innuendoes and definitions proper when explanation is required.

§ 1220. When the false pretences consist in words used by the respondent, it has been said to be sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning.[7] But this must be taken with some qualification, since, as in perjury and libel, it is proper and necessary that language other-

[1] R. *v.* Coulson, *ut supra.*

Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory note, through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential. Clark *v.* People, 2 Lansing, 330.

[2] Com. *v.* Stone, 4 Met. 43; Com. *v.* Coe, *ut supra.*

[3] R. *v.* Cartwright, R. & R. 106. See fully Wh. Cr. Pl. & Pr. §§ 184 *et seq.*

[4] R. *v.* Hill, R. & R. 190; R. *v.* Ady, 7 C. & P. 140; R. *v.* Hewgill, Dears. 315; 24 Eng. L. & Eq. 556; R. *v.* English, 12 Cox C. C. 171; State *v.* Mills, 17 Me. 211; State *v.* Dunlap, 24 Me. 77; Com. *v.* Morrill, 8 Cush. 571; People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Wend. 565; Skiff *v.* People, 2 Parker C. R. 139; Com. *v.* Daniel, 2 Pars. 333; Britt *v.* State, 9 Humph. 31; Cowen *v.* People, 14 Ill. 348; State *v.* Vorbeck, 66 Mo. 168. Supra, § 1168; Whart. Crim. Ev. § 131.

[5] Lord Raym. 886; 2 Camp. 138–9; Cro. C. C. 7th ed. 662; State *v.* Hascall, 6 N. H. 352; Com. *v.* Kneeland, 20 Pick. 206. Infra, § 1316.

[6] Supra, § 1214; State *v.* Vanderbilt, 3 Dutch. 328.

[7] State *v.* Call, 48 N. H. 126. See Skiff *v.* People, 2 Parker C. R. 139.

In a case already cited to another point, the indictment stated that, by the rules of a benefit society, every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account

wise unintelligible should be explained for the instruction of the court. Otherwise a court in error or arrest of judgment could not say that the pretences constituted an indictable offence.

§ 1221. The description of property obtained is required to be the same as in larceny.[1]

Description of property to be as in larceny.

Unless required by statute the indictment need not allege that the property was of any particular value.[2] When, however, the punishment depends upon value, some value should be alleged,[3] a variance as to such value being immaterial.[4] If a signature to negotiable paper be obtained, it must be stated as such.[5]

An indictment need not state all the property which the defendant obtained by the false pretences set forth.[6]

§ 1222. The property obtained must be identified so as to protect the defendant in case of a second prosecution.[7]

Property obtained must be individuated.

Thus where an indictment for obtaining the signature of a person to a deed of land did not allege that the grantor in the deed owned or claimed any title to the land conveyed thereby, and a description of the land was in the most general terms, as certain land in the State of Texas and United States of America, and the date of the deed was nowhere averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the grantor, and there was no averment that the deed could not be more particularly described, it was held, that in these particulars the indictment was defective.[8]

of his wife's death and burial, and that he *further* falsely pretended that he was entitled to five pounds from the society by virtue of their rule, in consequence of the death of his wife; by means of which 'last false pretence' he obtained money; this was held good. R. *v.* Dent, 1 C. & K. 249.

[1] See supra, § 977; and see State *v.* Kube, 20 Wis. 217.

[2] People *v.* Stetson, 4 Barb. 151–2; State *v.* Gillespie, 80 N. C. 396; Wh. Cr. Pl. & Pr. § 215. See also Com. *v.* Lincoln, 11 Allen, 233.

[3] Supra, §§ 882, 951 *et seq.*; Wh. Cr. Pl. & Pr. 215; State *v.* Ladd, 32 N. H. 110.

[4] Supra, §§ 951 *et seq.*

[5] State *v.* Blauvelt, 38 N. J. 396. Supra, § 1195.

"Check for the payment of money" is a sufficient description. Com. *v.* Coe, 115 Mass. 481. But see Bonnell *v.* State, 64 Ind. 498.

[6] Com. *v.* Davidson, 1 Cush. 33; People *v.* Parish, 4 Denio, 153. See Skiff *v.* People, 2 Parker C. R. 139.

[7] Baker *v.* State, 31 Oh. St. 314.

[8] Dord *v.* People, 9 Barb. 671.

§ 1223. It is necessary to state whose the property was at the time.[1] "Of the moneys of B." is a sufficient allegation of ownership.[2] Owner must be stated.

§ 1224. It is necessary for the pleader to negative specifically the false pretences relied on to sustain the indictment;[3] but if the proof be adequate as to the offence, though only coming up to a portion of the pretence averred in the indictment, a conviction is good.[4] In fact, as is well said by Lord Ellenborough, "to state merely the whole of the false pretence is to state a matter generally combined of some truth as well as falsehood."[5] Where, however, there are several distinct pretences, it is better to negative each pretence specifically in the indictment; since if only one of the pretences thus negatived, is well laid, and is proved on trial to have been the moving cause of the transfer of property from the prosecutor to the defendant, the rest may be disregarded.[6] Pretences must be negatived.

§ 1225. The defendant's knowledge of the falsity of the pretences is material,[7] and hence must be averred, *Scienter* must be averred.

[1] R. *v.* Martin, 3 N. & P. 472; 8 Ad. & El. 481; R. *v.* Norton, 8 C. & P. 196; Sill *v.* R., Dears. C. C. 132; 1 El. & Bl. 553; now unnecessary by 24 & 25 Vict. c. 96; R. *v.* Parker, 3 Q. B. 292. See State *v.* Lathrop, 15 Vt. 279; Halley *v.* State, 43 Ind. 509; State *v.* Levi, 41 Tex. 563.

Under 8 & 9 Vict. c. 109, s. 17, an indictment charging that the prisoner, by fraud in playing at cards, did win from A. a sum of money with intent to cheat A., need not necessarily allege that the money won was the property of A. R. *v.* Moss, Dears. & B. C. C. 104. But an indictment for a conspiracy to obtain goods by false pretences, not stating whose property the goods were which it was the object of the conspiracy to obtain, is bad in arrest of judgment. R. *v.* Parker, 2 G. & D. 709; 3 Q. B. 292.

[2] R. *v.* Godfrey, Dears. & B. 426; 7 Cox C. C. 392.

[3] R. *v.* Perrott, 2 M. & S. 379; Tyler *v.* State, 2 Humph. 37; Amos *v.* State, 10 Humph. 117; State *v.* Webb, 26 Iowa, 262. The negation must be specific. Keller *v.* State, 51 Ind. 111; State *v.* Bradley, 68 Mo. 140.

[4] Supra, §§ 1218; R. *v.* Hill, R. & R. 190; Com. *v.* Morrill, 8 Cush. 571; People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Wend. 565; State *v.* Smith, 8 Blackf. 489.

[5] R. *v.* Perrott, *ut supra.*

[6] See Whart. Crim. Ev. §§ 131–3. Supra, § 1218.

[7] Supra, §§ 1185, 1210. State *v.* Blauvelt, 38 N. J. L. 306.

Thus an indictment for obtaining money under false pretences must allege that the defendant knew the falsehood: "falsely and fraudulently" is not enough. R. *v.* Henderson, 2 M. C. C. 192; Car. & M. 328. But where the indictment alleged that the defendant "did unlawfully falsely pretend," &c., it was held that the omis-

unless the pretences stated are of such a nature as to exclude the possible hypothesis of the defendant's ignorance of their falsity.[1]

Intent to defraud must in some way appear.

§ 1226. An intent to defraud must be averred and proved;[2] but it is not necessary, in England, to state, to use the language of Lord Denman, C. J.,[3] "that the false pretence was made with the intention of obtaining the thing, if it be proved that in fact the party charged did intend to obtain the thing, made the false pretence, and did thereby obtain it. I am by no means sure that it is necessary

sion of the word "knowingly" was no ground for arresting the judgment. R. *v.* Bowen, 4 New Sess. Cas. 62; 13 Q. B. 790; 3 Cox C. C. 483.

[1] R. *v.* Philpotts, 1 C. & K. 112; R. *v.* Keighley, Dears. & B. 145; 7 Cox C. C. 217; Com. *v.* Speer, 2 Virg. Cases, 65; State *v.* Bradley, 68 Mo. 140; though see Com. *v.* Blumenthal, cited Wharton's Prec. 242; and Com. *v.* Hulbert, 12 Met. 446. See, as to general pleading of *scienter*, Wh. Cr. Pl. & Pr. § 164.

[2] Supra, § 1184; People *v.* Getchell, 6 Mich. 496; Scott *v.* People, 62 Barb. 62.

The intent to defraud is not sufficiently set forth in a statement that A. did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, £22 10*s.*, with intent to cheat and defraud the company. R. *v.* Marsh, 1 Den. C. C. 505; T. & M. 192; 3 New Sess. Cas. 699.

[3] R. *v.* Hamilton, 2 Cox C. C. 11; 9 Ad. & El. (N. S.) 276; cited fully supra, § 1213. That the omission of the allegation of intent is not fatal after verdict, under statute, see State *v.* Bacon, 7 Vt. 219; Jim *v.* State, 8 Humph. 603. That it is no variance that the proof goes only to a part of the money, to which the intent to defraud relates, see R. *v.* Leonard, 3 Cox C. C. 284; 1 Den. C. C. 304.

Under the English statutes the following rulings have been made, which are applicable to the corresponding statutes in this country.

Under 7 Geo. 4, c. 64, s. 21, an indictment for obtaining goods by means of false pretences, with intent to defraud a specified person, was bad, unless it stated whose property the goods were, and the defect was not aided after verdict. R. *v.* Martin, 3 N. & P. 472; 8 A. & E. 481; S. P., R. *v.* Norton, 8 C. & P. 196.

By 14 & 15 Vict. c. 100, s. 8, it shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person. By sec. 25, every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn. It was ruled that sec. 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within sec. 25. Sill *v.* R. Dears. C. C. 132; 1 El. & Bl. 553. 24 & 25 Vict. c. 96, s. 88, renders an allegation of ownership unnecessary.

even to prove that the representation was made with the particular intent."

An intent to defraud a firm necessarily includes an intent to defraud each of its members, and hence it is enough, when a firm is defrauded, to aver an intent to defraud a member of the firm.[1]

An averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid, and with intent to cheat and defraud the said B. of the same goods," is a sufficient averment that the goods were designedly obtained.[2] But there must be a specific averment of intent to defraud the prosecutor.[3]

Obtaining "by means" of pretence must be averred.

§ 1227. The property must be distinctly averred to have been obtained by means of the pretence. But the process of reasoning by which the conclusion was reached is usually matter of argument, not of pleading.[4] At the same time, there must always be something sufficient to show that the party defrauded was induced to part with his property by relying upon the truth of the alleged false statements.[5] And it is not, as a general rule, as has been seen,[6]

[1] Stoughton *v.* State, 2 Ohio St. 562. See supra, §§ 743, 1212.

[2] Com. *v.* Hooper, 104 Mass. 549.

[3] Com. *v.* Dean, 110 Mass. 64.

In this case it was said by Morton, J.: "The indictment does not charge any offence with the precision requisite in criminal pleadings. There is no sufficient allegation that the defendant obtained the signature of Sears to the note with an intent to defraud. The intent to defraud is an essential element of the crime intended to be charged, and must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely. Com. *v.* Lannan, 1 Allen, 590.

"The concluding clause that 'so the jurors aforesaid, upon their oaths aforesaid, do say and present that said Dean' 'in the manner aforesaid, designedly, by a false pretence and with intent to defraud, obtained the signature of said Sears,' is a statement of a legal conclusion from the facts previously charged. The conclusion does not follow from the premises. The only allegation of an intent to defraud is made argumentatively, and as a legal inference from facts stated, and that inference is unsound. Com. *v.* Whitney, 5 Gray, 85; R. *v.* Rushworth, R. & R. 317."

[4] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 271; Com. *v.* Hulbert, 12 Met. 446; Com. *v.* Coe, 115 Mass. 481; State *v.* Hurst, 13 W. Va. 54. See supra, § 1215.

It is said in Missouri that the phrase, "by color of said false pretence," is bad. State *v.* Chunn, 19 Mo. 233. See R. *v.* Airey, 2 East, 30.

[5] State *v.* Philbrick, 31 Me. 401;

[6] Supra, §§ 1215, 1216.

enough to aver false statements as to the value of property sold, and then to aver the obtaining of money. A *sale* of the property should be averred, as the chain connecting the other averments.[1]

A delivery of the property must be averred, as the result of the false pretences, in all cases in which the prosecution rests upon such delivery.[2]

Obtaining from A.'s wife, on A.'s directions, supports an averment of obtaining from A.[3] And so obtaining by an agent supports an averment of obtaining by the principal.[4]

Varying counts may be joined.

§ 1228. Counts varying the pretences, and counts varying the parties defrauded, may be joined.[5]

14. *Attempts.*

§ 1229. The general law as to attempts is elsewhere fully discussed.[6] So far as concerns the particular offence now under consideration, one or two special points are to be noticed.

Com. *v.* Strain, 10 Met. 521; Norris *v.* State, 25 Oh. St. 219; State *v.* Saunders, 63 Mo. 482. See Com. *v.* Parmenter, 121 Mass. 354; Epperson *v.* State, 42 Tex. 79; State *v.* Green, 7 Wis. 676; State *v.* Orvis, 13 Ind. 569.

[1] Supra, § 1215.

In an indictment against A., for obtaining goods from B. by false pretences, an averment that B. "was induced, by reason of the false pretences so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A." certain property, "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by false pretences he did pay and deliver, and is not defective for not repeating the words "then and there" before the words "to pay and deliver," or before the words "did pay and deliver." Com. *v.* Hooper, 104 Mass. 549.

The allegation of "a sale on credit," is supported by proof of a sale for a note payable in four months. Com. *v.* Davidson, 1 Cush. 33. Supra, § 1180.

The indictment need not charge that any false token or counterfeit letter was used, even where false token or writing is alternately used in the statute. Skiff *v.* People, 2 Parker C. R. 139. Supra, § 1179.

[2] State *v.* Philbrick, 31 Me. 401; Com. *v.* Strain, 10 Met. 521; Com. *v.* Lannan, 1 Allen, 590; Com. *v.* Goddard, 4 Allen, 312. See also Com. *v.* Jeffries, 7 Allen, 549; Com. *v.* Lincoln, 11 Allen, 233. Supra, § 1180.

It is not a fatal error that the obtaining of the signature to a promissory note, and the obtaining the money on the same, are stated to be on two distinct days. Com. *v.* Frey, 50 Penn. St. 245.

[3] R. *v.* Moseley, L. & C. 92.

[4] Supra, § 1212.

[5] Oliver *v.* State, 37 Ala. 134. Whart. Cr. Pl. & Pr. § 285.

[6] See supra, §§ 173 *et seq.*

By statute in England and in several of the United States, there may be a conviction of an attempt under indictment for the substantive offence, though at common law this is not permissible. Hence we have a number of reported cases where there was a conviction of the attempt under the ordinary indictment for obtaining goods by false pretences.[1]

By statute conviction may be had of attempt under indictment for complete offence.

§ 1230. In attempts, the question of prudence or imprudence of the prosecutor does not arise; and a conviction may be had where there was a fruitless attempt to obtain goods by a false pretence.[2]

Conviction may be had irrespective of prosecutor's prudence.

§ 1231. The same distinction applies where only credit on account is shown to have been secured. It has been already seen[3] that an indictment for the consummated offence cannot be sustained when only a credit on account was obtained. But under these circumstances, as is elsewhere more fully noticed, the defendant may be convicted of an attempt.[4]

Attempt may be sustained where only credit is obtained.

§ 1232. It is for the jury to determine whether the attempt was really made. Thus where C., being employed at a hospital, wrote to the prosecutor, as manager, for a small quantity of linen, not saying it was for the hospital, and the goods were really ordered for himself, but not sent; on an indictment for an attempt to obtain them, the question left to the jury was, whether he ordered the goods as for and on behalf of the hospital or in his own name, there being no evidence of an intention to pay cash, but evidence of the absence of such intention.[5]

Question of attempt is for jury.

§ 1233. In an indictment for an attempt to obtain by a false written instrument, a variance as to the instrument is fatal. Thus it has been ruled that where the indictment charges the instrument to be a money order, and the proof does not sustain this, a conviction is errone-

General character of instrument must be designated.

[1] R. v. Roebuck, Dears. & B. 24; 7 Cox C. C. 126; R. v. Ball, C. & M. 249; R. v. Hensler, 11 Cox C. C. 570; R. v. Francis, L. R. 2 C. C. 128; 12 Cox C. C. 612.

[2] R. v. Roebuck, supra; R. v. Ball, supra. Supra, § 199.

[3] Supra, § 1198.

[4] R. v. Eagleton, Dears. C. C. 515; 6 Cox C. C. 559. Supra, § 1159.

[5] R. v. Franklin, 4 F. & F. 94.

ous.[1] But the instrument need not, if correctly designated, be set out.[2]

Means of attempt must be averred.

§ 1234. Nor is it sufficient baldly to aver an "attempt," without in some way stating the means. Thus, an indictment was held bad which stated that A. did unlawfully attempt and endeavor to obtain from B. a large sum of money (stating it), with intent to cheat and defraud B.[3]

15. *Receiving Goods obtained by False Pretences.*

Receiving goods so obtained is indictable.

§ 1235. At common law, persons receiving goods knowing them to have been fraudulently obtained by false pretences will be indictable as accessaries after the fact, if the obtaining is a statutory felony; or, if cognizant of the original design, as principals, where the obtaining is a statutory misdemeanor. By statutes in England and elsewhere, however, such receiving is made a substantive offence. To sustain a conviction, in any view, it is necessary to prove that the defendant knew that the goods were obtained by false pretences.[4]

[1] R. *v.* Cartwright, R. & R. 106. Supra, §§ 190 *et seq.*, 1217.

[2] R. *v.* Coulson, T. & M. 332; 1 Den. C. C. 592. Supra, § 1217.

[3] R. *v.* Marsh, 1 Den. C. C. 505; T. & M. 192. Supra, §§ 190 *et seq.*

[4] R. *v.* Rymes, 3 C. & K. 327.

CHAPTER XIX.

FRAUDULENT INSOLVENCY.

I. Fraudulent Conveyances.
Under statute Eliz. making fraudulent conveyances is indictable, § 1238.
II. Secreting Goods.
Secreting goods made indictable by recent statutes, § 1239.
Secreting or assigning must be actual, § 1240.
Intent or *scienter* must be shown, § 1241.

I. FRAUDULENT CONVEYANCES.

§ 1238. By the statute 13 Eliz., which makes void all conveyances, &c., with intent to defraud *creditors*, it is provided that the parties to any "such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions," &c., "which at any time shall wittingly and willingly put in use, avow, maintain, justify, or defend the same or any part of them as true, simple, and done, had, or made *bonâ fide*, and upon good considerations; or shall aliene or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid," besides the civil penalty, "being lawfully convicted thereof, shall suffer imprisonment for one half year without bail or mainprise." By statute 27 Eliz. the same provision is extended to those concerned in similar devices to defraud *purchasers*.[1] Similar statutes have been adopted in several States of the American Union.

Under statute Eliz. making fraudulent conveyance is indictable.

In a leading case reported under the statute of 13 Eliz.,[2] it was held in arrest of judgment, by Maule, J., delivering the

[1] See 2 Russ. on Crimes, 315; Roberts's Digest Brit. Stat. 294; 1 Chitty's Stat. 385.

[2] R. *v.* Smith, 6 Cox C. C. 31. As to the English statute on fraudulent bankruptcy may be consulted Steph. Dig. C. L. art. 388; Brett, ex parte, L. R. 1 Ch. D. 151.

opinion of his brethren, that an indictment lies under the act for a fraudulent alienation of real estate.[1]

II. SECRETING GOODS.

§ 1239. By statutes in force in many States, the secreting of goods with intent to defraud creditors is an indictable offence. To constitute this offence it is necessary that there should be, —

Secreting goods is made indictable by statute.

1st. An actual fraudulent secreting, assigning, or conveying of goods, &c., or a fraudulent reception of the same.

2d. An intent to prevent such property from being made liable for the payment of debts, or, in case of reception, a guilty knowledge of such intent.[2]

§ 1240. 1st. *There must be an actual secreting or assigning of the goods.* It is not enough that the debtor, to his creditor's face, refuses to surrender property which the creditor claims. Thus it was held that a refusal of a defendant to deliver up a watch to the sheriff's deputy was not within the statutes.[3] The object of the law is not to make a man indictable who *resists* process, since for this another procedure exists, but to prevent the secret and covinous disposal of property in such a way as to elude the pursuit of the law and baffle an execution. A pointed illustration of this is the case of a trader, who, after obtaining credit by stocking his store with goods, either hides such goods until such time as he may be able, without suspicion or disturbance, to convert their proceeds to his own use, or consigns them to auction under such covers as may enable him to turn them into cash without his creditors' knowledge. It would seem, from analogy to the statutes of Elizabeth, that the offence would continue to be indictable, even if a consideration were received, if the intent to defraud were proved.

Secreting or assigning must be actual.

§ 1241. 2d. *An intent must be shown to prevent the property from being made liable for the payment of debts; or, in case of receivers, a guilty knowledge of such intent.*[4] It is not enough that the debtor's object was to give a preference to a particular creditor.[5]

Intent or scienter must be shown.

[1] See, for form of indictment, Wh. Prec. 518.

[2] See State *v.* Marsh, 36 N. H. 196; Com. *v.* Damon, 105 Mass. 580.

[3] People *v.* Morrison, 13 Wend. 399. See People *v.* Underwood, infra.

[4] See Com. *v.* Brown, 15 Gray, 189; Com. *v.* Strangford, 112 Mass. 289.

[5] Com. *v.* Hickey, 2 Parsons, 317.

All creditors are protected by the act, and as "creditors," it seems, may be classed even those whose debts are not yet due.[1] It is unnecessary that the prosecutors should be judgment creditors.[2]

[1] Johnes *v.* Potter, 5 S. & R. 519.

[2] People *v.* Underwood, 16 Wend. 546, citing Wiggins *v.* Armstrong, 2 John. Ch. 144.

Thus, in New York, Bronson, J., said: —

"The language of the act plainly extends to all creditors, and I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignment, or conveyance of property by a debtor, which the legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must first be a judgment before the crime can be committed, the statute will be of very little public importance. This is not like the case of a creditor seeking a *civil remedy* against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposition of his property; he must have a certain claim upon the goods before he can inquire into any alleged fraud on the part of the debtor. But this is a public prosecution, in which the creditor has no special interest. The legislature has relieved the honest debtor from imprisonment, and subjected the fraudulent one to punishment, as for a criminal offence. The crime consists in assigning or otherwise disposing of his property, with intent to defraud a creditor, or to prevent it from being made liable for the payment of his debts. The public offence is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy." Ibid. See generally Wharton's Precedents, as follows: —

(507.) Secreting, &c., with intent to defraud, &c.

(508.) Second count. Same, with intent to defraud, and prevent such property from being made liable for payment of debts.

(509.) Third count. Same. Not specifying property.

(510.) Fourth count. Averring intent to defraud persons unknown.

(511.) Fifth count. Same, not specifying goods, with intent to defraud persons unknown.

(512.) Sixth count. Same, with intent to prevent property from being levied on.

(513.) Another form on the same statute. First count. Intent to defraud, to prevent property from being made liable, &c.

(514.) Second count. Same, with intent to defraud another person.

(515.) Third count. Secreting, assigning, &c., with intent to defraud two, &c.

(516.) Fourth count. Secreting, &c., averring creditors to be judgment creditors.

(517.) Fifth count. Same, in another shape.

(518.) Fraudulent conveyance under statute Eliz. c. 5, § 3.

(519.) General form.

(520.) Averring collusion with another person.

(521.) Same, but averring collusion with another person.

The fact of indebtedness of some kind, however, on the part of the defendant, must be distinctly averred.[1]

(522.) Same, specifying another assignee.

(523.) Fraudulent insolvency by a tax collector. First count. Embezzling creditor's property.

(524.) Second count. Applying to his own use trust money, &c.

(525.) Pledging goods consigned, and applying the proceeds to defendant's use, under the Pennsylvania statute.

(526.) Second count. Selling same, and applying to defendant's use the proceeds.

(527.) Third count. Selling same for negotiable instrument.

[1] State *v.* Robinson, 9 Foster, 274.

BOOK III.

OFFENCES AGAINST SOCIETY.

CHAPTER XX.

PERJURY.

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§ 1244. PERJURY is the wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. Every person is a witness within this section who actually gives his evidence upon oath or in any form as aforesaid.[1] Perjury is at common law a misdemeanor.[2] And false swearing, when not technically perjury, may nevertheless be at common law indictable as an independent misdemeanor, when the oath is taken to affect a juridical right.[3]

Definition.

I. WILFUL.

§ 1245. The offence consists in swearing falsely and corruptly, without probable cause of belief; not in swearing rashly or inconsiderately, according to belief.[4] The false oath, if taken from inadvertence or mistake, cannot amount to voluntary and corrupt perjury.[5] Therefore,

Offence must be wilful.

[1] This definition is substantially that given by the English Commissioners in their draft report made in 1879, and to sustain it may be cited: 1 Hawk. c. 69, s. 1; 3 Inst. 164; Bac. Ab. tit. "Perjury;" Burn's Justice, tit. "Perjury;" Step. Dig. C. L. art. 135; 2 Russ. on Cr. 5th Am. ed. 596; State *v.* Tappan, 1 Foster, 56; Pickering's case, 8 Grat. 628; State *v.* Brown, 79 N. C. 642; State *v.* Dodd, 3 Murph. 226; State *v.* Ammon, 3 Murph. 123; Martin *v.* Miller, 4 Mo. 47; Pankey *v.* People, 1 Scam. 80; De Bernie *v.* State, 19 Ala. 23; Jackson *v.* State, 1 Carter (Ind.), 184; McGregor *v.* State, Ibid. 232; People *v.* Collier, 1 Mich. 137; Nelson *v.* State, 32 Ark. 193.

[2] 3 Inst. 163–5; R. *v.* Johnson, 2 Show. 1; Steph. C. L. note vii.

[3] R. *v.* Chapman, 1 Den. C. C. 432; T. & M. 90; R. *v.* Hodgkins, L. R. 1 C. C. 312. See R. *v.* O'Brian, 2 Stra. 1143; R. *v.* De Beauvoir, 7 C. & P. 17; and cases cited infra, §§ 1271, 1274.

[4] See infra, § 1246; U. S. *v.* Passmore, 4 Dall. 372.

[5] 1 Hawk. c. 69, s. 2; 2 Russ. on

where perjury is assigned on an answer in equity, or on an affidavit, &c., the part on which the perjury is assigned may be shown to be inadvertent by another part, or even by a subsequent answer.[1]

That the oath is wilful and corrupt must not only be charged in the indictment, but be supported on trial.[2] An oath is wilful when taken with deliberation, and not through surprise or confusion, or a *bonâ fide* mistake as to the facts, in which latter cases perjury does not lie.[3]

II. FALSE AND CORRUPT.

§ 1246. It is perjury where one swears wilfully and corruptly to a matter which he, according to his own lights, has no probable cause for believing,[4] since a man is guilty of perjury if he knowingly and wilfully swears to a particular fact, without knowing at the time that the assertion is true,[5] supposing that his purpose is corrupt. Hence it is held a good assignment of perjury that the defendant swore that he "thought" or "believed" a certain fact, whereas in truth and fact he "thought" or "believed" the contrary, and had no probable grounds for what he swore.[6] Nor is it

"Falsely" is knowingly affirming without probable cause.

Cr. 6th Am. ed. 597. See remarks on this point in Steinman *v.* M'Williams, 6 Barr, 170.

[1] 1 Sid. 419; Com. Dig. Jus. of Peace (B.), 102.

[2] Infra, § 1286; U. S. *v.* Moore, 2 Low. 232; Resp. *v.* Newell, 3 Yeates, 407; Thomas *v.* Com. 2 Rob. (Va.) 795; Com. *v.* Cook, 1 Rob. (Va.) 729; State *v.* Garland, 3 Dev. 114; Green *v.* State, 41 Ala. 419; Miller *v.* State, 15 Fla. 577.

[3] U. S. *v.* Shellmire, 1 Bald. 370; Com. *v.* Brady, 5 Gray, 78; Case *v.* People, N. Y. Ct. Ap. 1879, reported infra, § 1257; Com. *v.* Cornish, 6 Binn. 249; Com. *v.* Cook, 1 Rob. (Va.) 729. See R. *v.* Muscot, 10 Mod. 192; R. *v.* Moreau, 11 Q. B. 1028; Steinman *v.* 'Williams, 6 Barr, 178.

Ibid.

[5] R. *v.* Edwards, 3 Russ. on Cr. 1; Com. *v.* Halstat, 2 Bost. Law. Rep. 177; State *v.* Gates, 17 N. H. 373.

[6] Per Lord Mansfield, in R. *v.* Petrie, 1 Leach, 327; R. *v.* Schlesinger, 10 Q. B. 670; State *v.* Knox, Phil. (N. C.) L. 312; though see 2 Russ. on Cr. 6th Am. ed. 597; 1 Sid. 419; U. S. *v.* Shellmire, Bald. 370; U. S. *v.* Atkins, 1 Sprague, 558; 19 Law Rep. 95, questioned by Lowell, J., in U. S. *v.* Moore, 2 Low. 232.

In Lambert *v.* People, 6 Abb. New Cas. 181, an affidavit, appended to a statement by a life insurance company, stated that deponents were the officers of the company, "and on the 31st of December last all the above described assets were the absolute property of the company, free and clear from any liens or claims, except as above stated; that the foregoing statement, with the schedules

a defence that the fact to be inferred is true, if the defendant swears corruptly to false circumstances as a basis for inference.[1] As, for instance, if a man swear that J. N. revoked his will in his presence, though he really had revoked it, it is perjury if it were unknown to the witness that he had done so.[2] And it is perjury for a person knowingly and corruptly to swear that he is ignorant of a particular fact of which he is cognizant.[3]

Probable cause is to be estimated from defendant's stand-point.

§ 1247. It has just been seen that falsity consists in knowingly affirming a condition without probable cause.[4] But what is probable cause? Here we must again accept a position so often vindicated in these pages, that probable cause must be estimated, not from the jury's stand-point, nor from the judge's, but from the defendant's. On the one hand, the fact sworn to may have been true, but if the defendant swore to it wilfully and corruptly, not knowing it to be true, or not having probable cause, according to his

and explanations hereunto annexed and by them subscribed, are a full and correct exhibit of all liabilities, ... on the said 31st day of December last, with the year ending on that day, according to the best of their knowledge, information, and belief respectively." It was held by a majority of the court, that all the statements contained in the affidavit were on information and belief, as well those preceding the semicolon as those after it. Perjury, it was said, "can only be imputed upon full knowledge of the falsity, and cannot be predicated where wilfulness, corruption, and malice are not manifest. A possible misconception, or a mistake in swearing to the construction of a written instrument, is not enough to warrant a conviction of perjury. R. *v.* Crespigny, 1 Esp. 280; U. S. *v.* Conner, 3 McLean, 573; U. S. *v.* Stanley, 6 Ib. 409; 3 Whart. §§ 2199, 2200; Steinman *v.* M'Williams, 6 Penn. St. 170, 178. There is no fair inference that the accused intended to swear unqualifiedly as to the portion preceding the semicolon, and otherwise as to the remainder." See abstract in 19 Alb. L. J. 200; and see infra, §§ 1247, 1283.

[1] 1 Hawk. c. 69, s. 6; 3 Inst. 166; Palmer, 294. Infra, § 1302. In an action on a contract before a justice of the peace, the making of the contract was in issue. A witness testified that he went to a field with the parties to the contract, no other persons than the parties and himself being present, and that he heard the contract agreed to by the parties. In point of fact he did not go to the field, was not present when the contract was made, and had no knowledge of the making. The contract was made, nevertheless; but it was held that the prisoner, having wilfully sworn to a thing he did not know to be true, although it was true, was guilty of perjury. People *v.* McKinney, 3 Parker C. R. 510.

[2] Hetley, 97.

[3] Wilson *v.* Nations, 5 Yerg. 211. See U. S. *v.* Atkins, 1 Sprague, 558.

[4] See Com. *v.* Cook, 1 Rob. (Va.) 729; Jesse *v.* State, 20 Ga. 156.

own lights, for believing it to be true, he is guilty, as stated in the last section, of perjury. On the other hand, if he swears honestly to a fact or belief, with probable cause, according to his own lights, for the truth of his belief, he is not guilty of perjury, though his oath was really untrue.[1]

Admissible to prove a mistake of fact induced by erroneous representations of others.

§ 1248. Hence it is admissible to prove reception of such information by the defendant as gave him probable ground for his oath. A witness stating evidence truly to the writer of an affidavit, and swearing to it when drawn up, is not guilty of perjury if the statements are written erroneously by the amanuensis.[2] Upon an indictment against the defendant for a misdemeanor in falsely swearing that he *bonâ fide* had such an estate in law or equity of the annual value of £300 above reprises, as qualified him to be a member of parliament for a borough, a surveyor stated that the fair annual value of the property was about £200 a year, but another witness stated that it was badly let, and that he believed it was worth more than £300 a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification in point of value was not sufficient. It was held that the jury must be satisfied beyond all doubt that the property was not of the value of £300 a year, and that at the time the defendant made the statement he knew that it was not of that value.[3]

And so when advised by counsel.

§ 1249. An honest oath taken under advice of counsel, therefore, is not perjury.[4] Thus a bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury; the fraudulent intent being wanting.[5]

General evil intent may constitute corruption.

§ 1250. It has been already seen that when there is a general intent to do mischief, and a specific overt act follows in causal connection with such general intent, then the general intent applies to the specific act, so as to com-

[1] R. *v.* De Beauvoir, 7 C. & P. 17; R. *v.* Moreau, 11 Q. B. 1028; Com. *v.* Brady, 5 Gray, 78; Smith *v.* Myers, 41 Md. 425; Flemister *v.* State, 48 Ga. 170.

[2] Jesse *v.* State, 20 Ga. 156.

[3] R. *v.* De Beauvoir, 7 C. & P. 17 — Lord Denman, C. J.

[4] U. S. *v.* Stanley, 6 McLean, 409; State *v.* McKinney, 42 Iowa, 205.

[5] U. S. *v.* Conner, 3 McLean, 573. See U. S. *v.* Dickey, 1 Morris, 412.

plete the offence.[1] Hence it is perjury if a witness, from general recklessness and a depraved determination to hurt, fall the consequences where they may, swears knowingly to a falsehood. Even a drunkard, swearing falsely, may be convicted of perjury, if his intent in rendering his testimony was evil.[2] But if there be no evil intent, general or special, perjury fails. Thus it is not perjury to swear honestly to testimony which the witness believes to be true, though a little diligence would have enabled him to have discovered its falsity. If, however, he dishonestly refuses to make inquiry, and purposely shuts himself in to impressions which he has good reason to believe further investigations would dispel, then it is perjury. The *corruptness*, when proved, completes the offence; the absence of corruptness negatives it.[3]

III. OATH.

§ 1251. While the oath must be solemnly administered, and by an officer duly authorized,[4] it is immaterial in what form it is given, if the party, at the time, professes such form to be binding on his conscience.[5] When a witness comes to be sworn, it is to be assumed that he has settled with himself in what way he will be sworn, and he should make it known to the court; and should he be sworn with uplifted hands, or by any other unusual mode, though not conscientiously opposed to swearing on the gospel, and depose falsely, he subjects himself to a prosecution for perjury.[6] "The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience."[7]

Form of oath is immaterial if legal.

[1] See supra, §§ 101 *et seq.*

[2] People *v.* Willey, 2 Parker C. R. 19.

[3] U. S. *v.* Shellmire, Bald. 370; U. S. *v.* Atkins, 1 Sprague, 558; Com. *v.* Brady, 5 Gray, 78; Cothran *v.* State, 39 Missis. 541.

[4] Van Dusen *v.* People, 78 Ill. 645; Biggerstaff *v.* Com. 11 Bush, 169.

[5] See Whart. Crim. Ev. §§ 353 *et seq.*

[6] Com. *v.* Knight, 12 Mass. 274; Campbell *v.* People, 8 Wend. 636; State *v.* Wisenhurst, 2 Hawks, 458; Thomas *v.* Com. 2 Rob. 795; Com. *v.* Cook, 1 Rob. 729; State *v.* Caffey, N. C. Term R. 272; S. C., 2 Murph. 320; State *v.* Witherow, 3 Murph. 153. As to oath see Wh. Cr. Ev. § 353. As to oaths administered by commissioners from other States see Com. *v.* Smith, 11 Allen, 243. Infra, § 1287.

[7] Steph. Dig. C. L. art. 135, citing Ides *v.* Hoare, 2 B. & B. 232.

"Corporal oath" and "solemn oath" are equivalent, and either is sustained by proof of swearing with uplifted hands. Jackson *v.* State, 1

§ 1252. Where a party offers himself to prove his books, and wilfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers.[1] And a party is generally liable for perjury in his own case.[2]

No matter if oath was on *voir dire*.

IV. PARTY TO BE CHARGED

§ 1253. The crime being distinct, several persons cannot be joined. One only can be made defendant. Even supposing two persons to swear jointly to the same false affidavit, it is impossible to suppose that they did so at the same moment of time, so as to make the offence exactly joint.[3]

Two defendants cannot be joined.

§ 1254. If an incompetent witness is permitted to testify, and testifies falsely, it is perjury.[4] This holds even where a party himself is a witness.[5]

Perjury though witness is incompetent.

§ 1255. Nor is it requisite that the defendant should have been served with a subpœna, or have been compellable to testify. The mere fact of his testifying is enough.[6]

And though he be a volunteer.

V. IN A COMPETENT COURT.

§ 1256. Breach of vows, when attended by injury to others or to society, by the canon law is subjected to specific ecclesiastical penalties. "Quicunque sciens pejereravCarter (Ind.). 184. When a statute directs a form of swearing, it must be substantially followed. Maher *v.* State, 3 Minn. 444; State *v.* Davis, 69 N. C. 383; Ashburn *v.* State, 15 Ga. 246. But mere verbal deviations are immaterial. Com. *v.* Smith, 11 Allen, 243; State *v.* Gates, 17 N. H. 373; State *v.* Dayton, 3 Zab. 49; People *v.* Cook, 8 N. Y. 67. "Kissing the book" may be omitted. R. *v.* Haly, 1 C. & D. 199. That mere technical variations do not affect the validity of the oath see State *v.* Owen, 72 N. C. 605; Edwards *v.* State, 49 Ala. 334.

[1] State *v.* Keene, 26 Maine, 33.

[2] Infra, § 1271.

It has been ruled in Vermont that a prosecution for perjury cannot be based on testimony received orally, but which by law ought to have been taken in writing. State *v.* Trask, 42 Vt. 152. See infra, § 1294, and State *v.* Helle, 2 Hill (S. C.), 290.

[3] To an affidavit it is not necessary that there should be a signature. Com. *v.* Carel, 105 Mass. 582. Infra, § 1310; R. *v.* Phillips, 2 Strange, 921; Resp. *v.* Ross, 2 Yeates, 1. Whart. Cr. Pl. & Pr. § 302.

[4] Infra, §§ 1271, 1280; Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220.

[5] Ibid.; Resp. *v.* Newell, 3 Yeates, 407. See infra, § 1271; supra, §§ 185, 1252.

[6] Com. *v.* Knight, 12 Mass. 274.

The false swearing must have

erit" (whether in a private vow or public testimony, supposing that God be appealed to as a sanction of the truth of vow or statement), "quadraginta dies in pane et aqua et septem sequentes annos poeniteat, et nunquam sit sine poenitentia, et nunquam in testimonium recipiatur: communionem tamen post haec percipiat." (C. 18. c. vi. qu. 1.) But the Roman common law, followed in this respect by the English, treats perjury as an offence only when it can be used to disturb in judicial processes the civil relations of men. So far as it is solely an offence against God, by God is it solely to be avenged. "Jurisjurandi contemta religio satis Deum habet ultorem." (L. 2. Cod. de reb. cred.) In the maintenance of this distinction the English common law has been resolute.

been before a competent court.

§ 1257. The court must have jurisdiction of the proceedings in which the false oath was taken.[1] If it appear to have been taken before a person who had no lawful authority to administer it,[2] or who had no jurisdiction of the cause,[3] the defendant must be acquitted.[4] The indictment,

The court must have had jurisdiction.

[1] Infra, § 1275; 2 Russ. on Cr. 6th Am. ed. 599; R. v. Senior, L. & C. 409; 9 Cox C. C. 469; R. v. Bacon, 11 Cox C. C. 540; R. v. Lewis, 12 Cox C. C. 163; R. v. Willis, 12 Cox C. C. 164; U. S. v. Bailey, 9 Peters, 238; U. S. v. Barton, Gilpin, 439; State v. Furlong, 26 Me. 69; Com. v. Knight, 12 Mass. 274; Com. v. White, 8 Pick. 453; State v. Fassett, 16 Conn. 457; Arden v. State, 11 Conn. 408; Jackson v. Humphrey, 1 Johns. 498; Conner v. Com. 2 Va. Cas. 30; Pankey v. People, 1 Scam. 80; Montgomery v. State, 10 Ohio, 220; Lamden v. State, 5 Humph. 83; Steinson v. State, 6 Yerger, 531; State v. Gallimon, 2 Ired. 374; State v. Alexander, 4 Hawks, 182; State v. Hayward, 1 N. & McC. 546; State v. McCroskey, 3 McCord, 308; State v. Wyatt, 2 Hayw. 56; State v. Crumb, 68 Mo. 206. For other cases see § 1290.

An indictment averring that "in the White-chapel County Court of Middlesex, holden before J. M., judge of the court, an action, then pending in the court, came on to be tried; that the defendant was sworn as a witness before J. M., being judge of the said county court, and, having sufficient and competent authority to administer the said oath;" and then perjury was assigned, sufficiently shows on the face of the indictment that the court was properly constituted, and that the judge had jurisdiction over the cause in which the perjury was alleged to have been committed. Lavey v. R. (in error) 17 Q. B. 496; 2 Den. C. C. 504; 5 Cox C. C. 539. See, to same effect, R. v. Lawlor, 6 Cox C. C. 187.

[2] 3 Inst. 165, 166; Lambert v. People, 6 Abb. New Cas. 181; Case v. People, N. Y. Ct. Ap. 1879; Morrell v. People, 32 Ill. 499. Infra, § 1272.

[3] 3 Inst. 166; Yelv. 111; State v. Furlong, 26 Me. 69; State v. Alexander, 4 Hawks, 182. Infra, § 1272.

[4] See 1 Hawk. c. 69, ss. 3, 4; Bac. Abr. Perjury (A.); R. v. Crossley, 7

however, need not show the nature of the authority of the party administering the oath.[1] And being sworn by a clerk in presence of the court is being sworn by the court.[2]

The fact that the oath was administered must be proved beyond reasonable doubt.[3]

T. R. 315; R. *v.* Dunn, 1 D. & Ry. 10; R. *v.* Hanks, 3 C. & P. 419. Infra, § 1272.

[1] R. *v.* Callanan, 6 B. & C. 102; State *v.* Ludlow, 2 Southard, 772. Infra, §§ 1288, 1289.

[2] Infra, §§ 1287, 1315.

[3] In Case *v.* People, Court of Appeals of New York, February 18, 1879, 7 Reporter, 506, the defendant was charged with perjury in swearing to an affidavit before a notary, and the notary could not remember that he administered the oath, but believed he did so from seeing his name on the jurat, and the prisoner swore he did not take the oath, but sent the paper signed by him by a messenger to the notary's office, and the prisoner was corroborated by others. It was ruled that there was not adequate proof that the oath was ever administered.

Miller, J., in delivering the opinion of the court, said: "Numerous questions were raised upon the argument as to the validity of the conviction of the accused. Among others, and perhaps the most serious, one arises upon the motion made by the prisoner's counsel, at the close of the testimony of the prosecution upon the trial of the indictment, to acquit the defendant upon the ground of the insufficiency of the proof that the affidavit was made upon which the perjury was assigned. The same motion was renewed at the close of the whole testimony, and the court were then requested to instruct the jury to acquit, on the ground that the oath was not administered to the defendant. Each of the motions was denied, and an exception taken to the several rulings of the judge in reference to the same. If, as is urged, the oath was not administered, the allegation in the indictment that the accused swore to the affidavit was not proven, the evidence would not justify a conviction, and the court should have discharged the prisoner by directing an acquittal. The notary, MacClay, who was sworn upon the trial, after looking at the affidavit, in response to a question put to him by the public prosecutor to the effect whether the persons there indicted were sworn before him to the truth of the affidavit, and whether it was subscribed by him as a notary public, answered in the affirmative. Upon his cross-examination, after stating that he could not remember the specific occasions on which he had taken affidavits, and the character of the affidavit taken by him, he stated that he had no particular recollection of this affidavit except seeing his signature to it. He thought it was taken at the office, but he did not remember the place. He did not remember positively any matter connected with it; that he testified to the verification from seeing his certificate to it as a notary public, and beyond that had no recollection as to the place or circumstances under which it was taken. His examination elicited the fact that he was uncertain as to the place and circumstances, and that he could not positively or directly swear to the taking of the affidavit. In fact, it was mere conjecture arising from the circumstances that his name was subscribed to it as a notary public. Standing alone the testimony of

§ 1258. Where the court has jurisdiction of the subject matter of inquiry, it is not necessary that the proceedings should be strictly regular.[1] But if from want of some essential condition (*e. g.* an issue) no jurisdiction attached, perjury cannot be maintained.[2]

Proceedings need not have been strictly regular.

the notary public was very loose, uncertain, and unreliable. He does not swear to the material fact in the case, that he did administer the oath to the accused, and it is only for the reason that he finds his name attached to the jurat that he 'thinks' and 'argues,' and it may be truly said perhaps he supposes that he took the affidavit. Such testimony is certainly entitled to but little consideration. In a case like this there must be proof of the oath taken independent of the notary's certificate, signature, seal, and jurat. Assuming that the evidence was *primâ facie* sufficient, the presumption arising from the testimony was liable to be rebutted by other testimony that the oath was not administered, and we think the proof on the behalf of the prisoner was entirely sufficient to overcome the evidence of the prosecution, and to establish that no oath ever was administered, and that the affidavit was not sworn to. This position is sustained by the testimony of the accused, who positively swore that he never took the oath; by the evidence of Allen and Wetmore, the vice-president and secretary of the company, each of whom testified that the affidavit was signed in the office of the company, was not sworn to, but was taken to be certified by the porter, Roberts, to the notary, and was so certified in the absence of the accused. This testimony is supported by Roberts, the porter, who swears that he took the affidavit to MacClay's office, MacClay wrote his name upon and put his seal on it, and the witness then took and returned it to the office of the company. MacClay's evidence, as we have seen, does not contradict Roberts in any respect, or the testimony of the other witnesses. If the testimony was untrue, MacClay should have been called to contradict it. The prosecution failed to do this, as they could have done; and in the absence of any evidence that the oath was taken, and the failure of MacClay to contradict the proof, it is clear, uncontradicted, and conclusive that no oath was administered; and it must, therefore, be assumed as established that Roberts told the truth, and is entitled to full credit and belief. In fact, that the other witnesses also who are so strongly corroborated by his testimony, as well as the evidence of MacClay, and all the circumstances, were entitled to credit in swearing that no oath was ever taken. A careful consideration of the evidence leads to the conclusion that the prisoner never took the oath, and the court erred in refusing to direct the jury to render a verdict of acquittal, as should have been done at the close of the testimony."

[1] State *v.* Lavalley, 9 Mo. 824. Infra, § 1273.

In R. *v.* Hughes, C. C. R. June, 1879, 40 L. T. (N. S.) 685; 14 Cox C. C. 284, the point in the text was examined under the following circumstances: —

A police officer, H., obtained an il-

[2] R. *v.* Ewington, 2 Mood. C. C. 223; C. & M. 319; R. *v.* Pearce, 8 B. & S. 531; 9 Cox C. C. 258; State *v.* Shanks, 66 Mo. 560. Infra, § 1272.

§ 1259. Perjury before courts-martial is by statute made indictable in most jurisdictions; but even where a statute does not apply, the weight of authority is that it is perjury at common law.[1]

Perjury may be before court-martial.

§ 1260. In a celebrated and much contested case in Connecticut, it was held by a majority of the judges, that as Christianity is part of the common law of the land, an ecclesiastical tribunal has the right to administer an oath, and that false swearing before such a tribunal is perjury.[2] The last is certainly a bold position; and when we bear in mind the license with which ecclesiastical trials are conducted, particularly where the church discipline leaves the matter to the adjudication of the congregation as a body, it is questionable how far sound policy would justify a doctrine which would attach to ecclesiastical sentences, first the incidents and then the consequences of a civil judgment. When such a court, however, is established by law, this objection vanishes;[3] and in any view, the present tendency of the courts to treat the adjudications of ecclesiastical tribunals as authoritative within

And in Connecticut before an ecclesiastical court.

legal warrant against S. for assaulting him and obstructing him in the discharge of his duty. H. arrested S. thereon, and took him before the magistrates in petty sessions, who convicted and sentenced S. to six months' imprisonment with hard labor. S. took no objection to the proceedings, and he called a witness to show he was not guilty.

An indictment was afterwards found against H. for perjury committed by him at the hearing of the case at petty sessions, and he was convicted by the jury, subject to the opinion of the court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant. It was held (Kelly, C. B., dissentiente), that the justices had jurisdiction to hear and determine the case against S., notwithstanding he was brought before them on an illegal warrant, and there was no written information. But to make false swearing before commissioners of bankrupt perjury, it is necessary that there should be a good petitioning creditor's debt to support the fiat. R. *v.* Ewington, 2 M. C. C. 223; Car. & M. 319.

In R. *v.* Carr, 10 Cox C. C. 564, it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was, on the hearing of which the false evidence was given.

[1] R. *v.* Heane, 4 B. & S. 947; 9 Cox C. C. 433; R. *v.* Tomlinson, L. R. 1 C. C. 49.

Wilful and corrupt false swearing, when before a local marine board duly and lawfully appointed and constituted, upon a matter material to an inquiry then being lawfully investigated by them, is perjury. R. *v.* Tomlinson, L. R. 1 C. C. 49; 12 Jur. (N. S.) 945.

[2] Chapman *v.* Gillet, 2 Conn. 40.

[3] Infra, § 1267.

their sphere makes it important to solemnize and check testimony in such courts by the sanction of an oath.

§ 1261. Perjury, it seems, may be assigned on a false oath taken before a grand jury.[1] In England doubts seem to have existed as to whether a grand juror was competent to swear a witness; but it is clear that the clerk of the assizes, or any third person, is admissible for that purpose.[2] In most States the practice is for the foreman of the grand jury, or one of the members, to administer the oath.[3]

Grand jury may administer oath.

§ 1262. The officer must have legal power to administer the oath in the particular process.[4] Thus a man cannot be indicted for perjury in swearing before a justice to his attendance in court as a witness, when the clerk only is authorized to administer such oath.[5]

But otherwise of unauthorized officer.

§ 1263. It is sufficient *primâ facie*, that the person by whom the oath is administered was an acting magistrate, and the evidence of the individual himself may be received to prove this.[6] The rule, however, is inflexible, that the jurisdiction should be *primâ facie* competent, and

Officer acting as such *primâ facie* competent.

[1] 1 Ch. C. L. 322; State *v.* Fassett, 16 Conn. 457; Com. *v.* Parker, 2 Cush. 212; Huidekoper *v.* Cotton, 3 Watts, 56; Thomas *v.* Com. 2 Rob. (Va.) 795; Com. *v.* Pickering, 8 Grat. 628. See State *v.* Offutt, 4 Blackf. 355; People *v.* Young, 31 Cal. 563; Whart. Cr. Pl. & Pr. §§ 378 *et seq.*

[2] R. *v.* Hughes, 1 C. & K. 519.

[3] See Whart. Cr. Pl. & Pr. § 358 *a*; People *v.* Young, 31 Cal. 563; State *v.* Green, 24 Ark. 591.

[4] R. *v.* Stone, Dears. 251; R. *v.* Hanks, 3 C. & P. 419; State *v.* Clark, 2 Tyler, 277; Lamden *v.* State, 5 Humph. 83.

[5] State *v.* Wyatt, 2 Hayw. 56. But see supra, § 1257.

[6] R. *v.* Roberts, 38 L. T. (N. S.) 690; State *v.* Hascall, 6 N. H. 352. See infra, § 1315; Whart. Crim. Ev. §§ 164, 835.

In R. *v.* Roberts, 36 L. T. 690, an indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U. at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, entitled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the said court." It was ruled on a case reserved that there was sufficient proof of J. U. acting as deputy judge, and therefore *primâ facie* evidence of his appointment as such. Lord Coleridge, C. J., said: —

"I am of opinion that the conviction should be affirmed. One of the best recognized principles of law, *Omnia praesumuntur esse rite et solemniter acta donec probetur in contrarium*, is applicable to public officers acting in

the proceedings judicial.[1] But perjury may be assigned in an oath erroneously taken, especially while the proceedings in which it was taken remain unreversed.[2]

Perjury not extra-territorially punishable.

§ 1264. According to English and American law, one State has no jurisdiction of perjury committed in a foreign State, against the authority of such foreign State;[3] nor does it make any difference that such perjury was committed in an affidavit taken before a judge of the prosecuting State at the time sojourning in the foreign State,

discharge of public duties. The mere acting in a public capacity is sufficient *primâ facie* proof of the proper appointment; but it is only a *primâ facie* presumption, and it is capable of being rebutted, and in the case of Rex *v.* Verelst that presumption was rebutted in fact, and the person who there had acted as surrogate for twenty years was proved to have been improperly appointed. The case of Rex *v.* Verelst, 3 Camp. 433, is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C. J., to be sufficient *primâ facie* evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition Rex *v.* Verelst was referred to as good law by Lord Campbell, C. J., in Wolton *v.* Gavin, 16 Q. B. 48. But it was further shown in Rex *v.* Verelst that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be shut out, however long he might have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true rule as to the *primâ facie* presumption in such cases. It is laid down in all the text-books as a recognized principle, that a person acting in the capacity of a public officer is *primâ facie* to be taken to be so, and that principle was adopted by Patteson, J., in Doe dem. Bowley *v.* Barnes, 8 Q. B. 1043. In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient *primâ facie* proof for the purpose of an action of ejectment without proving their appointment." He then referred to the decision of Tindal, C. J., to the same effect, in Reg. *v.* Newton, Car. & Kir. 469, and to Reg. *v.* Jones, 2 Camp. 131; and added: "This objection, if it were good, would extend very widely, for, suppose perjury committed on the first time of acting in his office before a judge or a recorder or county court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jelf has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention." See infra, § 1315.

[1] People *v.* Phelps, 5 Wend. 10; State *v.* Clark, 2 Tyler, 277.

[2] Van Steenburgh *v.* Kortz, 10 Johns. 167. Infra, § 1273.

[3] Musgrave *v.* Medex, 19 Ves. 652; Phillippi *v.* Bowen, 2 Barr, 20; Wh. Con. of Laws, § 853.

such judge not being authorized so to act by the prosecuting State.[1] There are, however, exceptions to this rule: —

Perjury before consuls, &c., abroad, by statute, may be punished in the United States.[2]

Perjury before a commissioner to take testimony, though committed abroad, is punishable in the State from which the commission issues.[3] But the authority of the commissioner is strictly limited by his commission; and if he transcends it, any oath administered by him is not the subject of prosecution in the State from which the commission issues.[4]

Fraudulent use of a false foreign affidavit, though the perjury itself is not cognizable, is indictable at common law.[5]

Whether a state court has jurisdiction of perjury in a federal procedure will be presently considered.[6]

State magistrate under act of Congress may administer oath.

§ 1265. It has been held that if a state magistrate administer an oath under an act of Congress expressly giving this power to magistrates of his class, it is to be regarded as a lawful oath by one having competent authority; as much so as if he had been especially appointed a commissioner under a law of Congress for that purpose.[7] But the right of Congress to impose duties of this class on state officials, may be questioned.[8]

And so justice of the peace and arbitrators under rule of arbitration.

§ 1266. Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitration by a rule of court, with the consent of parties.[9] The same rule applies to arbitrators.[10] But it is otherwise if the arbitrators have no power to make a binding award.[11]

[1] Jackson *v.* Humphrey, 1 Johns. 498.

[2] Supra, § 276; Wh. Con. of Laws, § 873.

[3] Supra, § 276; Com. *v.* Kunzmann, 41 Penn. St. 429. See Com. *v.* Smith, 11 Allen, 243; Phillippi *v.* Bowen, 2 Barr, 20; Wh. Con. of Laws, § 722.

[4] Com. *v.* Quimby, 6 Bost. Law Rep. (N. S.) 210.

[5] O'Mealy *v.* Newell, 8 East, 364.

[6] Infra, § 1275.

[7] U. S. *v.* Bailey, 9 Peters, 238; U. S. *v.* Winchester, 2 McLean, 135.

[8] Supra, §§ 264–6; infra, § 1275.

[9] State *v.* Stephenson, 4 McCord, 165. See Chapman *v.* Gillett, 2 Conn. 40.

[10] R. *v.* Ball, 6 Cox C. C. 360. See State *v.* McCroskey, 3 McCord, 308.

[11] Infra, § 1269.

VI. IN JUDICIAL PROCEEDING.

False swearing must be in judicial proceeding.

§ 1267. To constitute the technical offence of perjury at common law, it must appear that the false swearing was in a judicial proceeding.[1] At the same time it must be remembered that the making of a false affidavit in any proceeding authorized by statute is a misdemeanor akin to perjury; and in an indictment for such an offence, the averments peculiar to perjury may be rejected as surplusage.[2]

If the defendant took a false oath when examined as a witness at a trial; or in an answer to a bill in equity;[3] or in depositions in a court of equity;[4] or on a motion for continuance;[5] or in proceedings before referees;[6] or in an affidavit in any pending issue in court;[7] or upon a wager of law;[8] or upon a commission for the examination of witnesses;[9] or in justifying bail in any of the courts;[10] or before a federal commissioner;[11] or in naturalization proceedings;[12] or upon an examination before a magis-

[1] Supra, § 1244; State *v.* Chamberlin, 30 Vt. 559; State *v.* Simons, Ibid. 620.

In the Draft Code which was presented to the British Parliament in 1879, the following is given as a codification of the common law on this point: —

"Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of justice, or before either house of parliament, or any committee of either house of parliament empowered by law to administer an oath, or before any justice of the peace, or any arbitrator or umpire, or any person or body of persons authorized by any statute in force for the time being to make an inquiry, and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice, or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not, so as to authorize the holding the proceeding, and although such proceeding was held in a wrong place or otherwise invalid."

[2] R. *v.* Hodgkiss, L. R. 1 C. C. 212; Rump *v.* Com. 30 Penn. St. 475. Supra, § 1244.

[3] 5 Mod. 348; 3 Inst. 66; Com. *v.* Warden, 11 Met. 406.

[4] 5 Mod. 348.

[5] State *v.* Johnson, 7 Blackf. 49; State *v.* Flagg, 27 Ind. 24; State *v.* Shupe, 16 Iowa, 36; Morrell *v.* People, 32 Ill. 499.

[6] State *v.* Keene, 26 Me. 33.

[7] 5 Mod. 348; 1 Show. 335, 397; 1 Ro. Rep. 79, per Coke, C. J.; Stewart *v.* State, 22 Oh. St. 477.

[8] Noy, 128.

[9] Cro. Car. 99. See 1 B. & P. 240.

[10] State *v.* Lavalley, 9 Mo. 824.

[11] U. S. *v.* Volz, 14 Blatch. 15.

[12] U. S. *v.* Jones, 14 Blatch. 90.

trate; or in a judicial proceeding in a court baron;[1] or before a grand jury;[2] or before a legally authorized ecclesiastical court;[3] it is perjury.[4]

Juror indictable for false swearing on *voir dire*.

§ 1268. An indictment lies against a juror which alleges that he falsely and corruptly swore upon his *voir dire*, that he had not formed or expressed an opinion on the merits of the case, when in fact he had.[5]

Voluntary false affidavits are not perjury.

§ 1269. But a mere voluntary oath cannot amount to perjury. Therefore false swearing in a voluntary affidavit, made before a justice of the peace or notary, before whom no cause is pending, and under no statutory procedure, is not perjury.[6] Even when a reference before arbitrators is pending, it is not perjury to swear falsely before a justice to an affidavit to be used by them, if no suit or legal procedure could be based on their action.[7] And the same rule applies to all extra-judicial oaths, and to oaths not required by law.[8] Even false swearing to an affidavit attached to a bill in equity is not perjury, unless the bill was one required by law to be verified.[9]

In this case J. testified, as a witness, that he was well acquainted with the applicant. It appeared that he was a total stranger to the applicant, and volunteered as a witness. This was held perjury.

[1] 5 Mod. 348; 1 Mod. 55, per Twisden, J.

[2] Supra, § 1261.

[3] 5 Mod. 348. Supra, § 1260.

[4] Archbold's C. P. 9th ed. 538; 1 Hawk. c. 69, s. 3.

[5] State *v.* Wall, 9 Yerger, 347; State *v.* Moffatt, 7 Humph. 250; State *v.* Howard, 63 Ind. 502.

[6] U. S. *v.* Nickerson, 1 Sprague, 232; Com. *v.* Knight, 12 Mass. 274; Jackson *v.* Humphrey, 1 Johns. 498; People *v.* Travis, 4 Parker C. R. 213; Shaffer *v.* Kentzer, 1 Binn. 542; Lamden *v.* State, 5 Humph. 83; State *v.* Wyatt, 2 Hayw. 56; Pegram *v.* Styrm, 1 Bailey, 595; State *v.* Stephenson, 4 McCord, 165; State *v.* Dayton, 3 Zab. 49. It is doubted if perjury can be assigned upon the oath made for the purpose of obtaining a marriage license; R. *v.* Alexander, 1 Leach, 74; but see 1 Vent. 370; and in R. *v.* Foster, R. & R. 459, a false oath taken before a surrogate, to procure a marriage license, was holden not sufficient to support a prosecution for perjury. The contrary, however, was ruled in R. *v.* Chapman, 1 Den. C. C. 432; 2 C. & K. 846. In South Carolina, doubts have been expressed on a cognate point. Pegram *v.* Styrm, 1 Bailey, 595. In such a case it is usual to indict as for a mere misdemeanor at common law. Archbold C. P. 9th ed. 538; R. *v.* Hodgkiss, L. R. 1 C. C. 212. Supra, § 1267.

[7] Mahan *v.* Berry, 5 Mo. 21. See supra, § 1266.

[8] People *v.* Fox, 25 Mich. 492; People *v.* Gaige, 26 Mich. 30. See Silver *v.* State, 17 Oh. 365.

[9] People *v.* Gaige, 26 Mich. 30.

§ 1270. As has been seen,[1] when a statute authorizes an affidavit to be made as a foundation for any legal claim or right, the false swearing to such an affidavit is an indictable misdemeanor at common law. But in such case the affidavit must be within the purview of the statute.[2] If it be, or if the affidavit be made in conformity with any enabling statute, the offence is a misdemeanor, if the oath was taken before a party authorized to administer the same.[3]

But otherwise as to statutory affidavit.

But it is not necessary that a statutory affidavit should do more than substantially follow the statute.[4]

§ 1271. The fact that the alleged perjury is committed by a party testifying in his own case is no defence. If the party offer himself as a witness, be sworn and testify falsely, perjury may be assigned on the oath thus taken.[5] As has been seen, perjury may be committed in an answer to a bill in equity. It is said in Ohio, however, where there are no common law offences, that this is not the case where the bill does not call for an answer under oath.[6]

Party may be guilty of perjury in his own case.

[1] Supra, § 1244.

[2] State *v.* Helle, 2 Hill (S. C.), 290. See U. S. *v.* Kendrick, 2 Mason, 69; U. S. *v.* Babcock, 4 McLean, 113; U. S. *v.* Sonachall, 4 Biss. 425; State *v.* Foulks, 57 Mo. 461.

[3] St. Dig. C. L. art. 138, citing the following: —

"(1.) A. takes a false oath before a surrogate in order to obtain a marriage license. A. commits a misdemeanor. Chapman's case, 1 Den. C. C. 432.

"(2.) A. takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A. commits a misdemeanor. Hobart, 62.

"(3.) A. swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 36). A. commits a misdemeanor. R. *v.* Hodgkiss, L. R. 1 C. C. 212."

For false affidavits by solicitors see R. *v.* Moojen, London Law Times, Dec. 6, 1879.

A party making a false affidavit before a justice of the peace of a State, in order to establish a claim against the United States, is indictable under the act of Congress passed March 1, 1823, to prevent false swearing touching public money, though such affidavit was not expressly authorized by act of Congress. U. S. *v.* Bailey, 9 Pet. 238.

[4] Supra, § 1251.

[5] R. *v.* Mullany, 10 Cox C. C. 97; L. & C. 593; R. *v.* Tichborne, London, May, 1873; State *v.* Keene, 26 Me. 33; Van Steenburg *v.* Kortz, 10 Johns. 167; Montgomery *v.* State, 10 Ohio, 220; Resp. *v.* Newell, 3 Yeates, 417; State *v.* Molier, 1 Dev. 263; Haley *v.* McPherson, 3 Humph. 104. As to incompetent witness see supra, § 1254; infra, § 1280.

[6] Silver *v.* State, 17 Ohio, 365.

§ 1272. A suit which is actually void and null from want of jurisdiction or other incurable defect is not one in which perjury can be committed.[1] Thus it is not perjury to swear falsely in a discontinued or abated suit.[2] But if the proceeding is merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if the false evidence could by any contingency be introduced as testimony.[3]

No perjury in void suit.

§ 1273. At common law perjury cannot be committed in an official oath, so far as such oath touches future conduct.[4]

Nor on oath as to future official conduct.

§ 1274. Perjury may be assigned upon an oath or affidavit which is insufficient to effect the purpose for which it was taken without additional proof, and it is not necessary to show or aver that such additional proof was made.[5]

Not necessary to show additional enabling proof.

[1] R. v. Cohen, 1 Stark. 511; R. v. Ewington, C. & M. 319; 2 Mood. C. C. 223; R. v. Pearce, 3 B. & S. 531; 9 Cox C. C. 258; R. v. Scotton, 5 Q. B. 493. Infra, §§ 1294, 1295; supra, § 1256.

[2] R. v. Pearce, 3 B. & S. 531; 9 Cox C. C. 258; State v. Hall, 49 Me. 412. Supra, § 1258.

[3] Infra, §§ 1294, 1295; R. v. White, M. & M. 271; King v. R. 3 Cox C. C. 561; 14 Q. B. 31; R. v. Millard, 6 Cox C. C. 150; R. v. Simmonds, 8 Cox C. C. 190; R. v. Hailey, R. & M. 94; R. v. Christian, C. & M. 388; R. v. Meek, 9 C. & P. 513; Pippet v. Hearn, 1 D. & R. 266; R. v. Fletcher, L. R. 1 C. C. 320; U. S. v. Reese, 4 Sawy. 629; State v. Keene, 26 Me. 33; Com. v. Tobin, 108 Mass. 426; State v. Pike, 15 N. H. 83; Van Steenburgh v. Kortz, 10 Johns. 167; State v. Hall, 7 Blackf. 25; State v. Lavalley, 9 Mo. 824.

An information, not upon oath, was laid before a justice of the peace under the English Malicious Trespass Act, who thereupon issued a summons to the party charged. At the hearing the defendants were examined as witnesses, and upon the evidence which they gave perjury was subsequently assigned. It was ruled that the hearing before the magistrates was a judicial proceeding, and that jurisdiction existed, although the information was not upon oath. R. v. Millard, Dears. C. C. 166; 6 Cox C. C. 150.

An indictment against P. for perjury, alleged to have been committed on the trial of D. for perjury, averred, that the evidence he gave on the trial of D. was material, and that D. was convicted. The record showed that while D. was convicted and sentenced, the judgment against him was afterwards reversed on writ of error. It was ruled that the reversal of the judgment against D. was no ground of defence for P., as showing that his evidence could not have been material, and that it did not negative the allegation that D. had been convicted. R. v. Meek, 9 C. & P. 513.

[4] State v. Dayton, 3 Zab. 49; 1 Hawk P. C. 431.

[5] Ibid.

§ 1275. A state court, it has been ruled, cannot punish for perjury when made such under an act of Congress,[1] and such is the true view when the offence is exclusively against the United States. Yet it is on principle otherwise when the offence strikes at the integrity of the State.[2] Hence false swearing in a naturalization case is perjury at common law, and, though it may also be an offence against the federal government, the offender may be indicted and punished in a state court.[3] Whether a state court can act generally under an act of Congress has been already discussed.[4]

State court has ordinarily no jurisdiction of false swearing in federal court.

VII. IN A MATTER MATERIAL.

§ 1276. The assignment of perjury on which a conviction is asked must be in a matter which was material to the issue.[5] Thus, in a common case, if a witness be asked whether goods were paid for "*on a particular day*," and he answer in the affirmative; if the goods were really paid for, though not on that particular day, it will not be perjury,[6] unless the day be material. It has also been ruled that it was not perjury when a witness falsely swore that a thing which occurred on a particular Sunday did not occur on a Sunday between two dates which included the Sunday in question; the

False swearing must have been in matter material.

[1] Bridges, ex parte, 2 Wood, 428; State *v.* Adams, 4 Blackf. 146; People *v.* Kelly, 38 Cal. 145; State *v.* Kirkpatrick, 32 Ark. 117.

[2] U. S. *v.* Bailey, 9 Peters, 238.

[3] State *v.* Whittemore, 50 N. H. 245; Rump *v.* Com. 30 Penn. St. 475. *Contra*, People *v.* Sweetman, 3 Parker C. R. 358. See supra, § 266, for discussion of this topic.

[4] See supra, § 266; U. S. *v.* Bailey, 9 Pet. 238; State *v.* Whittemore, 50 N. H. 245; Wood *v.* People, 59 N. Y. 117; Rump *v.* Com. 30 Penn. St. 475. Compare People *v.* Sweetman, 3 Parker C. R. 358.

[5] 2 Russ. on Crimes (6th Am. ed.), 600; R. *v.* Worley, 3 Cox C. C. 535; R. *v.* Owen, 6 Cox C. C. 105; R. *v.* Naylor, 11 Cox C. C. 13; R. *v.* Alsop, 11 Cox C. C. 264; R. *v.* Tate, 12 Cox C. C. 7; State *v.* Trask, 42 Vt. 152; Com. *v.* Knight, 12 Mass. 274; Com. *v.* Smith, 11 Allen, 243; Com. *v.* Grant, 116 Mass. 17; State *v.* Hobbs, 40 N. H. 229; Campbell *v.* People, 8 Wend. 636; Conner *v.* Com. 2 Va. Cas. 30; State *v.* Aikens, 32 Iowa, 403; State *v.* Flagg, 25 Ind. 243; People *v.* Gaige, 26 Mich. 30; Pollard *v.* People, 69 Ill. 148; State *v.* Hattaway, 2 N. & M. 118; Hinch *v.* State, 2 Mo. 158; State *v.* Bailey, 34 Mo. 350; Gibson *v.* State, 44 Ala. 17; Nelson *v.* State, 47 Miss. 621. See Platt *v.* Braunsdorff, 40 Wis. 107.

[6] 2 Ro. Rep. 41, 42. See R. *v.* London, 12 Cox C. C. 50.

court holding that the attention of the witness should have been called to the particular day.[1] It has even been declared that if a person swear that J. S. beat another with his sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material is the battery.[2] And, generally, superfluous and irrelevant matter, stated in an affidavit for a writ of *habeas corpus*, although false, is not perjury.[3]

§ 1277. Yet when such superfluous matter goes to give circumstantiality to the narrative, it becomes material as contributing largely to the witness's credibility.[4] Bald statements of results (*e. g.* "He struck me," as in a case just mentioned) want one of the prime essentials of reliable testimony. For a witness knowingly to fabricate details, in order to strengthen his credibility, is as much perjury as is any other false swearing. Hence it has been wisely held that perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point.[5] Thus where three or more persons were alleged to be

But circumstantiality of detail may be material.

[1] R. *v.* Stolady, 1 F. & F. 508.

[2] Hetley, 97. See 1 Hawk. c. 69, s. 8.

[3] White *v.* State, 1 Sm. & M. 149.

[4] Com. *v.* Grant, 116 Mass. 17; Wood *v.* People, 59 N. Y. 117.

[5] R. *v.* Tyson, Law Rep. 1 C. C. 107; 11 Cox C. C. 1; Com. *v.* Pollard, 12 Met. 225; People *v.* Wood, 59 N. Y. 117; State *v.* Dayton, 3 Zab. 49; State *v.* Brown, 79 N. C. 642; Floyd *v.* State, 30 Ala. 511; State *v.* Shupe, 16 Iowa, 36. On an assignment of perjury by a defendant in a bastardy case, that he had never kissed the prosecutrix, the question of materiality was held by Wightman, J., to be for the jury. R. *v.* Goddard, 2 F. & F. 361. See R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200. Infra, § 1284. Upon the trial of C. for perjury in an affidavit, proof was given that the signature to the affidavit was in his handwriting; and there was no other proof that he was the person who made the affidavit. P. was then called, and swore that the affidavit was used before the taxing master, that C. was then present, and that it was publicly mentioned, so that everybody present must have heard it that the affidavit was C.'s. It was held, that the matters sworn were material upon the trial of C. R. *v.* Alsop, 11 Cox C. C. 264 — C. C. R.

"A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact. He cannot, in the latter case, exonerate himself from the offence, because while the circumstances to which he thus swore did not exist, the fact sought to be established by them did exist." Devens, J., Com. *v.* Grant, 116 Mass. 17.

Where in a county court, on an action for having sued for goods sold,

jointly concerned in an assault, and it was contended to be immaterial, if all participated in it, by which of them certain acts were done, the contrary was held, and it was ruled that evidence as to the acts of any one, if wilfully and falsely given, constituted perjury.[1] So the testimony of a person offering himself as bail, of the value of his property, is material,[2] though not as to incidents of the property not affecting its value.[3] It is when the false swearing goes to a point, the existence or non-existence of which cannot affect the question in dispute, that it does not tend to prevent the due administration of justice, and therefore is not perjury.[4] Yet a person swearing falsely to a material fact cannot

P., the defendant, falsely swore on cross-examination that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station; it was held on a trial for perjury that this evidence was material. R. *v.* Lavey, 3 C. & K. 26. Supra, § 1279.

[1] State *v.* Norris, 9 N. H. 96.

[2] Com. *v.* Butland, 119 Mass. 317.

[3] Pollard *v.* State, 69 Ill. 148. Infra, § 1323.

[4] R. *v.* Worley, 3 Cox C. C. 535; Studdard *v.* Linville, 3 Hawks, 474.

P., the defendant, in an answer in chancery to a bill in equity against him for specific performance of an agreement relating to the purchase of land, relied on the statute of frauds (the agreement not being in writing), and also denied having entered into any such agreement. Upon this denial in his answer he was indicted for perjury. It was held that the denial of an agreement, which, by the statute of frauds, was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to an acquittal. R. *v.* Dunston, R. & M. 109. As we will see, perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds. R. *v.* Benesech, Peake's Add. Cas. 93. Infra, § 1282.

P. being charged with perjury, for having falsely sworn before magistrates at petty sessions that D. R. was the father of her illegitimate child, at the trial the imputed father, D. R., swore that he never had intercourse with her. In corroboration of D. R., a witness was called who swore that P. had told witness, at a time when she generally denied being with child, that "D. R. had never touched her clothes." It was ruled that, as the negation was made by the prisoner at a time when she generally denied being with child, it was so far a part of such general denial that, although it could not be altogether withdrawn from the jury, it was not a corroboration of D. R.'s testimony, on which alone they could convict her. Another assignment of perjury was, that on the same occasion P. had falsely sworn that her master, who was uncle of D. R., had promised her that he would raise her wages, and allow her to lie in at his house, if she would swear the child to a person other than his nephew, D. R. It was held that such statement was not material to the issue so as to constitute the crime of perjury. R. *v.* Owen, 6 Cox C. C. 105. As to materiality see also supra, § 1246.

defend himself on the ground that the case did not ultimately rest on the fact to which he swore.[1]

§ 1278. Perjury may be assigned upon a man's testimony as to the credit of a witness,[2] and it does not matter that the testimony was legally inadmissible.[3] Or he may perjure himself in his answer to a bill in equity, though it be in a matter not charged by the bill.[4]

And so testimony as to credit of witness.

§ 1279. A witness's answers on his own cross-examination, are material, and may be assigned as perjury, however discursive they may be, if they go to his credit.[5]

And so witness's answers on his own cross-examination.

§ 1280. Hence may we accept as a general rule that where a court illegally admits evidence, such illegality, if the evidence go to the jury, is not *per se* evidence of immateriality.[6] It may be otherwise as to a witness absolutely incompetent.[7]

Inadmissibility no test of immateriality.

[1] Wood *v.* People, 59 N. Y. 117.

[2] 2 Salk. 514; R. *v.* Griepe, Ld. Ray. 256; Wood *v.* People, 50 N. Y. 117; State *v.* Street, 1 Murph. 156.

[3] Infra, § 1280; R. *v.* Gibbon, L. & C. 109; 9 Cox C. C. 105.

[4] 5 Mod. 348. *Semble*, 1 Sid. 106, 174.

[5] R. *v.* Overton, Car. & M. 655; 2 Mood. C. C. 263; R. *v.* Lavey, 3 C. & K. 26; R. *v.* Gibbon, L. & C. 109; R. *v.* Tyson, L. R. 1 C. C. 107.

[6] R. *v.* Philpotts, 5 Cox C. C. 363; 3 C. & K. 135; 2 Den. C. C. 302; R. *v.* Gibbon, supra. Supra, § 1254.

It having become material to prove whether J. had died before M., the defendant on the trial produced a document purporting to be a copy of J.'s will, and falsely swore that he had examined it with the original will in the registry; and also, that he had examined a memorandum at the foot of the copy of the will with the entry in a book called the Act Book in the same registry. The judge offered to admit the evidence, but it was withdrawn; it was, in point of law, inadmissible. It was held that the circumstances that the evidence was inadmissible, and was withdrawn, did not affect the question of perjury, as it could not purge the false swearing; and that, as it was not material

[7] P. was indicted for perjury alleged to have been committed on the hearing of a summons which had been taken out against himself, for permitting gambling in his house contrary to the tenor of his license. The defendant had tendered himself as a witness, representing himself as the son of C., and had thereupon been sworn and given evidence on behalf of C., who was really himself, and that evidence formed the subject of the indictment. It was ruled that as he was not a competent witness, and could not give evidence in his own behalf, the magistrates had no power to swear him or receive his evidence, and that he could not therefore be guilty of perjury. R. *v.* Clegg, 19 L. T. (N. S.) 47. But see supra, §§ 1254, 1271.

Admission not conclusive as to materiality.

§ 1281. On the other hand, the fact that certain testimony was admitted in evidence is not by itself sufficient to warrant a jury, upon the trial of the indictment for perjury, to infer that such testimony was material to the issue.[1]

Primâ facie materiality is sufficient.

§ 1282. Swearing to a falsehood necessarily and absolutely ineffective is not perjury; but it is otherwise when the falsehood is capable of a *primâ facie* though only temporary effect. A man, for instance, denies on oath a promise which the statute of frauds requires to be in writing. Hence, in jurisdictions in which such promise is absolutely void, the denial of it is not perjury, for the denial touches a non-existent object.[2] So when the alleged false oath is as to the addition to a writing of certain words which are utterly without legal effect, and when such denial is not made to prop up the defendant's testimony in things material.[3] And so it is when the false oath is made to a matter which is an absolute nullity.[4] But the false swearing to matter which, however valueless and ineffective ultimately, has yet some *primâ facie*, though illusory weight, is perjury; for by this injury and annoyance to another may be at least transiently wrought.[5] A similar distinction in forgery has been noticed;[6] it not being indictable to forge an absolutely void instrument, though it is otherwise

whether probate of J.'s will was granted in the lifetime of M., if the evidence of the prisoner had been received it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury. R. *v.* Phillpotts, 2 Den. C. C. 302; 3 C. & K. 135; T. & M. 607; 5 Cox C. C. 363.

In R. *v.* Gibbon, L. & C. 109; 9 Cox C. C. 105, P. was indicted for having falsely sworn that in September, 1860, he had carnal knowledge of A. A. had obtained an affiliation summons against H., and in her cross-examination denied having had connection with the defendant in September, 1860 (a time which could not have made him the father of the child). P. was called as a witness on behalf of H., and swore that he had connection with A. in the month named. It was determined that although his evidence was legally inadmissible, yet, being admitted, it became material, and perjury might be assigned upon it.

[1] Com. *v.* Pollard, 12 Met. 225.

[2] R. *v.* Dunston, R. & M. (N. P.) 109 — Abbott, C. J.; R. *v.* Benesech, Peake's Add. Cas. 93 — Kenyon, C. J.

[3] People *v.* McDermott, 8 Cal. 288.

[4] R. *v.* Fairlie, 9 Cox, 209; State *v.* Steel, 1 Yerg. 394.

[5] R. *v.* Yates, C. & M. 132; Com. *v.* Parker, 2 Cush. 212.

[6] Supra, § 696.

as to an instrument only voidable. In other words, a fabrication aimed into blank air, where there is no possibility of injury, is not indictable; but such fabrication is indictable when there is a possibility of injury, no matter how remote, contingent, or ephemeral.

Irrelevant opinions not subjects of perjury.

§ 1283. Hence when opinions are irrelevant, they are not subjects of perjury.[1] But when relevant and material (as with the opinions of experts, and of jurists testifying to foreign laws), it is otherwise.[2] Eminently is this the case when such opinion is a summary of facts claimed to be known by defendant.[3] As has been seen, however, opinions honestly expressed, though on insufficient evidence, are not perjury.[4]

Materiality is for court.

§ 1284. According to Lord Campbell, a great and experienced criminal judge, the materiality of the alleged false oath is for the jury.[5] But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court.[6] And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.[7]

VIII. INDICTMENT.[8]

§ 1285. Each point in the definition of perjury must be distinctly shown on the indictment, subject to the statutory or other

[1] R. v. Crespigny, 1 Esp. 280; R. v. Pepys, Peake (N. P.), 187.

[2] See R. v. Pedley, 1 Leach, 365; R. v. Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200; State v. Lea, 3 Ala. 602; R. v. Cowan, 24 Up. Can. (Q. B.) 606.

[3] Com. v. Thompson, 3 Dana, 301; Hoch v. People, 3 Mich. 552; State v. Terry, 30 Mo. 368.

[4] Supra, § 1246.

[5] R. v. Lavey, 3 C. & K. 26; R. v. Worley, 3 Cox C. C. 535. See R. v. Courtney, 7 Cox C. C. 111; R. v. Goddard, 2 F. & F. 361. Supra, § 1277.

[6] R. v. Mullany, L. & C. 593; 10 Cox C. C. 97; R. v. Southwood, 1 F. & F. 356; Steinman v. McWilliams, 6 Barr, 170; State v. Lewis, 10 Kans. 157.

[7] See Cothran v. State, 39 Miss. 541; State v. Lewis, 10 Kans. 157.

[8] For forms of indictment see Wharton's Precedents, as follows:—

(577.) General frame of indictment. Perjury in swearing an alibi for a felon.

(578.) Swearing as to age in procuring money of the United States in enlisting in the navy of the United States.

(579.) At custom-house, in swearing to an entry of invoice, intending to

qualifications hereafter stated. Thus it must appear that the oath was, —

1. *Wilful and Corrupt.*

Indictment must charge wilfulness and corruption.

§ 1286. An indictment charging that the defendant, "being a wicked and evil person, and unlawfully and unjustly contriving, &c., deposed," &c., and concluding that the defendant "of his wicked and corrupt mind did commit wilful and corrupt perjury," is defective even at common law, for not alleging that the defendant wilfully and corruptly swore falsely.[1] And an indictment which charges that the prisoner "feloniously, corruptly, knowingly, wilfully, and maliciously swore," omitting the word "falsely," but concluding "and so the defendant in manner and form aforesaid did commit wilful and corrupt perjury," is also bad.[2] But in another case, an indictment which stated that the defendant "did voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negativing by express

defraud the United States, &c., under Act of March 1st, 1823.

(580.) In justifying to bail for a party after indictment found, &c.

(581.) In giving evidence on the trial of an issue on an indictment for perjury.

(582.) On a trial in the Supreme Judicial Court of Massachusetts, on a civil action.

(583.) For perjury committed in an examination before a commissioner of bankrupts.

(584.) Against an insolvent in New York, for a false return of his creditors and estate.

(585.) Against an insolvent in Pennsylvania, for a false account of his estate.

(586.) False swearing in answering interrogatories on a rule to show cause why an attachment should not issue for a contempt in speaking opprobrious words of the court in a civil suit.

(587.) In charging J. K. with larceny before a justice of the peace.

(588.) In charging A. N. with assault and battery before a justice.

(589.) In false swearing by a person offering to vote, as to his qualifications when challenged.

(590.) In an affidavit to hold to bail, in falsely swearing to a debt.

(591.) False swearing to an affidavit in a civil cause in which the defendant swore that the arrest was illegal, &c. The perjury in this case is for swearing to what the defendant did not know to be true.

(592.) Perjury, in an answer sworn to before a master in chancery.

(593.) Perjury before a grand jury.

(594.) In answer to interrogatories exhibited in chancery.

(595.) Committed at a writ of trial.

(596.) Falsely charging the prosecutor with bestiality at a hearing before a justice of the peace.

[1] State *v.* Carland, 3 Dev. 114.

[2] R. *v.* Oxley, 3 C. & K. 317. See Wh. Cr. Pl. & Pr. 264.

averments the truth of the oath, and concluding, that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," was held good.[1]

We may in general conclude that at common law the words "knowingly," "wilfully," "corruptly," and "falsely," are terms which cannot be omitted with safety.[2]

2. *Sworn before Competent Jurisdiction.*

§ 1287. "Duly sworn" is sufficient to describe the swearing; nor need the particular mode be set forth.[3] Hence it is sufficient to aver that the defendant "did then and there, in due form of law, take his corporal oath," without stating whether he was sworn on the gospels, or with uplifted hand.[4] But "sworn" (or affirmed) must be distinctly alleged.[5]

Oath must be properly set forth.

At common law the name and office of the person administering the oath must be given,[6] and a variance in this respect is fatal.[7]

[1] Resp. *v.* Newell, 3 Yeates, 407. In R. *v.* Cox, 1 Leach, 82, "wilfully" was held to be unnecessary when "falsely, maliciously, wickedly, and corruptly" were used.

An indictment against an insolvent debtor for perjury, in swearing to a schedule which did not discover certain debts owing to him, was held bad on demurrer for not averring that he well knew and remembered that the omitted debts were then justly due and owing to him. Com. *v.* Cook, 1 Rob. (Va.) 729.

[2] R. *v.* Stevens, 5 B. & C. 246; R. *v.* Richards, 7 D. & R. 665; R. *v.* Harris, 1 D. & R. 578; 5 B. & A. 926; U. S. *v.* Babcock, 4 McLean, 113; Thomas *v.* Com. 2 Rob. (Va.) 795; Cothran *v.* State, 39 Miss. 541; State *v.* Carland, 3 Dev. 114; State *v.* Bobbitt, 70 N. C. 81; Juaracqui *v.* State, 28 Tex. 625; State *v.* Webb, 41 Tex. 67; Allen *v.* State, 42 Tex. 12. Under Iowa statute see State *v.* Morse, 1 Greene, 503. "Knowingly" is said not to be necessary when "falsely, wilfully, and corruptly" are averred. State *v.* Sleeper, 37 Vt. 122. Under Texas statute see Smith *v.* State, 1 Tex. App. 620.

[3] See infra, § 1305; R. *v.* McCarther, Peake, 211; Tuttle *v.* People, 36 N. Y. 431; Dodge *v.* State, 4 Zabr. 455; State *v.* Farrow, 10 Rich. 165. See Com. *v.* Warden, 11 Met. 406; People *v.* Warner, 5 Wend. 271.

[4] Resp. *v.* Newell, 3 Yeates, 407. See State *v.* Freeman, 15 Vt. 723.

[5] State *v.* Divoll, 44 N. H. 140; State *v.* Hamilton, 65 Mo. 667.

It has been ruled that in cases where, to give magistrates jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information on oath made before them, it is not sufficient in an indictment for perjury, alleged to have been committed on the hearing of such information, to

[6] Kerr *v.* People, 42 Ill. 307.

[7] Hitesman *v.* State, 48 Ind. 473; State *v.* Oppenheimer, 41 Tex. 82.

It is, however, enough to allege swearing *before* a court;[1] and proof of swearing before an officer of court, in presence of the court, will sustain an allegation of swearing before or by the court.[2]

An indictment charged the defendant with having sworn to tell "the truth, the whole truth, and nothing but the truth." The evidence was that he was sworn to tell "the whole truth and nothing but the truth." It was held that the variance was immaterial.[3]

Detailed authority of court need not be given.

§ 1288. By stat. 23 Geo. 2, c. 11, it is "sufficient to set forth . . . . by what court, or before whom the oath was taken, averring such court or person or persons to have competent authority to administer the same." By the English practice, under this statute, the *nature* of the authority need not be specified.[4] In the United States, there are jurisdictions in which the relaxation of the common law affected by the statute has not been accepted;[5] but it has been held necessary to set forth all the facts essential to constitute the authority to administer the oath.[6]

But as a general rule, the principle of the statute has been accepted among us as virtually a part of the common law.[7]

Otherwise with special statutory authority.

§ 1289. Under any circumstances, however, where the oath was taken before a subordinate statutory officer, specially empowered to administer an oath, it is necessary

allege that before M. G., Esq., and T. H. H., clerk, two of the justices, &c., the magistrates who heard the case, J. O. came and exhibited a certain information upon oath, because it does not sufficiently show that J. O. was sworn before M. G. and T. H. H. R. *v.* Goodfellow, Car. & M. 569.

[1] Campbell *v.* People, 8 Wend. 636.

[2] Supra, § 1257; infra, § 1315.

[3] State *v.* Gates, 17 N. H. 373. See R. *v.* Southwood, 1 F. & F. 356.

[4] R. *v.* Callanan, 6 B. & C. 102; 9 D. & R. 97; R. *v.* Doty, 13 Up. Can. (Q. B.) 398; R. *v.* Mason, 29 Up. Can. (Q. B.) 431. See Burns *v.* People, 59 Barb. 531.

[5] For cases in which it is recognized see People *v.* Warner, 5 Wend. 271; U. S. *v.* Deming, 4 McLean, 3.

[6] State *v.* Gallimon, 2 Ired. 372; Lodge *v.* Com, 2 Grat. 579; McGregor *v.* State, 1 Carter (Ind.), 232. See State *v.* Hanson, 39 Me. 337; State *v.* Nickerson, 46 Iowa, 447.

[7] State *v.* Langley, 34 N. H. 529, cited infra, § 1297; Com. *v.* Hatfield, 107 Mass. 227; Burns *v.* People, 59 Barb. 531; State *v.* Ludlow, 2 South. 772; State *v.* Dayton, 3 Zabr. 49; State *v.* Schill, 27 Iowa, 263; Stofer *v.* State, 3 W. Va. 689. Infra, §§ 1294, 1325.

that the facts setting forth his authority should be averred. Thus, it is not enough to aver that the perjury was committed before "a commissioner of the United States duly appointed." The mode and authority of the appointment, and the official title of the officer, must be set out.[1] utory officer.

§ 1290. The jurisdiction of the court over the subject matter must be distinctly averred.[2] The title of the court must be correctly given;[3] and if a quorum is essential to jurisdiction, it is proper to aver that a due quorum of the judges was present.[4] But if jurisdiction be averred, the subordinate prerequisites of regularity may be inferred from the other allegations, when not explicitly stated.[5] Thus, in perjury committed by a petitioner in bankruptcy, it is unnecessary to set forth the petition; such reference to it as will show its character and object is sufficient.[6] In States where the statute of Geo. II. is not in force, and where there is no similar relaxing statute, there is, as has been seen, authority to the effect that the whole Jurisdiction must be averred.

[1] U. S. *v.* Wilcox, 4 Blatch. C. C. 391. See Flint *v.* People, 35 Mich. 491.

[2] State *v.* Hanson, 39 Me. 337; State *v.* Thurstin, 35 Me. 205; State *v.* Plammer, 50 Me. 217; Steinson *v.* State, 6 Yerg. 531; State *v.* Witherow, 3 Murph. 153; R. *v.* Doty, 13 Up. Can. (Q. B.) 398.

[3] State *v.* Street, 1 Murph. 156. Infra, § 1314.

[4] State *v.* Freeman, 15 Vt. 723.

[5] R. *v.* Virrier, 4 P. & D. 161; 12 Ad. & El. 317; Walker *v.* R. 8 El. & Bl. 439; Com. *v.* Hatfield, 107 Mass. 227. Supra, § 1257.

It has been held that jurisdiction is sufficiently averred in an indictment which charges that a petition for protection from process was, under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors' Acts), filed and presented at the county court of S., at W., by the defendant; that he afterwards obtained an order of protection; but afterwards, while the proceedings were pending in the county court, to wit, at the time of the filing the petition and schedule, he came before K., a commissioner to administer oaths in chancery, duly appointed and empowered to act in the matter of the insolvent, and take the defendant's oath then and there at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit, and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true, K. having competent power and authority to administer the oath. The indictment went on to aver that certain matter was material in the matter of the insolvency, and that the affidavit was false in respect thereof. The defendant was convicted, and judgment sustained. Walker *v.* R. (in error), 8 El. & Bl. 439; 27 L. J. M. C. 43. See supra, §§ 1287 *et seq.*

[6] U. S. *v.* Deming, 4 McLean, 3. Supra, § 1289; infra, § 1299.

record should be set forth. But such cumbrous and entrapping particularity will scarcely at present be anywhere exacted.

Time and place must be correctly averred.

§ 1291. If the facts be stated, as to time or place, with uncertainty or repugnancy, the indictment will be bad.[1] And a variance as to *time* of oath, when the latter is proved by record, is fatal.[2] But where the indictment charged the defendant with having committed perjury, by swearing at a court in July that he had witnessed a transaction in October of the same year, it was held not to be such a repugnancy as to afford cause for arresting judgment.[3]

3. *In a Judicial Proceeding.*

Judicial proceeding must be averred.

§ 1292. An indictment for perjury, either at common law or under 23 Geo. 2, c. 11, which does not show on its face that the oath was in a judicial proceeding, is bad.[4]

Thus, an omission to charge in the bill of indictment that the matter of traverse tried between the State of Tennessee and D., touching which the defendant gave his evidence, was by indictment or presentment, is fatal.[5]

Must appear that proceedings were regular.

§ 1293. It has been shown that it is necessary that the proceedings should have been regular.[6] Thus where it becomes necessary, in charging the commission of the offence, to allege that a certain term of county court was duly holden, it is not sufficient to allege that it was

[1] State *v.* Hardwick, 2 Mo. 185.

[2] Whart. Crim. Ev. § 103 *a*. Infra, § 1314; U. S. *v.* McNeal, 1 Gallis. 387; U. S. *v.* Bowman, 2 Wash. C. C. 328; Com. *v.* Monahan, 9 Gray, 119.

[3] State *v.* McKennon, Harp. 302.

[4] R. *v.* Overton, 4 Q. B. 83; 3 G. & D. 133; State *v.* Lamont, 2 Wis. 437; Morrell *v.* People, 32 Ill. 499. See for adequate form Com. *v.* Carel, 105 Mass. 582.

An indictment was held defective which merely stated that the defendant, intending to subject W. M. to the penalties for felony, went before two magistrates, and "did depose and swear," &c., setting out a deposition, which stated, that W. B. had put his hand into the defendant's pocket and taken out a £5 note, and assigning perjury upon it. The defects stated were that the indictment did not show that any charge of felony had been previously made, or that the defendant then made any charge of felony, or that any judicial proceeding was pending before the magistrate. R. *v.* Pearson, 8 C. & P. 119. Supra, § 1277.

[5] Steinson *v.* State, 6 Yerg. 531.

[6] Supra, §§ 1267, 1273, 1287.

It was averred in the indictment that after K. was duly summoned to appear before certain justices, being

holden by and before the chief judge of such court, without mention of any assistant judges.[1] And it must appear that the party administering the oath had authority.[2]

But irregularities which are curable are not fatal.

§ 1294. Curable irregularities, however, are not fatal.[3] Thus it is no defence to perjury on an affidavit that the affidavit was not filed.[4]

Otherwise as to essential conditions.

§ 1295. It is otherwise as to essential prerequisites. Thus judgment was arrested in a case where perjury was charged to have been committed in what was in effect an affidavit on an interpleader rule; and the indictment set out the circumstances of a previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act.[5] And an indictment for perjury in false swearing to a bill of equity which does not show that the bill is one which is required to be verified by oath, is insufficient.[6]

By present practice only essential averments of record need be introduced.

§ 1296. But so radically have the statutes of jeofails, and those for relaxing the old common law strictness in this respect, affected this portion of criminal pleading, that there is probably no State in which it would now be held necessary to set out the whole record of the suit in which the perjury is alleged to have been committed.

and acting as two justices of the peace in and for a county, to answer before such justices a certain information and complaint against him, of having opened his house (a beer-house) on a Sunday, for the sale of beer, after three and before five in the afternoon; that K. duly appeared before the justices at the petty sessions of a petty sessional division in the county, and that at the hearing, the defendant, being called as a witness for K., falsely swore that he had not been in the house of K. at all that day; that he had never seen a certain policeman, and had not been in B. that day, or for a fortnight before. It was ruled that it was sufficiently alleged in the indictment that the offence was one over which the justices had jurisdiction, and that it was committed in a place where they had jurisdiction. R. *v.* Shaw, L. & C. 579; 10 Cox C. C. 66.

[1] State *v.* Freeman, 15 Vt. 723.

[2] Supra, § 1251.

[3] See supra, § 1273. State *v.* Shanks, 66 Mo. 560.

[4] R. *v.* Crossley, 7 T. R. 315. Supra, § 1288. See R. *v.* Hailey, 1 C. & P. 258; R. & M. 94; State *v.* Langley, 34 N. H. 529. See State *v.* Sleeper, 37 Vt. 122. Supra, § 1289.

[5] R. *v.* Bishop, C. & M. 302.

[6] People *v.* Gaige, 26 Mich. 30. See Silver *v.* State, 17 Oh. 365.

It is generally enough to state correctly the facts showing that the court had jurisdiction, that the oath was duly administered, and that the proceedings were regular.[1]

[1] Several cases to this point have been grouped in other sections of the present chapter. In addition to these the following may be examined: Where the indictment charged perjury in a matter of traverse between the State of Tennessee and D., for an "assault and battery," it was held that this was not a sufficient charge of the jurisdiction of the court before which the case was tried. Steinson *v.* State, 6 Yerger, 531. In an indictment for perjury in taking a false oath before a regimental court of inquiry, it has been ruled in Virginia, where the statute of George II. is not in force, that the indictment ought to set forth what number of officers the court of inquiry consisted of, and what was their respective rank, so as to enable the court to discern whether the said court of inquiry was constituted according to law. Com. *v.* Conner, 2 Va. Cas. 30. An English indictment for perjury, alleged to have been committed on a writ of trial, stated the trial to have taken place before the high sheriff. It was proved that when the defendant gave evidence on the writ of trial, neither the high sheriff nor the under sheriff was present, but that the writ of trial was executed before M. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy; but the writ of trial was directed to the sheriff, and it was stated in the postea that the trial took place before him; it was held by the judges that the allegation in the indictment was supported, and that it sufficiently appeared that M. S. had authority to execute the writ of trial. R. *v.* Dunn, 1 C. & K. 730. It is not necessary, in averring the authority of an officer to administer an oath, in an indictment for perjury, to aver that he then and there had authority, if time and place had been added to the act of taking the oath before him. State *v.* Dayton, 3 Zabriskie, 49. On a conviction for perjury in Rutherford County, North Carolina, two reasons were assigned in arrest of judgment: 1st. That the indictment did not charge that the oath was taken in Rutherford County. 2d. That the evidence was not given to the court and jury, but to the jury only. The first reason was overruled, the indictment charging that "he, the said A. B., on the sixteenth of April, in the year aforesaid, in the county aforesaid, came before the said C. D., judge as aforesaid, and then and there, before the said C. D., did take his corporal oath." The part of the indictment immediately preceding stated that C. D. held the court as judge at that term in Rutherford County; the same county was inserted in the caption of the indictment, and there was none other mentioned in any part of it: the words "then and there" refer to the sixteenth of April, and to the county of Rutherford. The second reason was overruled, as the indictment charged that the oath was taken before the judge, and the evidence was thereupon given to the jurors. This, it was held, was the proper way of stating the oath. State *v.* Witherow, 3 Murph. 158. The style of the court may be sufficiently described by words which cannot apply to any other court. U. S. *v.* Deming, 4 McLean, 3; State *v.* Gallimon, 2 Iredell, 374. According to the old

4. *How, and to what Extent, the alleged False Matter is to be set out.*

§ 1297. The same rigor has not been required in this country in the setting forth of the alleged false oath of the defendant, as under the statute of Elizabeth was considered essential in England.[1] Thus, it is said that at common law it is only necessary to set forth the sub-

Verbal exactness in sworn matter not necessary.

North Carolina practice, which, as has been noticed, rejected the statute of Geo. II. where the defendant is indicted for a perjury, committed on trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment, in the proper court of the proper county, and should also set forth that indictment, or so much thereof as to show that it charged an offence committed in that county, and of which said court had cognizance, and also the traverse or plea of the defendant in that indictment, whereon the issue was joined. State *v.* Gallimon, 2 Ired. 374. And see State *v.* Keene, 26 Me. 33.

In State *v.* Gallimon, the indictment, as stated by the learned and able judge who tried the cause (Judge Gaston), averred that at a court of pleas and quarter sessions, held for the county of Cabarrus, on the third Monday of April, 1841, before John Stile, junior, B. W. Allison, William Barringer, and James Young, Esquires, justices qualified by law to hold the said court, "a certain issue, in due manner joined in said court, between the State of North Carolina and one Benjamin Erwin, upon a certain indictment depending against the said Benjamin Erwin, for assaulting and beating one Michael Holbrook, and for making an affray, came on to be tried by a jury of the county, in due manner sworn and taken for that purpose," and that "upon the trial of the said issue, James Gallimon did then and there appear, and was produced as a witness in behalf of the said State against the defendant, Benjamin Erwin," and proceeded to charge that the said James then and there took his corporal oath to testify the truth, the whole truth, and nothing but the truth, upon the said issue, "they, the said John Stile, junior, B. W. Allison, William Barringer, and James Young, Esquires, justices aforesaid, then and there having competent authority to administer the said oath;" that a certain inquiry became material on the trial of the said issue, and that thereupon the said Gallimon did corruptly, maliciously, and falsely depose, swear, and give in evidence as is therein particularly stated; and then it proceeded to falsify the testimony so given, and to aver that therein the said James did commit wilful and corrupt perjury. "The objection to the indictment," to use the language of the judge, "is, that it does not distinctly and certainly set forth the facts which show that the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof. It is a general rule that

[1] See Whart. Crim. Plead. & Prac. §§ 203–4; Whart. Crim. Ev. § 120 *a*; Wh. Prec. *in loco*; State *v.* Keene, 26 Me. 33. Infra, § 1313.

stance of the oath, and when that is done, an exact recital is not necessary;[1] hence when the article "an" was substituted for the

every indictment should charge explicitly all the facts and circumstances which constitute the crime, so that, on the face of the indictment, the court can with certainty see that the indictors have proceeded upon sufficient premises, and afterwards, when these facts and circumstances are confessed or found to be true, can behold upon the record an undoubted warrant for awarding the judgment of the law. According to this rule, the indictment in this case should have averred, as a fact, the finding of an indictment in the county court of Cabarrus against Benjamin Erwin, and should have set forth that indictment, or so much thereof as to show that it charged an offence committed within that county, and of which said court had cognizance; and also have set forth the traverse or plea of the said Benjamin, whereon the issue was joined. Had it done so, it would then have appeared upon the face of the indictment whether the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof. Nor on common law principles is the want of precision in this matter helped by the averment in the indictment, that the justices, before whom the oath was taken, had competent authority to administer said oath, for this is but the averment of a legal inference and not of a distinct fact, and an averment by the indictors, whose province it is to state facts, and who must leave legal inference to be drawn by the court."

It has been held in Iowa not necessary, in an indictment for swearing falsely before the grand jury, to aver that the person whose case was under investigation, and as to whom the defendant swore, was or was not guilty, nor to state the facts as to such offence. State *v.* Schill, 27 Iowa, 263. See infra, § 1325. In an indictment for perjury, committed by the defendant upon an examination under oath as to his sufficiency as a surety for another in a bond executed under the 4th subdivision of the 10th section of the New York "act to abolish imprisonment for debt," &c., after a conviction of the debtor and an order for his commitment under that act, it is not necessary, under the special terms of that act, to set forth facts sufficient to show that the officer who entertained the proceedings had jurisdiction to administer the oath. People *v.* Tredway, 3 Barb. 470, decided on the strength of People *v.* Phelps, 5 Wend. 10, and People *v.* Warner, 5 Wend. 271; which decisions, however, were disapproved. See supra, § 1289.

[1] R. *v.* Webster, Bell C. C. 154; 8 Cox C. C. 187.

An indictment alleged that a cause was pending in a county court, and that at the hearing it became a material question whether the plaintiff in the cause had, in the presence of the prisoner, signed at the foot of a bill of account, purporting to be a bill of account between a firm called B. & Co. and W., a receipt for payment of the amount of the bill; and that the prisoner falsely swore that the plaintiff did, on a certain day, in the presence of the prisoner, sign the receipt (meaning a receipt at the foot of the first mentioned bill of account) for the payment of the amount of the bill. The plaintiff in the county court had on other occasions signed similar receipts in the presence of the prisoner. It was ruled that the bill of account was stated and set forth in the indict-

article "the," the variance was held immaterial.[1] In a case decided in 1876, in Massachusetts, an indictment charging that the defendant swore that he had personal property in G., in the county of E., and Commonwealth of Massachusetts, was held to be sustained by proof that he swore to a written statement that he had personal property at G., in the county of E., there being proof that the statement was meant for G. in the Commonwealth of Massachusetts.[2] But a substantial variance is fatal.[3]

§ 1298. At common law, where the tenor of an affidavit is undertaken to be recited, and the recital is variant in a word or letter, thereby introducing a different word, it is fatal.[4] But where a statement of the substance and effect of an affidavit is sufficient, as is now generally the case in English and American practice, and only substance and effect are pretended to be given, evidence of the substance and effect is sufficient.[5] And where the charge is swearing to an affidavit "to the substance and effect following;" a variance, which consisted in using the word "suit" instead of "case," is immaterial.[6]

"Substance" and "effect" enough.

§ 1299. It is not necessary to set out the whole of what the defendant has sworn: only those parts alleged to be false need be stated,[7] and such parts may be lumped in one count.[8] The questions which elicited the alleged false answers are also unnecessary.[9] But alleged false statements that are averred consecutively must be proved to have been made consecutively,[10] and the substance must be given.[11]

Only alleged falsities need be pleaded.

ment with sufficient certainty. R. *v.* Webster, Bell C. C. 154; 8 Cox C. C. 187.

[1] People *v.* Warner, 5 Wend. 271; State *v.* Ammons, 8 Murph. 123.

[2] Com. *v.* Butland, 119 Mass. 317. As to variance under Massachusetts statute see Com. *v.* Terry, 114 Mass. 263.

[3] Infra, § 1313; Wh. Cr. Ev. § 120 *a*.

[4] Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; R. *v.* Leefe, 2 Camp. 134. See State *v.* Umdenstock, 43 Tex. 554.

[5] Ibid.; State *v.* Groves, Busbee, 402; Taylor *v.* State, 48 Ala. 157.

[6] State *v.* Caffey, N. C. Term R. 272; S. C., 2 Murph. 320; Whart. Cr. Pl. & Pr. § 173.

[7] Campbell *v.* People, 8 Wend. 636; Ingram *v.* Watkins, 1 Dev. & Bat. 442; State *v.* Neal, 42 Mo. 119. Infra, §§ 1305, 1325.

[8] Ibid. Infra, §§ 1301, 1322, 1325.

[9] State *v.* Bishop, 1 Chip. (Vt.) 120; Com. *v.* Knight, 12 Mass. 274.

[10] R. *v.* Leefe, 2 Camp. 134.

[11] Ibid.; Com. *v.* Lodge, 2 Grat. 579; U. S. *v.* Morgan, Morris (Iowa), 341.

In an indictment for perjury, un-

When innuendoes are necessary to make out the sense, their omission is fatal.[1]

5. *How the False Matter is to be negatived.*

Negation of false matter must be express.

§ 1300. The general averment that the defendant swore falsely, &c., upon the whole matter, will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury) to negative that which is false, and it is necessary that the indictment should thus expressly contradict the matter falsely sworn to by the defendant.[2] While it may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence, yet the word "falsely" does not import that the whole is false; and when the proper averments come to be made it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest.[3]

Several assignments may be incorporated in one count.

§ 1301. All the several particulars, in which the prisoner swore falsely, may be embraced in one count,[4] and proof of the falsity of any one will sustain the count.[5]

"Belief" must be specifically negatived.

§ 1302. In negativing the defendant's oath, where he has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that "*he well knew*" the contrary. Thus when an affidavit merely states the belief of the affiant that a larceny had

der the bankrupt law, for not giving a full and true account of the property of the petitioners, the items on the schedule need not be stated in the indictment. The allegation that the property was omitted, with intent to defraud A. and the other creditors, is sufficient. U. S. *v.* Chapman, 3 McLean, 390. See supra, § 1290.

[1] R. *v.* Yates, 12 Cox C. C. 233. Infra, § 1303; supra, § 1296.

[2] Infra, § 1323; R. *v.* Whitehouse, 3 Cox C. C. 86; State *v.* Mumford, 1 Dev. 519. Though see State *v.* Lindenburg, 13 Tex. 27.

[3] See Wh. Prec. §§ 577 *et seq.*

[4] R. *v.* Callanan, 6 B. & C. 102; 9 D. & R. 97; State *v.* Bishop, 1 Chip. 120; Com. *v.* Johns, 6 Gray, 274. Infra, § 1325; supra, § 1299.

[5] R. *v.* Hill, R. & R. 190; R. *v.* Callanan, 6 B. & C. 102; 9 D. & R. 97; State *v.* Hascall, 6 N. H. 352; Com. *v.* Johns, 6 Gray, 274; Dodge *v.* State, 4 Zabr. (N. J.) 455; De Bernie *v.* State, 19 Ala. 23; State *v.* Raymond, 20 Iowa, 582. Infra, § 1316; Whart. Crim. Ev. § 131.

been committed, the assignment of the perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged did not commit the larceny.[1]

Ambiguities may be cleared by innuendoes.

§ 1303. The assignment of perjury may, in some instances, be more full than the statement of the defendant which it is intended to contradict. When there is any doubt on the words of the oath, which can be made more clear and precise by a reference to some other matter, it may and must be supplied by an innuendo; the use of which is, by reference to preceding matter, to explain and fix the meaning more precisely;[2] but it is not allowed to add to, extend, or change the sense.[3] In a case where an objection was made to an indictment that it added, by way of innuendo, to the defendant's oath, "his house, situate in the Haymarket, in St. Martin-in-the-Fields;" without stating by an averment, recital, or introductory matter, that he had a house in the Haymarket; or, even admitting him to have such a house, that his oath was of and concerning the said house, so situated; the objection was overruled, on

[1] State *v.* Lea, 3 Ala. 602. See, as to whether *scienter* is generally to be averred, Wh. Cr. Pl. & Pr. § 164. In State *v.* Lindenburg, 13 Tex. 27, a mere negation of the belief was held enough, which is sound law; and see supra, § 1246.

[2] R. *v.* Taylor, 1 Camp. 404; R. *v.* Yates, 12 Cox C. C. 233. After conviction a motion to arrest judgment was made on an indictment, which alleged that a petition was presented to the House of Commons against the return of B., on the ground of bribery; that, shortly before his election, to wit, on the 6th July, B. and C. went to the house of the defendant to solicit his vote; that, at the time of the petition, it was a material question whether at the time when B. and C. went to the defendant's house, a certain act of bribery took place; that the defendant was a witness sworn to speak the truth of and concerning the premises, and he deposed touching the election and the matter of the petition, that, shortly before B.'s election, B. and C. came on a canvassing visit to the defendant's house, and that the act of bribery then took place (innuendo), thereby meaning that at the time when B. and C. went to the defendant's house as aforesaid, the act of bribery was committed. It was held by the court: first, that the allegation that the defendant deposed "touching the election," &c., sufficiently pointed to the matter whereupon the defendant was sworn as a witness; secondly, that the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shown to refer to that particular time and no other. R. *v.* Verrier or Virrier, 4 P. & D. 161; 12 A. & E. 317.

[3] R. *v.* Griepe, 1 Ld. Raym. 256. See supra, §§ 1214, 1220.

the ground that the innuendo was only a more particular description of the same house which had been previously mentioned.[1]

6. *Materiality.*

§ 1304. It must be either averred on the face of the indictment that the matter alleged to be false was material;[2] or such materiality must appear on record;[3] and the latter is sufficient even where the bare averment of ma-

Materiality must appear on record.

[1] R. *v.* Aylett, 1 T. R. 63.

In the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was held good.

In a case of perjury committed in an affidavit, it was held that a word which had been omitted by accident in the original document was improperly stated in the indictment as though it had been in the original document, and that such word ought to have been inserted and explained by an innuendo. R. *v.* Taylor, 1 Camp. 404. If an innuendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and will be bad after verdict. R. *v.* Griepe, 1 Ld. Raym. 256.

Where it was alleged to be a material question whether or not P., the defendant, ever got one M. W. to write a letter for her; and in the averments, negativing the truth of what was sworn, the indictment alleged that, in truth and fact, the said P. did get the said M. W., and that when, on her cross-examination at the trial, when the alleged perjury was committed, she was asked whether she had ever got a Mr. M. W. (who was then pointed out to her in court) to write a letter for her: it was held, that the averments were sufficient, without any allegation connecting the "one Milo Williams" named in the allegations of materiality, and the averments negativing the truth of what was sworn, with the "Mr. Milo Williams" named in the subsequent part of the indictment. R. *v.* Bennett, 3 C. & K. 124; 2 Den. C. C. 241; T. & M. 567.

[2] R. *v.* Nicholl, 1 B. & Ad. 21; R. *v.* Stolady, 1 F. & F. 518; R. *v.* Cutts, 4 Cox C. C. 435; R. *v.* Bartholomew, 1 C. & K. 366; R. *v.* Tate, 12 Cox C. C. 7; State *v.* Chandler, 42 Vt. 446; Com. *v.* Byron, 14 Gray, 31; Wood *v.* People, 59 N. Y. 117; State *v.* Beard, 1 Dutch. 384; State *v.* Thrift, 30 Ind. 211; Morrell *v.* People, 32 Ill. 499; People *v.* Collier, 1 Mich. 137; People *v.* Gaige, 26 Mich. 30; Pickering's case, 8 Grat. 629; State *v.* Kennerly, 10 Rich. 152; Hembree *v.* State, 52 Ga. 242; State *v.* Holden, 48 Mo. 93; State *v.* Shanks, 66 Mo. 560.

[3] 2 Stark. N. P. C. 428, n.; R. *v.* Dunn, 1 D. & R. 10; R. *v.* Thornhill, 8 C. & P. 575; R. *v.* Goodfellow, C. & M. 569; R. *v.* Harvey, 8 Cox C. C. 99; State *v.* Chamberlain, 30 Vt. 559; Com. *v.* Knight, 12 Mass. 274; Campbell *v.* People, 8 Wend. 636; Wood *v.* People, 59 N. Y. 117; State *v.* Dayton, 3 Zabr. 49; Stofer *v.* State, 3 W. Va. 692; Weathers *v.* State, 2 Blackf. 278; State *v.* Hall, 7 Blackf. 25; State *v.* Dodd, 3 Murph. 226; Hinch *v.* State, 2 Mo. 158; Hendricks *v.* State, 26 Ind. 493; Galloway *v.* State, 29 Ind. 442. See State *v.* McCormick, 52 Ind. 169.

teriality is defective.[1] When the first alternative, that of the allegation of materiality, is taken, it is sufficient to charge generally that the false oath was material on the trial of the issue in which it was taken; it is not necessary to show particularly how it was material.[2] And this is the case though the record does not itself show that the false oath was material.[3] But the averment of materiality does not avail when the record shows immateriality.[4]

An express averment that a question is material lets in evidence to prove it to be so.[5]

[1] U. S. *v.* McHenry, 6 Blatch. 503.

[2] R. *v.* Dowlin, 5 T. R. 311; R. *v.* Gardiner, 8 C. & P. 737; 2 Mood. C. C. 95; State *v.* Mumford, 1 Dev. 519; State *v.* Maxwell, 28 La. An. 361; R. *v.* Scott, 13 Cox C. C. 594.

It is not sufficient to aver that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. R. *v.* Stolady, 1 F. & F. 518.

An averment that at a court of admiralty session K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the trial it then and there became and was made a material question, whether, &c., are sufficient averments that the perjury was committed on the trial of K. for the murder, and that the question on which the perjury was assigned was material on that trial. R. *v.* Dowlin, 5 T. R. 311; S. C. (at Nisi Prius) Peake, 170.

It is not necessary to set forth so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became material. Ibid.

[3] State *v.* Sleeper, 37 Vt. 122; People *v.* Burroughs, 1 Parker C. R. 211.

[4] People *v.* Gaige, 26 Mich. 30.

The averment of an indictment was that L. stood charged by P., before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on land in pursuit of game, on the 12th August, 1843; and that T. S. proceeded to the hearing of the charge; and that, upon the hearing of the charge, the defendant falsely swore that he did not see L. during the whole of the 12th August, meaning that he did not see L. at all on the 12th day of August, in the year aforesaid; and that, at the time he swore as aforesaid, it was material or necessary for T. S., so being such justice, to inquire of, and be informed by the defendant, whether he did see L. at all during the 12th day of August, in the year aforesaid. It was held that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question and received this answer. R. *v.* Bartholomew, 1 C. & K. 366.

[5] R. *v.* Bennett, 2 Den. C. C. 241; 5 Cox C. C. 207; 3 C. & K. 124; R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200.

An indictment sufficiently charges materiality, by averring that upon a

It is not enough to say that "it became and was material to ascertain the truth of the matter hereinafter alleged to be sworn to." [1]

certain trial it became and was a material question whether certain chattels sold by the defendant to another person were so sold "in part payment for" a certain debt, or "in part payment for" a certain other debt; and that the defendant falsely swore that they were so sold in part payment of the debt first named; without adding anything about the other debt. Com. v. Johns, 6 Gray, 274.

An indictment against a person summoned as a juror, for having falsely sworn to his having formed or expressed an opinion as to the guilt or innocence of a person on trial, must state that it became material to ascertain whether the juror had formed and expressed an opinion of the guilt or innocence of such person, and that an issue as to the qualifications of the jurors generally, or of the juror in particular, had been made by the parties, and submitted to the court. State v. Moffatt, 7 Humph. 250.

Where, in an indictment for perjury, it appeared that the defence set up to a criminal complaint amounted to an alibi; that the testimony of a particular witness who was examined thereon, and whose evidence was alleged to be false, tended to establish this defence; and it was averred that each and every part of the testimony became and was material to the defence; it was held, that the materiality of the alleged false testimony was sufficiently stated in the indictment. Com. v. Flinn, 8 Cush. 525.

An indictment against P. for perjury was in four counts, each of which stated, that for P. on his retainer V. had done business as attorney; that V. delivered his bill, and after the expiration of one month from such delivery took out a summons before a judge, under 6 & 7 Vict. c. 73, to show cause why the bill should not be referred for taxation; that it then and there became and was material in showing cause to ascertain whether P. did retain V.; and that he, before showing cause, made an affidavit, denying that he had retained V., and assigned perjury on such affidavit. Each of the counts concluded, "and so the jurors aforesaid did say, that the defendant did commit perjury." The record stated the writ of venire to try whether the defendant "be guilty of the perjury and misdemeanor aforesaid," and the verdict, that "he is guilty of the perjury and misdemeanor aforesaid," and a general judgment thereon. It was ruled, that the fact of the retainer by the defendant was a material ingredient in the inquiry, and was sufficiently averred; and that the averment at the conclusion of each count was immaterial, and might be struck out as surplusage. Ryalls v. R. (in error) 11 Q. B. 781; 18 L. J. M. C. 69; 3 Cox C. C. 254 — Exch. Cham. affirming the judgment of the Q. B.; S. C., 12 Jur. 458; 17 L. J. M. C. 93.

An assignment was that the defendant, upon his oath, did swear "that he then thought that the words written in red ink were not his writing, and that he had not in the presence of W. D. written the words so written in red ink, whereas, in truth and in fact, the words so written in red ink were the defendant's writing, and whereas also, in truth and in

[1] R. v. Goodfellow, C. & M. 569.

IX. EVIDENCE.

§ 1305. The fact that the defendant was duly sworn must be substantively proved.[1] An indictment alleging that the respondent was sworn, and took her *corporal oath* to speak the truth, the whole truth, &c., is sustained by evidence of the oath taken in the usual form.[2] But if it be stated that the defendant was sworn on the gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will at common law be fatal.[3] But if it be not alleged that he was sworn in any other manner, proof that he was sworn generally, and was examined, will support this allegation.[4]

Oath must be correctly averred and proved.

§ 1306. Here must be kept in mind the distinction between evidence when *preceded* by the oath, and evidence when *followed* by the oath. According to the Roman common law, the oath must close the testimony. The witness swears that all the foregoing testimony is true. According to the practice of the English common law, the witness is sworn beforehand to the testimony he subsequently gives. Where the former practice exists, the witness is allowed to review the whole of his testimony before the jurat; and as he has thus an opportunity to revise each point that he accepts and swears to, there is less objection to prosecuting him for perjury in particular statements. Yet even here the perjury, viewing the question philosophically, is to be gauged by the whole of the testimony thus given.[5] Under the English common law practice,

Whole of testimony may be taken into consideration.

fact, he then and there, when he so deposed as aforesaid, thought that the words so written in red ink as aforesaid were his writing." It was ruled, that perjury might be assigned upon the deposition of the defendant. And it was ruled, further, that the materiality of the allegation that the defendant wrote the words in the presence of W. D. being averred, the court would not inquire into it. R. *v.* Schlesinger, 10 Q. B. 670; 2 Cox C. C. 200.

[1] See Hitesman *v.* State, 48 Ind. 473.

[2] State *v.* Norris, 9 N. H. 96; Resp. *v.* Newell, 3 Yeates, 407. See supra, § 1287.

[3] R. *v.* M'Carther, Peake (N. P.), 155; State *v.* Porter, 2 Hill (S. C.), 611.

[4] R. *v.* Rowley, R. & M. (N. P.) 299. See Van Dusen *v.* People, 78 Ill. 645.

[5] Die Vollendung tritt ein, sobald die ganze Eidesformel von dem Schwörenden gesprochen ist. Berner, Lehrbuch, p. 560.

this precaution is peculiarly important. A witness examined *vivâ voce* may inadvertently, or through confusion, say many things to which he would not deliberately swear, had he an opportunity of final revision, and which, in subsequent portions of his testimony, he may qualify or recall. Hence, on the trial, he should have the privilege of proving the whole of his testimony, so as to show, if possible, that the alleged falsehood was in other portions of his examination recalled or toned down.[1] But it is not necessary for the prosecution to put in the whole of the defendant's evidence.[2]

Substance of assignment must be proved.

§ 1307. It is necessary, at all events, for the prosecution to prove in substance the whole of what was set out in a particular assignment, as having been sworn by the defendant referrible to such assignment; proving a part only, it seems, is not sufficient.[3]

One witness enough to prove testimony.

§ 1308. The evidence of a single witness is sufficient to prove that the defendant swore to the facts charged in the indictment.[4]

Answers in chancery and depositions to be proved by jurat.

§ 1309. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it,[5] to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is in the defendant's handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose.[6] The same practice applies to depositions in equity, and other similar cases, at least so as to throw upon the defendant the onus of proving that he was personated.[7]

[1] See supra, §§ 1244, 1245.

[2] Dodge *v.* State, 4 Zabr. 455.

It is sufficient to prove all the evidence given by the defendant, referrible to the fact on which perjury is assigned. R. *v.* Rowley, R. & M. 299.

[3] R. *v.* Jones, Peake (N. P.), 37. See infra, § 1322.

[4] Com. *v.* Pollard, 12 Met. 225; State *v.* Hayward, 1 N. & McC. 546; State *v.* Wood, 17 Iowa, 18. As to admissibility of judge's notes, see R. *v.* Child, 5 Cox C. C. 197; R. *v.* Morgan, 6 Cox C. C. 107. See, as to subornation of perjury, Com. *v.* Douglass, 5 Met. 241.

[5] See R. *v.* Laycock, 4 C. & P. 326.

[6] R. *v.* Morris, 2 Burr. 1189; R. *v.* Benson, 2 Camp. 508.

[7] 2 Burr. 1189.

On an indictment for perjury, setting forth, with proper innuendoes, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant,

§ 1310. It makes no difference that either before or after the oath was administered the statements of the witness made, when examined *vivâ voce*, were reduced to writing and signed by the witness. In either case parol testimony of the evidence is admissible.[1]

Written evidence may be proved by parol.

§ 1311. Secondary evidence is admissible of a lost written instrument on which perjury is assigned.[2]

So of lost instrument.

§ 1312. Where the alleged false oath was in a common law proceeding, after proof of the identity of the defendant with the person swearing to it,[3] the certificate of the magistrate or officer before whom the affidavit was sworn to, on proof of the handwriting of his signature, is competent and sufficient *primâ facie* evidence of the administration of the oath at the alleged time and place to the defendant.[4]

Jurat of officer administering oath is proof of oath.

§ 1313. The proof must substantially support the indictment;[5]

he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition, signed by him, is the substance. R. *v.* Thomas, 2 C. & K. 806.

[1] Com. *v.* Carel, 105 Mass. 582; Com. *v.* Hatfield, 107 Mass. 227.

[2] R. *v.* Milnes, 2 F. & F. 10.

[3] This is essential. R. *v.* Barnes, 10 Cox C. C. 539.

In this case, on an indictment against P. for perjury committed in an affidavit, alleged to have been made by him in order to obtain a marriage license, the evidence showed that some person went to the vicar-general's office and gave certain instructions, in accordance with which an affidavit was filled up by one of the clerks, which, after having been read over to the applicant, was signed by him. B.'s father proved that the signature to the affidavit was in his son's handwriting. The custom of the vicar-general's office was for the clerk who filled up the affidavit to go with the applicant, and get him to swear to it before a surrogate. Neither the clerk in the vicar-general's office, nor the surrogate, could identify B. as having sworn to the affidavit, and although the clergyman who married B. recognized him as being the person who was married under the license granted on the strength of the affidavit signed by him, yet he did not receive it from him on the day of the marriage, but he received it on the previous day from the verger of his church. It was ruled that further proof of the identity of the person who swore to the affidavit with the person who signed it was necessary before B. could be convicted of perjury assigned on a false statement contained in it. Ibid.

[4] R. *v.* Spencer, 1 C. & P. 260; R. & M. 97; Com. *v.* Warden, 11 Met. 406. As already seen (supra, § 1309), in an answer in chancery, the practice is to prove the fact of swearing, the handwriting of defendant, and the jurat of the officer administering the oath. R. *v.* Morris, 1 Leach, 60; R. *v.* Benson, 2 Camp. 508; R. *v.* Morris, 2 Burr. 1189.

[5] Wh. Cr. Ev. § 116; R. *v.* Leefe, 2 Camp. 134.

any substantial variance in this respect will be fatal.[1] Thus where the indictment charged that the defendant swore "that one G. did not interrupt a constable in driving certain cattle to G.'s house," and the evidence was, that the defendant swore "that G. did assist in driving the cattle from the officer," it was held that the evidence did not support the charge.[2] But substantial conformity is enough.[3]

Substantial variance as to evidence is fatal.

§ 1314. Any variance, as has been already said, in the setting forth of a record is at common law fatal,[4] though under recent statutes mere formal variances are cured by verdict, or may be amended on trial.[5]

Records must be literally given.

The day on which the offence occurred, being matter of record, must at common law be correctly laid; and if there be a variance from the record on this point, the indictment is bad.[6]

A failure to prove any substantial averment (*e. g.* that a summons issued in the original case) is fatal.[7]

§ 1315. It is not necessary to prove the appointment of the officer who administered the oath, it being only requisite to prove that he performed the duties of a certain

Not necessary to prove ap-

[1] Supra, § 1297; Whart. Crim. Ev. § 120 *a*. See R. *v.* Taylor, 1 Camp. 404; and see 2 Ibid. 509; 1 Stark. N. P. C. 518; 1 T. R. 327, 340, n.; 14 East, 218, n.; R. *v.* Stoveld, 6 C. & P. 489; R. *v.* Cooke, 7 C. & P. 559.

[2] State *v.* Bradley, 1 Hayw. 403, and 1 Hayw. 463.

An allegation that A. and four others committed an assault on B. is not proved by the production of a record which sets forth a bill of indictment charging A. and five others with an assault on B. State *v.* Harvell, 4 Jones, N. C. 55.

[3] See supra, § 1297; and see Harris *v.* People, 64 N. Y. 148; Taylor *v.* State, 48 Ala. 157.

[4] See Whart. Crim. Ev. § 115; R. *v.* Christian, C. & M. 388; R. *v.* Browne, 3 C. & P. 572; M. & M. 315; R. *v.* Dunn, 2 Mood. C. C. 297; 1 C. & K. 730; R. *v.* Stoveld, 6 C. & P. 489; State *v.* Tappan, 1 Foster (N. H.), 56; State *v.* Ammons, 3 Murph. 123. Thus, an allegation of perjury committed upon a trial for the larceny of property of W. G. M. G., or his son M., is not sustained by a record of an indictment for the larceny of property of W. G. M. G.'s son M. Brown *v.* State, 47 Ala. 47.

[5] State *v.* Bailey, 11 Foster (N. H.), 521.

[6] U. S. *v.* Bowman, 2 Wash. C. C. 326; U. S. *v.* M'Neal, 1 Gallis. 387; *contra*, People *v.* Hoag, 2 Parker C. R. 36. See Whart. Cr. Pl. & Pr. § 135; Whart. Crim. Ev. § 103. Supra, § 1290.

[7] R. *v.* Whybrow, 8 Cox C. C. 438; R. *v.* Newall, 6 Cox C. C. 21; R. *v.* Hurrell, 3 F. & F. 271. See R. *v.* Dunn, 2 Mood. C. C. 297; 1 C. & K. 730; R. *v.* Smith, L. R. 1 C. C. 110. Infra, § 1326; supra, § 1263.

office,[1] and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case.[2] And the officer himself may be called to prove that he was acting as such.[3] Appointment of officer.

Swearing before a clerk in open court is equivalent to swearing before the court.[4]

§ 1316. Some one or more of the assignments of perjury must be sustained by proper evidence, and the assignments proved must have been material to the matter before the court at the time the oath was taken.[5] It is not necessary, therefore, as will be seen, to support all the assignments in any given count. The proper course of pleading is to negative specially each part of the defendant's testimony which is alleged to be false; and if any material assignment is adequately proved, it is enough to support the indictment,[6] if falsity be satisfactorily shown.[7] So on an indictment for obtaining goods on false pretences, it is sufficient to prove on trial any one of the several assignments of fraud which a given count may contain.[8] But the attention of the jury must be called to each specific assignment as an independent issue.[9] Proving one assignment is sufficient.

§ 1317. When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false.[10] Thus, upon an indictment for per- Defendant's oath to the contrary not

[1] R. v. Newton, 1 C. & K. 469; R. v. Verelst, 3 Camp. 432; R. v. Howard, 1 M. & R. 187; Keator v. People, 32 Mich. 484; Whart. Crim. Ev. §§ 164, 835. Supra, § 1263.

[2] Supra, § 1264; Whart. Crim. Ev. §§ 164, 835; R. v. Roberts, 14 Cox C. C. 101; State v. Hascall, 6 N. H. 352; State v. Gregory, 2 Murph. 69.

[3] Ibid.

[4] Server v. State, 2 Blackf. 35. Supra, § 1287.

[5] Dodge v. State, 4 Zabr. 455. Supra, § 1301; infra, § 1322.

[6] Lord Raymond, 886; 2 Camp. 138-9; Cro. C. C. 7th ed. 622; R. v. Hemp, 5 C. & P. 468; State v. Bishop, 1 Chip. (Vt.) 120; State v. Hascall, 6 N. H. 358; Com. v. Johns, 6 Gray, 274; Com. v. McLaughlin, 122 Mass. 449; Dodge v. State, 4 Zabr. 455. See Harris v. People, 64 N. Y. 148. See supra, § 1301. Whart. Crim. Ev. § 131.

[7] Infra, § 1322.

[8] Supra, § 1218.

[9] Wood v. People, 59 N. Y. 117.

[10] R. v. Hughes, 1 C. & K. 519; U. S. v. Mayer, Deady, 127; Schwartz v. Com. 27 Grat. 1025. Whart. Crim. Ev. § 387.

sufficient proof of falsity.

jury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed the direct negative to everything he had sworn before the court; but Gurney, B., held this not sufficient *per se* without other evidence to show that the statement before the court was true, and that before the magistrate false.[1] So where on trial upon an indictment for perjury in swearing falsely to a deposition, the facts stated in the deposition appeared to be true, but after making the deposition, the deponent had testified on the stand that they were not true; it was held, that the prisoner in his defence was not estopped by his *vivâ voce* testimony from showing the verity of the facts stated in the deposition.[2]

Facts admissible to infer corrupt motive.

§ 1318. Evidence is admissible to show that the motives which actuated the defendant were fraudulent or corrupt; as, for instance, that his object was to coerce the settlement of a civil claim.[3] For the same purpose it is admissible to prove other cognate perjuries.[4]

One witness not enough to prove falsity.

§ 1319. The rule that the testimony of a single witness is not sufficient to negative the alleged false oath is not merely technical, but is founded on substantial justice. There must be either two witnesses to prove such falsity, or one witness with material and independently established corroborative facts.[5] Evidence confirmatory of that one witness, in some slight particular only, is not sufficient to warrant a conviction.[6] And where perjury was assigned upon a statement made by the prisoner on oath, on a trial at *nisi prius*, that in June, 1851, he owed no more than one quarter's rent to his landlord, and the prosecutor swore that the prisoner owed five quarters' rent at that time, and to corroborate this a witness

[1] R. *v.* Wheatland, 8 C. & P. 238. See Cothran *v.* State, 39 Miss. 541.

[2] State *v.* J. B. 1 Tyler, 269.

[3] Supra, § 1245; R. *v.* Munton, 3 C. & P. 498; State *v.* Hascall, 6 N. H. 352.

[4] State *v.* Raymond, 20 Iowa, 582. Wh. Cr. Ev. § 53.

[5] R. *v.* Gardner, 8 C. & P. 737; R. *v.* Boulter, 2 Den. C. C. 396; 5 Cox C. C. 543; R. *v.* Roberts, 3 C. & K. 607; R. *v.* Braithwaite, 8 Cox C. C. 254; R. *v.* Hook, 8 Cox C. C. 5; U. S. *v.* Wood, 14 Pet. 430; Crusen *v.* State, 10 Oh. St. 258; State *v.* Raymond, 20 Iowa, 582; State *v.* Heed, 57 Mo. 252.

[6] R. *v.* Yates, 1 C. & M. 132; 2 Russ. on Cr. 6th Am. ed. 650; Champney's case, 2 Lewin C. C. 258; R. *v.* Boulter, 2 Den. C. C. 396; 5 Cox C. C. 543; State *v.* Buie, 43 Tex. 532.

was called who proved that in August, 1850, the prisoner admitted to him that he owed his landlord three or four quarters' rent, it was held that this was not a sufficient corroboration.[1] But one witness may be adequately sustained by the defendant's own letters and declarations,[2] as well as by independent corroborative material facts.[3]

Credibility of witnesses for jury.

§ 1320. The *credibility* of the witnesses is for the jury. They are not to be excluded because *participes criminis*.[4]

[1] R. *v.* Boulter, 9 Eng. L. & Eq. 537; 5 Cox C. C. 543; 3 C. & K. 236; 2 Den. C. C. 396. See also R. *v.* Parker, C. & M. 639. See Whart. Cr. Ev. § 387.

[2] R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Webster, 1 F. & F. 515; R. *v.* Hook, D. & B. 606; 8 Cox C. C. 5. See R. *v.* Champney, 2 Lew. 258; R. *v.* Towey, 8 Cox C. C. 328; U. S. *v.* Wood, 14 Peters, 430; Dodge *v.* State, 4 Zabr. 455; State *v.* Moliere, 1 Dev. 263.

P., a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore, on the hearing, that he knew nothing of the matter except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. P. was indicted for perjury, and the perjury was assigned on this last allegation, and the evidence to prove its falsehood was that P., when laying the information, said that "he had seen four men leave the house after eleven," and that he could swear to one as W. On two other occasions P. made a similar statement to two other witnesses, and W. and others did, in fact, leave the house after eleven o'clock on the night in question; that on the hearing P. acknowledged that he had offered to smash the case for 30*s.*; that he had talked, in the presence of another witness, of making the publican give him money to settle it; and he had, in fact, offered to the publican to settle it for £1, and had said that he had received 10*s.* to smash the case, and was to have 10*s.* more. It was ruled that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. R. *v.* Hook, Dears. & B. C. C. 606; 8 Cox C. C. 5.

Where P. was charged with having falsely sworn that certain invoices bearing certain dates were produced by her to C., the only witness called was C., who swore that she had not produced those invoices, but that she had produced others of the dates of which he made a memorandum at the time. It was held that the memorandum was a sufficient corroboration upon which to convict. R. *v.* Webster, 1 F. & F. 515.

[3] R. *v.* Lee, 2 Russ. on Cr. 545; R. *v.* Gardner, 2 Mood. C. C. 95; R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Verrier, 12 Ad. & El. 317; R. *v.* Hare, 13 Cox C. C. 174; R. *v.* Roberts, 2 C. & K. 607; R. *v.* Braithwaite, 8 Cox C. C. 254; 1 F. & F. 639; R. *v.* Boulter, 9 Eng. L. & Eq. 537; 2 Den. C. C. 396; 5 Cox C. C. 543; Com. *v.* Parker, 2 Cush. 212; Com. *v.* Pollard, 12 Met. 225; Hendricks *v.* State, 26 Ind. 493; State *v.* Raymond, 20 Iowa, 582; Crusen *v.* State, 10 Oh. St. 258; State *v.* Hayward, 1 N. & Mc. 546. See fully Whart. Cr. Ev. § 387.

[4] Wh. Cr. Ev. § 439. See infra, § 1330.

When falsity is proved, the burden is on the defendant to show that it arose from surprise, inadvertence, or mistake, and not from a corrupt motive.[1]

Witness may be dispensed with when there is adequate documentary falsification.

§ 1321. The cases in which a living witness to the *corpus delicti* of the defendant, in a prosecution for perjury, may be dispensed with, are: in cases where a person is charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken corruptly; in cases where the party has been charged with taking an oath contrary to what he must necessarily have known to have been the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.[2]

Some one assignment should be adequately falsified.

§ 1322. Where an indictment contains several assignments of perjury, it is not sufficient to disprove all of them by one witness; since, in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, to negative the truth of the matter contained in such assignment.[3] It is not necessary, however, that *every* fact which goes to make up any particular assignment of perjury should be so disproved.[4] There can be no statement, however false, that does not contain some element of truth.

Necessary only that testimony should be substantially negatived.

§ 1323. Nor is it requisite that the false testimony set forth in the indictment should be in every point and shade squarely negatived and falsified by the prosecution, for if so, no conviction of perjury could be had, it being difficult to conceive, in matters of moral proof, of any

[1] State *v.* Chamberlain, 30 Vt. 559.

[2] U. S. *v.* Wood, 14 Peters, 430.

[3] 2 Russ. on Cr. 6th Am. ed. 653; 3 Greenl. on Ev. § 198; R. *v.* Roberts, 2 C. & K. 607; Whart. Crim. Ev. § 387.

[4] R. *v.* Parker, C. & M. 639; R. *v.* Verrier, 12 Ad. & El. 317; R. *v.* Yates, C. & M. 132; R. *v.* Mudie, 1 M. & R. 128.

two propositions as exactly and absolutely opposite. It is sufficient if the *effect* of the defendant's testimony is shown to have been false. Thus a false statement, on an affidavit justifying bail, to the effect that the witness owned certain parcels of land, is perjury, if he did not own some of the parcels, though the value of others of the parcels, which he did own, was sufficient to cover the amount of the bail for which he offered himself.[1]

As has been already seen, there may be a negation of a false statement of opinion, of a false statement of an inference, and of a false statement of unreal incidents to a real fact.[2]

But one material and salient point, at least, assigned as perjury, must be proved to have been false.[3]

Where the false oath alleged was that the prisoner had sworn that he had not voted at the election, and the assignment of the perjury was that he had voted previously at said election, at the 4th Ward, "at the house of T. L. W. in said ward," without stating that he had voted before a board of officers duly constituted and authorized according to law, or that any lawful election had been appointed; it was held that the assignment was too general and uncertain, not being of a character which permitted specific proof or disproof. It was further said, that in the absence of any averment to that effect, it would not be inferred that the election was lawfully held at the place named.[4]

Perjury not to be prosecuted during pendency of civil suit

§ 1324. It should not be forgotten, that as the policy of the law forbids a witness in a civil suit from being made infamous, so far as respects that suit, through a conviction for perjury obtained upon the testimony of a party to such suit, the English courts will not permit a wit-

[1] Com. *v.* Hatfield, 107 Mass. 227. See supra, §§ 1277, 1300.

[2] Supra, §§ 1246 *et seq.*; R. *v.* Hook, supra, § 1319.

[3] R. *v.* Tucker, 2 C. & P. 500.

P. having sworn that he did not enter into a verbal agreement with B. and C. for them to become joint dealers and copartners in the trade or business of druggists, was indicted for perjury, and it appeared that, in fact, B. was a druggist, keeping a shop with which P. had nothing to do; but that P. and C. being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he agreeing to divide profits and losses with P. & C. It was held that this did not support the indictment, as this was not the sort of partnership denied by P. upon oath. R. *v.* Tucker, 2 C. & P. 500.

[4] Burns *v.* People, 59 Barb. 531.

In which alleged false oath was taken.

ness, under such circumstances, to be excluded from the witness-box by an intermediate conviction for perjury.[1] On the same principle, and to suppress the same evil, it has been held in Pennsylvania that an indictment for false swearing to an affidavit of defence does not lie until the case in which the affidavit is filed is terminated.[2] In England the present practice is to postpone the trial for perjury until the cause out of which it arises is determined,[3] in order to keep the testimony of the witness intact.

Entire facts connected with false evidence admissible.

§ 1325. All the facts necessary to the explanation of the evidence are admissible. Thus on the trial of an indictment for perjury alleged to have been committed on the trial of an assault, all the evidence that was admissible on the trial of the indictment for the assault is admissible, if relevant, on the trial for perjury.[4] Where a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury as set forth in the indictment, such paper is proper evidence at the trial.[5]

At common law entire record should be proved.

§ 1326. In a trial at *nisi prius*, on an indictment for perjury, the *postea* must be produced by the plaintiff.[6] At common law, generally the entire record should be put in evidence.[7] But where the proceedings were in any way collateral, and there is parol proof of regularity, it is not necessary that all the original papers should be produced or exemplified.[8] Nor need there be proof of final judgment when the *postea* is produced.[9]

Character of defendant for truth admissible.

§ 1327. As a defence, character for truthfulness may be set up; and Lord Denman once permitted the following questions: "What is the character of the defendant for veracity and honor?" and "Do you consider him a man likely to commit perjury?"[10]

[1] See 2 Russ. on Cr. 6th Am. ed. 654.

[2] Com. *v.* Dickinson, 5 Penn. L. J. 164.

[3] R. *v.* Simmons, 8 C. & P. 50; R. *v.* Ashburn, 8 C. & P. 50. See Peddell *v.* Rutter, 8 C. & P. 337. And as to continuance see more fully Whart. Cr. Pl. & Pr. §§ 584 *et seq.*

[4] R. *v.* Harrison, 9 Cox C. C. 503.

[5] Osburn *v.* State, 7 Ham. (Part 1st) 212.

[6] Resp. *v.* Goss, 2 Yeates, 479.

[7] Porter *v.* Cooper, 6 C. & P. 354.

[8] R. *v.* Turner, 2 C. & K. 732; R. *v.* Smith, L. R. 1 C. C. 110; 11 Cox C. C. 10.

[9] Bull. N. P. 243.

[10] R. *v.* Hemp, 5 C. & P. 468. See Whart. Crim. Ev. § 60.

X. ATTEMPTS TO COMMIT PERJURY.

§ 1328. An attempt to commit perjury is indictable [1] on the same reasoning as are attempts to commit other offences. And when the complete offence of perjury is not proved (as where the false oath is taken before an incompetent officer, the defendant believing him to be competent), the defendant may be indicted for the attempt.[2] Attempts to suborn witnesses, and to suppress testimony, will be independently considered.[3]

Attempt at perjury indictable.

XI. SUBORNATION OF PERJURY.[4]

§ 1329. To constitute subornation of perjury, which is an offence at common law, the party charged must procure the commission of the perjury, by inciting, instigating, or persuading the witness to commit the crime.[5] Perjury must have been actually committed.[6] The suborner must be aware of the intended corruptness on part of the person suborned. Thus though a party, who is charged with subornation of perjury, knew that the testimony of a witness

To subornation corrupt motive is essential.

[1] St. Dig. C. L. art. 138; R. *v.* Taylor, Holt, 534. See R. *v.* Stone, Dears. 251; Chapman's case, 1 Den. C. C. 432; Hodgkins *v.* R. L. R. 1 C. C. R. 212. Supra. §§ 179 *et seq.*, 185.

[2] R. *v.* Stone, Dears. 251; 22 Eng. L. & Eq. 593.

[3] Infra, § 1332.

[4] For forms of indictment see Wh. Prec., as follows: —

(597.) Subornation of perjury in a prosecution for fornication, &c.

(598.) Subornation of perjury on a trial for robbery, where the prisoner set up an alibi.

(599.) Subornation of perjury in an action of trespass.

(600.) Corruptly endeavoring to influence a witness in the U. S. courts.

(601.) Endeavoring to entice a witness to withdraw himself from the prosecution of a felon.

(602.) Persuading a witness not to give evidence against a person charged with an offence before the grand jury.

(603.) Inducing a witness to withhold his evidence as to the execution of a deed of trust, in Virginia.

(604.) Endeavoring to suborn a person to give evidence on the trial of an action of trespass, issued in the Supreme Judicial Court of Massachusetts.

(605.) Soliciting a woman to commit perjury, by swearing a child to an innocent person, the attempt being unsuccessful.

(606.) Soliciting a witness to disobey a subpœna to give evidence before the grand jury.

[5] 1 Hawk. c. 69, s. 10; 2 Russ. on Cr. (6th Am. ed.) 596; R. *v.* Reilley, 2 Leach, 509; U. S. *v.* Staats, 8 How. 41; Com. *v.* Douglass, 5 Met. 241. See Com. *v.* Smith, 11 Allen, 243.

[6] Com. *v.* Maybush, 29 Grat. 857.

whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.[1]

Testimony must be material.

§ 1330. In subornation of perjury, the same rules as to materiality of testimony prevail as in perjury.[2] Hence, in trials of this class, a perjured witness, who claims to have been suborned, is not sufficient, without corroboration, to procure the conviction of the alleged suborner.[3]

Indictment must aver *scienter*.

§ 1331. The *scienter* must be averred; and it must be also averred that the false oath was procured to be used as testimony in a court having jurisdiction.[4] But it is enough for the indictment to aver that the defendant "unlawfully, wilfully, wickedly, feloniously, and corruptly did persuade, procure, and suborn" the witness to "commit said perjury in manner and form aforesaid." The term "knowingly" is thereby adequately implied.[5]

XII. ATTEMPTS TO SUBORN: DISSUADING WITNESS FROM APPEARING.

Attempts at subornation are indictable.

§ 1332. Although, in order to constitute the technical offence of subornation, the person cited must actually take the false oath, yet it is plain that attempts, though unsuccessful, to induce a witness to give particular testimony, irrespective of the truth,[6] even though such witness had not been served with a subpœna, are indictable.[7]

And so of dissuading witness

§ 1333. To dissuade a witness from attending a trial is not merely a contempt of court, but may be punishable by indictment, irrespective, it is said, of materiality,[8]

[1] Com. *v.* Douglass, 5 Met. 241; Stewart *v.* State, 22 Oh. St. 477.

[2] Com. *v.* Smith, 11 Allen, 243.

[3] People *v.* Evans, 40 N. Y. 1. So in Ohio by Act of May, 1869.

[4] U. S. *v.* Wilcox, 4 Blatch. C. C. 391, 393; Whart. Cr. Pl. & Pr. § 164.

[5] Stewart *v.* State, 22 Oh. St. 477.

[6] 2 Russ. on Cr. 6th Am. ed. 595; R. *v.* Darby, 7 Mod. 100; Overton, ex parte, 2 Rose, 257; Jackson *v.* State, 43 Tex. 421. See State *v.* Hughes, 43 Tex. 518. Supra, § 179.

[7] R. *v.* Phillips, Cas. temp. Hard. 241; State *v.* Keyes, 8 Vt. 57. See supra, § 179; and see Wh. Cr. Pl. & Pr. § 954.

It is not necessary, in an indictment for attempting to suborn a witness, that the fact, which the defendant attempted to procure the witness to swear to, should be proved specifically; as that fact would only be evidence to show *quo animo* the bribe was offered, it may be shown by other circumstances. State *v.* Holding, 1 McCord, 31. For form of indictment see Stewart *v.* State, 22 Oh. St. 477.

[8] State *v.* Carpenter, 20 Vt. 9; State *v.* Early, 8 Harrington, 562; and see

or of the prior summoning of the witness by subpœna.[1] from attending.

In an indictment against S., for endeavoring to prevent a witness bound over to testify before a grand jury from appearing and testifying, the indictment in the original case, in which the witness was recognized to appear, need not be recited, nor does the guilt or innocence of the respondent depend upon the sufficiency of that indictment, or of the guilt or innocence of the respondent in the first case.[2]

XIV. FABRICATION OF EVIDENCE.

§ 1334. "Fabricating evidence," it is said by the English Commissioners on the Draft Code of 1879, "is an offence which is not so common as perjury, but which does occur and is sometimes detected. An instance occurred a few years ago on a trial for shooting at a man, with intent to murder him, where the defence was that though the accused did fire off a pistol, it was not loaded with ball, and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution, in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous as perjury, but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence) is only fine and imprisonment." In those of our States where a common law exists, the offence would probably be regarded as indictable at common law.[3]

2 Russ. on Cr. (6th Am. ed.) 595; R. v. Chandler, 1 Strange, 612; 8 Mod. 336; Com. v. Reynolds, 14 Gray, 87.

[1] State v. Ames, 64 Me. 386; State v. Keyes, 8 Vt. 57.

[2] State v. Carpenter, 20 Vt. 9. See Martin v. State, 28 Ala. 71.

[3] Supra, § 681.

CHAPTER XXI.

CONSPIRACY.

I. General Considerations.
Conspiracies are indictable when directed to accomplishment of illegal object or use of illegal means, § 1337.
Offence to be limited to such cases, § 1338.
Where concert is necessary to an offence conspiracy does not lie, § 1339.
Conspiracy must be directed to something which, if not interrupted by extraneous interference, will result in unlawful act, § 1340.
Not necessary that all the parties should be capable of committing offence, § 1340 *a*.
Conspiracy may be defended by whatever is a defence to attempt, § 1341.
Evil intent is necessary to offence, § 1341 *a*.

II. Conspiracies to commit Indictable Offence.
Conspiracy to commit felony is indictable at common law, § 1342.
Indictment need not detail means, § 1343.
Gradual abandonment of doctrine of merger, § 1344.
In conspiracies to commit misdemeanors, indictment need not detail means, § 1345.
Such conspiracy does not merge, § 1346.
Conspiracies to cheat are indictable at common law, § 1347.
Enough if indictment charge "divers false pretences," § 1348.
On the merits a conspiracy to defraud is punishable, § 1349.
Mere civil trespass or fraud not enough, § 1350.
Conspiracy in fraud of bankrupt or insolvent laws indictable, § 1351.
And so of conspiracies to violate lottery laws, § 1352.
And of conspiracies to commit breaches of the peace, § 1353.
And so to assault, § 1354.
And so to falsely imprison, § 1355.
And so of seditious conspiracies, § 1356.
And so to utter illegal notes, § 1357.

III. Conspiracies to use Indictable Means to effect Indifferent End.
When the illegality is in the means, the means must be set forth, § 1358.

IV. Conspiracy to do an Act whose Criminality consists in the Confederacy.
Acts *quasi* criminal are to be distinguished from acts indifferent, § 1359.
Conspiracy to commit *quasi* criminal acts is indictable, § 1360.

1. *To commit Immoral Acts.*
Conspiracy to seduce or cause to elope is indictable, § 1361.
So to procure a fraudulent marriage or divorce, § 1362.
So to debauch, § 1363.
So to produce abortion, § 1364.
So to prevent interment of dead body, § 1365.

2. *To prejudice the Public or Government generally.*
Conspiracy to forcibly or fraudulently raise or depress labor is indictable, § 1366.
Unlawful means should be averred, § 1367.
Conspiracy to keep an operative out of employment or induce him to leave is indictable, § 1368.
So to engross business staple, § 1369.
So to suppress competition at auction, § 1370.
So to combine to do wrong by secrecy or coercion, § 1371.

So to use fraudulent means to effect an election, § 1372.
So to defraud revenue, § 1373.
So to publish false report of corporation, § 1374.
So to attempt corrupt bargains with government, § 1375.
3. *To falsely accuse of Crime or extort Money.*
Conspiracy to falsely prosecute is indictable, § 1376.
Conviction no bar, § 1377.
Indictment need not detail imputed crimes, § 1378.
Conspiracy to extort money is indictable, § 1379.
4. *Conspiracies to obstruct Justice.*
Such conspiracies are indictable, § 1380.
V. GENERAL REQUISITES OF INDICTMENT.
Executed conspiracies should be so averred, § 1381.
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May be useful as explaining conspiracy charge, § 1383.
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Counts for conspiracy can be joined with counts for substantive offence, § 1387.
Two or more persons necessary to offence, § 1388.
Prosecution may elect co-conspirators to proceed against, § 1389.
All contributing with knowledge of common design may be joined, § 1390.
Acquittal of one defendant evidence on trial of other, § 1391.
Husband and wife without other defendant not sufficient, § 1392.
Unknown co-conspirators can be introduced, § 1393.
Judgment should be several, § 1394.
New trial for one is new trial for all, § 1395.
Parties injured must be named if practicable, § 1396.
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VI. EVIDENCE.
Proof of conspiracy is inferential, § 1398.
Complicity in prior stages unnecessary, § 1399.
No overt act necessary, § 1400.
Order of evidence discretionary with court, § 1401.
Mere cognizance of fraudulent action no conspiracy, § 1402.
Material variance as to means fatal, § 1403.
System of conspiracy may be proved, § 1404.
Co-conspirators are liable for each others acts, § 1405.
Declarations of co-conspirators admissible against each other, § 1406.
VII. VERDICT.
Verdict acquitting all but one defendant acquits all, § 1407.

I. GENERAL CONSIDERATIONS.

§ 1337. AN indictable conspiracy is a confederation by two or more persons to commit an indictable offence; or by deceit or falsehood or other fraudulent means to defraud the public generally, or a particular individual, though in a way which might not expose a single person to indictment if the fraud was undertaken by him alone. It is only as to the second branch of this definition that there can be doubt.

Conspiracies are indictable when directed to accomplishment of illegal object or use of illegal means.

It has been on all sides conceded that combinations of two or more persons may become indictable when directed to the accomplishment either of an illegal object, or of an indifferent object

by illegal means.[1] The conflict begins when we reach those combinations which are assumed to be indictable, not from any specific unlawfulness, but from the idea that the policy of the law forbids the reaching of the attempted object by a confederacy. We propose, therefore, instead of further defining the offence, *first*, to scrutinize the cases which have been considered as belonging to it; and *secondly*, to notice such general points of pleading and evidence as relate to them all jointly. Before proceeding, however, to this analysis, certain general qualifications are to be noticed.

Offence to be limited to such cases.

§ 1338. We may now regard it as settled that it is an indictable offence for two persons to conspire to defraud a third by false statements for which one calls on the other in any way to vouch, this concert, as well as the falsehood, being concealed from the party defrauded; nor is it any defence in such cases that there is no statute under which, if the conspiracy charge were thrown out, the defendants could be convicted. Cheating by reciprocal preconcerted false personations of this class may justly be regarded on principle a cheat at common law; and the rulings making it indictable are sustainable on principle.[2] But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert involving neither false statement nor force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an in-

[1] Sir J. Stephen's definition (Dig. C. L. art. 36) is given infra, § 1347.

By sec. 284 of the English Draft Code of 1879, declared by the reporters to be a compilation in this respect of the common law, "every one shall be guilty of an indictable offence, and shall be liable, upon conviction thereof, to five years' penal servitude, who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public, or to affect the public market price of stocks, funds, shares, or merchandise, or anything else publicly sold, or who conspires by deceit and falsehood or other means to defraud any person, ascertained or unascertained, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence, as hereinafter defined."

By sec. 420 it is made indictable to conspire "to commit any indictable offence not punishable with penal servitude or to do anything in any part of the world, which, if done in England or Ireland, would be an indictable offence not punishable with penal servitude."

That overts acts are not necessary see infra, §§ 1382, 1400.

[2] Supra, § 1124; infra, § 1359. Compare §§ 14 *et seq.*

different act be held to make such act criminal. We all know what offences are indictable, and if we do not, the knowledge is readily obtained. Such offences, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, public, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. These there has never been any judicial attempt to define, or legislative attempt to codify.[1] No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitution of an indictable offence, as is elsewhere shown,[2] that it should be prohibited either by statute or by common law; but conspiracies to commit by non-indictable means non-indictable offences, if we resolve them into their elements, are neither prohibited by common law nor by statute. By force of their definition, their object is not *per se* prohibited; and the other ingredient in their constitution, that of an association of individuals to effect a common end, is essential to all action in which two persons engage. When we remember, also, that, as we have seen, it is necessary to a righteous administration of public justice that punishment should be attached only to acts which are made penal by rules which are pre-announced and constant,[3] the objection just stated acquires additional weight. An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which in one condition of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been, treated as an indictable offence.[4] Legislative and judicial compromises, which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy.[5] Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified. It used to be said that the *combina-*

[1] See supra, § 15.
[2] Supra, § 14.
[3] See supra, §§ 1 *et seq.*
[4] See infra, § 1366.
[5] Infra, § 1375.

tion of two or more persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents; but riot is positively defined by the law, and all who engage in a riot have means to know what it is, and that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of two alternatives we must here accept. Either we must, with the old English judges, look upon all voluntary combinations as suspicious, and objects of judicial suppression, or we must declare that only such combinations are penally cognizable as are made so either by statute or by a settled judicial construction of the common law. We must, in other words, either on the one hand say, that voluntary combination has in it an element of evil which infects with indictability acts not in themselves indictable, or we must hold that voluntary combination is indictable or not, just as the act it seeks to effect is indictable or not. Now, whatever may have been the view in old times, when the maxim was that voluntary combinations should do nothing that government could do, the first of these hypotheses must be rejected in an age in which the maxim is that government, so far as concerns affairs of trade, should do nothing that voluntary combinations can do as well, and in which great social and commercial enterprises can no longer be undertaken by individuals, but must be undertaken by combinations alone. So cogent have these and other reasons appeared to the jurists of countries whose notions of the freedom of the individual we are apt to regard as less comprehensive than our own, that conspiracy (Komplott), as a distinct offence, has been stricken from the revised codes of Prussia, Oldenburg, Würtemburg, Bavaria, Austria, and North Germany.[1] Nor can it be justly said that by this change of the law the courts lose the power to punish offences in their inception. Such was no doubt the case before the law of attempts assumed its present comprehensiveness. Since, however, whatever crime is punishable in

[1] Berner, a very high authority (Strafrecht, &c., 1871, § 113), says: "The common (German) law doctrine developed the idea of conspiracy to a perilous practical extent; and it has consequently been omitted in our later codes. As illustrating the mischief which this idea has wrought see the cases in Temme, Archiv. i. pp. 260–6; ii. 72, 100, 126."

consummation is now punishable in attempt,[1] the argument drawn from necessity fails.[2]

§ 1339. When to the idea of an offence plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.* which cannot take place without concert), we may mention duelling, bigamy, incest, and adultery, to the last of which the limitation here expressed has been specifically applied by authoritative American courts.[3] We have here the well known distinction between *concursus necessarius* and *concursus facultativus:* in the latter of which the accession of a second agent to the offence is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, *added* to crime, does not lie for *concursus necessarius.* In other words, when the law says, "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name," it is not lawful for the pleader to call it by some other name; and when the law says, "such an offence, *e. g.* adultery, shall have a certain punishment," it is not lawful for the prosecutor to evade this limitation by indicting the offence as conspiracy. Of course, when the offence is not consummated, and the conspiracy is one in which by evil means a combination of persons is employed to bring it about, this combination is of itself indictable. And of course, also, persons combining to induce others to commit bigamy, adultery, incest, or duelling, do not fall within this exception, and may be indicted for conspiracy.

Where concert is necessary to offence, conspiracy does not lie.

§ 1340. Mere thoughts are not indictable, nor is the expression of thought, unless as a scandal or a political wrong. Such expressions, if not indictable when uttered by an

Conspiracy must be directed to

[1] See supra, §§ 173 *et seq.*

[2] See U. S. *v.* Goldberg, 7 Biss. 175; U. S. *v.* Nunnemacher, 7 Biss. 111; and see infra, § 1400. That when an offence is consummated, the indictment should be for the consummated offence, see infra, § 1346.

[3] Shannon *v.* Com. 14 Penn. St. 226; Miles *v.* State, 58 Ala. 390.

something which, if not interrupted by extraneous interference, will result in an unlawful act.

individual, do not become indictable when uttered by a crowd.[1] Nor are preparations for crime indictable, unless under special statute, or unless such preparations are made in complicity with those by whom the crime is executed.[2] We must here again appeal to the distinction already fully set forth between a *condition* and a juridical *cause*.[3] The selling of a gun, for instance, is a *condition* of the gun's being used in a homicide; but it is not a juridical *cause*, unless the seller disposes of it for the purpose of killing a third person, and thus becomes accessary before the fact in such killing. The turning of a drunken man into the street is a *condition* of his being subsequently struck by lightning when lying in the public road; but it is not the juridical *cause* of such death, because the stroke of lightning was an extraordinary natural occurrence, not in any way a likely consequence of turning the man out of doors. If, on the other hand, the drunken man was in a helpless state, and if the cold outside were such that he would freeze to death when exposed to it, then turning him out of doors was the juridical cause of his death, since the death resulted from this act, and not from either collateral human intervention, or an extraordinary natural occurrence. This check, which applies equally and invariably to all criminal prosecutions, is peculiarly important in conspiracy. The dangers arising from a vague extension of conspiracy have been already noticed; and it will be seen that the offence has been made already to embrace cases which a wise philosophic jurisprudence would withdraw from criminal cognizance. These dangers would be greatly multiplied if we should hold that conspiracy includes a combination to produce such conditions of crime as are distinct from juridical causes. If the law be thus stretched, indictments for conspiracy could be maintained against all who furnish firearms or other lethal weapons; against all who mould type which could be used for incendiary publications; against all who con-

[1] See Alderman *v.* People, 4 Mich. 414. A conspiracy cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. Mulcahy *v.* R. (in error) L. R. 3 H. L. 306; S. C., 1 Ir. R. C. L. (Q. B.) 13. Mere sympathy is no conspiracy. Infra, § 1400.

[2] See supra, §§ 173 *et seq.*; U. S. *v.* Nunnemacher, 7 Biss. 111; U. S. *v.* Goldberg, 7 Biss. 175.

[3] Supra, §§ 152 *et seq.*

tribute the material, however indifferent, which is subsequently used for purposes of guilt. Undoubtedly there are dicta by English judges which go to sustain this position;[1] though these dicta are usually qualified by the statement that the manufacturer or producer is not to be held guilty unless he anticipated the guilty use to which the instrument is to be put. But what thoughtful man who manufactures or sells any dangerous weapon or compound but must anticipate that there may arise contingencies in which it may be put to an unlawful use? And what safety or uniformity can there be in the administration of penal justice if it depends upon the surmises a jury may make as to a defendant's capacity of anticipation? The only safe course is to make the test objective, even, and palpable, and to apply universally the limit here presented, holding that conspiracy does not lie unless the defendants can be proved to have done something which, if not interrupted by extraordinary natural occurrences, or by collateral human intervention, would have resulted in an unlawful act. But if so the conspiracy is indictable, though the overt act was not consummated.[2]

§ 1340 *a*. Waiving the question discussed in the chapter on attempts, whether an indictment lies for a conspiracy to do an act of which the parties are legally incapable, we may hold that it is sufficient to sustain a conspiracy to commit an act, that one of the parties was legally capable of committing the act.[3]

Not necessary that all the parties should be capable of committing the offence.

§ 1341. Conspiracy, if the overt act is discharged, is nothing more than an attempt, and is subject to the conditions of an attempt. Hence we must hold that a confederacy merely to solicit an intelligent free agent to commit crime is not indictable, unless it is made so by statute;

Conspiracy may be defended by whatever is a defence to attempt.

[1] See O'Connell *v.* R. 11 C. & F. 155. A striking illustration may be found in an English case, where it was held that an indictment for conspiracy to violate the provisions of a statute will lie, after the repeal of such statute, for an offence committed before the repeal. R. *v.* Thompson, 16 Q. B. 832; Dears. C. C. 3. The offence could not have been prosecuted after the statute was repealed; why the conspiracy, unless seditious? Supra, § 31.

[2] Infra, §§ 1382–1400. As to the controversy between "objective" and "subjective" tests see supra, § 182.

[3] 1 East P. C. 96; R. *v.* Potts, R. & R. 352; U. S. *v.* Bayer, 4 Dillon, 407; State *v.* Sprague, 4 R. I. 257; Boggus *v.* State, 34 Ga. 275.

that it is no defence that the means adopted, if apparently adapted to the end, are not really so; that there need not be physical ability in the conspirators to effect their purpose; and that it is a defence that the conspiracy was abandoned voluntarily and freely before put in process of execution.[1]

Evil intent necessary.

§ 1341 *a*. We must also hold, to advance a step further, that there cannot be a negligent conspiracy. Evil intent is necessary to constitute the offence.[2] "The confederation must be corrupt. This is implied in the meaning of the term conspiracy." [3]

II. CONSPIRACIES TO COMMIT AN INDICTABLE OFFENCE.

Conspiracy to commit felony is indictable at common law.

§ 1342. Conspiracies to commit felonies are unquestionably indictable at common law. Two questions of interest, however, have arisen concerning them: first, whether it is necessary for the indictment to set forth the *means* by which the conspiracy was to have been executed; and secondly, whether, if the act is consummated, the conspiracy merges.

Indictment need not detail means.

§ 1343. As to the first question, it is not disputed that if the indictment sets forth the object of the conspiracy in the language used to charge the commission of the offence itself, no exception as to form can be taken. But this is often impracticable, and if it were not, it would be absurd to charge A. and B. with conspiring "with one knife, of the value of one shilling, which he the said A. in his right hand was then and there to have and hold, him the said C. feloniously, &c., to strike," or with conspiring to rob the prosecutor of half a dozen distinct articles which he happened to have in his pocket, but with the value and character of which it would be irrational to suppose the defendants to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as will describe it as a conclusion of law.[4] Thus, it is sufficient to say that the defendants conspired "feloniously, wilfully, and of their malice aforethought, to kill and murder,"

[1] Supra, §§ 173 *et seq.*

[2] People *v.* Powell, 63 N. Y. 88.

[3] Andrews, J., 63 N. Y. 92. Supra, § 129.

[4] See State *v.* Bartlett, 30 Me. 132; State *v.* Ripley, 31 Me. 386; Hazen *v.* Com. 23 Penn. St. 355; State *v.* Noyes, 25 Vt. 415.

&c., without describing the weapons intended to be used;[1] or that they conspired "certain goods and chattels of great value, &c., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were.[2] This liberality is extended to every case where parties combine to commit an offence which is indictable whether committed by one or by a confederacy.[3] It is advised, however, that wherever the means by which a conspiracy was to have been executed are not sufficiently known to enable them to be specified, the reason why they are not set forth should be averred.[4] And the substantive felony intended must be described accurately; it being insufficient to charge a conspiracy to rob without averring "by violence" or "by putting in fear."[5]

Gradual abandonment of doctrine of merger.

§ 1344. The technical rule of the old common law pleaders, that a misdemeanor always sinks in the felony when the two meet, has in some instances been recognized in this country,[6] though without good reason. In England, as has been already noticed, the inconvenience of the principle, as well as its absurdity, has attracted grave judicial scrutiny, and eminent judges have declared they felt no disposition to extend a rule by which a man, when indicted for a misdemeanor, was acquitted because it was doubtful whether the offence was not a felony, and who, when indicted for the felony, was acquitted because it was doubtful whether the offence was not a misdemeanor. This has led, if not to a repudiation of the doctrine, at least to its restriction within narrow limits. Thus, it has been said that even when the felony is executed there may be cases where the conspiracy may still be pursued as an independent offence. Thus, when in 1848 the defendants, who

[1] State v. Dent, 3 Gill & J. 8.

[2] Com. v. Rogers, 5 S. & R. 463. See R. v. Higgins, 2 East, 5.

[3] Archb. C. P. 5th Am. ed. 262, 458, 485, 487; People v. Bush, 4 Hill (N. Y.), 133. Supra, §§ 156, 644; infra, § 1404.

[4] For parallel cases see Whart. Cr. Pl. & Pr. § 156. And for Ohio statute see Code of that State.

[5] Landringham v. State, 49 Ind. 186, which also holds that a statute making it unnecessary to aver the offence is unconstitutional.

[6] Whart. Cr. Pl. & Pr. § 464. See State v. Mayberry, 48 Me. 218; State v. Noyes, 25 Vt. 415; Com. v. Kingsbury, 5 Mass. 106; People v. Mather, 4 Wend. 229; Com. v. Parr, 5 W. & S. 345; Com. v. McGowan, 2 Parsons, 341; People v. Richards, 1 Mich. 216; Com. v. Blackburn, 1 Duv. 4; Whart. Cr. Pl. & Pr. § 463. As to Pennsylvania see Rev. Acts, supra, § 26.

were the workmen of L., a dyer, were charged with conspiring to use his vats and dye in preparing for market goods not belonging to him, and without his assent, it appeared on the trial that L. permitted the defendants to use his dye, &c., for their own use, and for such materials as he intrusted them with, but that they made a profit by using them for other materials without his knowledge. After conviction and removal to the Queen's Bench, a motion in arrest of judgment was urged on the ground that as larceny in abstracting the prosecutor's material was proved, the conspiracy merged. But the Court of Queen's Bench were unanimous in entering judgment on the verdict. "A misdemeanor which is part of a felony," declared Lord Denman, C. J., in summing up the cases, "may be prosecuted as a misdemeanor though the felony has been completed; and the attempt, upon the argument, to make a distinction between misdemeanors by statutes and those by common law was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it is derived. It was further urged by the defendants that unless the defence was sustained they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law. If, however, a prosecution for felony should occur after a conviction for conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction."[1] On the same reasoning it was decided by the fifteen judges that a conviction for the misdemeanor of carnally knowing a girl under twelve years old would stand, notwithstanding the felony of rape was proved on trial.[2] So far as the authority of the English

[1] R. *v.* Button, 11 Q. B. 929; 3 Cox C. C. 229.

[2] R. *v.* Neale, 1 Den. C. C. 36. See infra, §§ 1746, 1764.

But as late as 1879 we have the following: "One Robert Martin, who was tried before the Lord Chief Justice, at Maidstone, last assizes, has every reason to rejoice at the rule of law which says that a man indicted for a felony shall not on that indictment be found guilty of a misdemeanor, even though the facts, whilst failing to establish the felony, show clearly that he has committed a misdemeanor. On the 2d September last he met the prosecutor, to whom he was known, and offered to buy from him a pony and cart which the said prosecutor was then driving. The price of £32 was agreed upon, and the prisoner, in the presence of the prosecutor, filled up a printed form of check of a bank at Maidstone for that sum, with the name of the prosecutor as payee, which he signed with the

courts go, therefore, the doctrine of merger, if not now abandoned, is confined to that small class of cases where the misdemeanor was the first step in the commission of the felony.[1] And in several of our courts a disposition has been exhibited to reject the doctrine in all cases.[2]

In New Jersey, a charge of conspiring to procure an indictment by perjury does not charge a felony which merges the conspiracy.[3]

§ 1345. The observations made on the last head, as to the setting out the means of the conspiracy, apply with equal force to this. The comparative simplicity of such an

In conspiracies to commit

name of 'William Martin,' and delivered to the prosecutor, who put it in his pocket without further looking at it or observing in what name it was signed. The pony and cart were then delivered to the prisoner, who sold them. On presenting the check at the bank upon which it was drawn, payment was refused on the ground that the signature was not that of any customer of the bank. Prisoner had been a customer of the bank, and had had an account there in his proper name, but the account was closed on the previous 4th June. No money was afterwards paid to the prisoner's credit, nor was any check drawn by him. His defence was, that he had expected money to be paid into his account, but this statement was supported by no evidence. Now, it has long been settled law that, if a person obtains goods from another upon giving him in payment his check upon a banker, with whom in fact he has no account, this is a false pretence. Therefore the prisoner might, if he had been so indicted, have been found guilty of false pretences. What he was indicted with was forgery, the forgery consisting in his signing the name of 'William Martin' when his real name was 'Robert Martin.' He was found guilty, but the Lord Chief Justice, having a doubt as to whether the facts amounted to forgery, reserved the point, which was considered by the Court for Crown Cases Reserved on Saturday last. As long ago as 1765 it was held, in Dunn's case (1 Leach. 59), that in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that, if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit being there wholly given to himself, without any regard to the name or without any relation to a third person. This principle being clearly applicable to the present case, the judges quashed the conviction, and Martin, although clearly guilty of false pretences, has escaped punishment by virtue of the rule of law we mentioned above. Had the Criminal Code Bill passed, and in operation at the time of the trial, this miscarriage of justice would not have taken place." London Law Times, Dec. 13, 1879.

[1] This was the case in R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 M. & Rob. 469. See Hewitt, ex parte, 3 Am. L. Rev. 382.

[2] Wh. Cr. Pl. & Pr. § 464; and see Laura *v.* State, 26 Miss. 174.

[3] Johnson *v.* State, 2 Dutch. (N. J.) 313.

misdemeanors, the indictment need not detail means.

indictment has made it a favorite practice in this country, in preparing a prosecution for misdemeanor, the description of which is attended with any difficulties, to insert a count for a conspiracy. When the evidence for the prosecution is finished, the court will compel it, in a proper case, to state on what class of counts it relies; and when this discretion is judiciously exercised, it is hard to see how the defendant can be embarrassed in the management of his defence. Where he is shown to have acted conjointly with others, he cannot justly complain if he is charged with having conspired with them in producing the particular results; even though the names of his co-conspirators are not known to the grand jury, and the indictment so states.[1] The advantage of joining counts for conspiracy with counts for constituent misdemeanor is strongly illustrated by a leading case in Pennsylvania.[2] The defendants were charged in one set of counts with the sale of a lottery ticket, and in another with a conspiracy to sell it; the law being that, in an indictment for this offence, the ticket should be particularly set out, and as the ticket is perhaps purposely of a very complex character, it is convenient for the pleader to back up a count for the individual offence with the count for a conspiracy "to sell and expose to sale, and cause to be sold and exposed to sale" (reciting the words of the statute), "a lottery ticket, and tickets in a lottery not authorized by the laws of this commonwealth." This was the language of a count which was sustained by the Supreme Court after a new trial, in consequence of a variance in the count purporting to set forth the ticket, and an arrest of judgment for want of particularity in the counts charging the sale of the ticket without an attempt to set it out. After showing that such a generality of statement as appeared in the latter counts could not be tolerated, Duncan, J., proceeded: "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular prohibited lottery, but of all. The conspiracy

[1] See infra, § 1393.

[2] Com. v. Gillespie, 7 S. & R. 469.

was the *gravamen*, the *gist* of the offence."[1] The same liberality in the construction of counts for conspiracies to effect objects *per se* illegal having prevailed in England,[2] the practice of joining conspiracy counts with counts for the constituent misdemeanor is there sanctioned.[3]

Conspiracy does not merge in misdemeanor.

§ 1346. The same difficulty as to merger, however, which is applied to felonies, has been started as to misdemeanors, with equal reason but with less success. A conspiracy, it has been said in an early case[4] in Massachusetts, to commit either a misdemeanor or felony, merges in the overt act when such overt act appears to have been consummated. The case before the court was one of a conspiracy to commit a felony; and to extend the doctrine to cases of misdemeanors is in conflict with the English text books, where such a doctrine is never broached, as well as with the books of precedents, where forms constantly occur of conspiracies to commit misdemeanors to which the overt act is attached. In Massachusetts, in fact, the application of the doctrine of merger to cases of misdemeanors has been intercepted by Rev. Stat. c. 137, § 11.[5] In New York, Maine, Vermont, Michigan, and Pennsylvania,[6] the idea that there can be a merger of one misdemeanor in another has been summarily repudiated; and there are few courts of criminal jurisdiction where counts for conspiracy to commit misdemeanors (*e. g.* obtaining goods by false pretences or the sale of lottery tickets) are not constantly supported by evidence of the commission of the constituent offence. "It is supposed," said Marcy, J.,[7] "that a conspiracy to commit a crime is merged in the crime where the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and

[1] See Hazen *v.* Com. 23 Penn. St. 355.

[2] 1 Russ. on Cr. 691.

[3] 3 M. & S. 550; 1 Chit. C. L. 255.

[4] Com. *v.* Kingsbury, 5 Mass. 106. See infra, § 1344.

[5] Com. *v.* Drum, 19 Pick. 479; Com. *v.* Goodhue, 2 Met. 193; Com. *v.* Walker, 108 Mass. 309; Com. *v.* Bakeman, 105 Mass. 53; Com. *v.* Dean, 109 Mass. 349.

[6] People *v.* Mather, 4 Wend. 265, Marcy, J.; State *v.* Murray, 15 Me. 100; State *v.* Mayberry, 48 Me. 218; State *v.* Noyes, 25 Vt. 415; People *v.* Richards, 1 Mich. 216; Com. *v.* Hartman, 5 Barr, 60; Com. *v.* McGowan, 2 Parsons, 341.

[7] 4 Wend. 265.

where its object is only to commit a misdemeanor, it cannot be merged. Wherever crimes are of an equal grade there can be no technical merger." But while technically this is the case, the better course, when the offence is consummated, is to indict, not for the conspiracy but for the overt act.[1]

Conspiracy to cheat is indictable at common law.

§ 1347. Undoubtedly where obtaining goods by false pretences, and secreting goods with fraudulent intent, are statutory misdemeanors, conspiracies to effect them are indictable, both as to real[2] and personal estate; and the unbroken and unquestioned practice of the courts has been to convict under indictments for conspiracies pointed at either of these statutory offences.[3] Where, therefore, the prac-

[1] In R. *v.* Boulton, 12 Cox C. C. 93, Cockburn, C. J. said: —

"I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses."

[2] People *v.* Richards, 1 Mich. 216.

[3] See Wharton's Precedents, 611; R. *v.* Parker, 3 Q. B. 292; R. *v.* Whitehouse, 6 Cox C. C. 38; Heymann *v.* R., L. R. 8 Q. B. 102; 12 Cox C. C. 383; R. *v.* Bunn, 12 Cox C. C. 316; Com. *v.* Walker, 108 Mass. 309; Clary *v.* Com. 4 Barr, 210; State *v.* Norton, 3 Zab. 33. In Com. *v.* Walker, *ut supra*, decided in 1871, the indictment was for a conspiracy to obtain goods by pretending falsely that the defendant intended to take the goods to his shop to sell in the ordinary course of trade. Compare, also, criticisms on R. *v.* Bunn, in Fortnightly Review for July 1, 1873, p. 40.

Sir J. Stephen (Dig. C. L. art. 336), gives the following: —

"Every one commits the misdemeanor of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public, or any particular person, or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal, although the act agreed upon is not in itself a crime.

"An offender convicted of this offence may be sentenced to hard labor.

"*Illustrations.* — The following are instances of conspiracies with intent to defraud: —

"A conspiracy to defraud the public by a mock auction. R. *v.* Lewis, 11 Cox C. C. 404.

"A conspiracy to raise the price of the funds by false rumors. R. *v.* De Berenger, 3 M. & S. 67.

"A conspiracy to defraud the public by issuing bills in the name of a fictitious bank. R. *v.* Haven, 2 East P. C. 858.

"A conspiracy to induce a person to buy horses by falsely alleging that they were the property of a private

titioner has a case in which he is able, from the maturity of the offence, to specify in the indictment what pretences the defendants conspired to use, and what goods they conspired to obtain, he may be sure that he will bring himself within the strictest rules of criminal pleading, and that the offence as thus stated will be adjudged indictable at common law. But in conspiracy this is not often practicable. Two important questions, therefore, here arise. The first is, whether a conspiracy "to cheat" is itself indictable. That such an indictment is too general there can be little doubt. If, however, the indictment, following the definition with which this chapter opens, should aver a conspiracy to cheat by "deceit and falsehood," or by "fraudulent means," specifying these, or excusing their non-specification, then other conditions are to be considered. It must be remembered that a confederacy to cheat by force of combination, even in a way not indictable by statute, if designed and effected by an individual singly, adds to the cheating a quality (that of reciprocity of support among its conspirators) which may make it indictable at common law, just in the way that using false weights or tokens makes a cheat indictable at common law, when, without such false weights or tokens, it would not be so indictable.[1] The playing of several persons into each other's hands may be, if not a false token, in some measure a false pretence. On this ground may be justified the definition already given in the text,[2] as well as that of the eminent jurists who framed the English Draft Code of 1879.[3] And accepting this definition, an indictment averring, as far as it is in the pleader's power, such a conspiracy, is good.[4]

§ 1348. So far as concerns indictments to cheat by "false pre-

person, and not of a horse dealer. R. v. Kenrick, 5 Q. B. 49.

"A conspiracy to induce a man to take a lower price than that for which he had sold a horse, by representing that it had been discovered to be unsound, and resold for less than had been given for it. Carlisle's case, Dears. 337.

"A conspiracy to defraud a partner by false accounts, the fraud not being in itself criminal when it was committed. R. v. Warburton, L. R. 1 C. C. 274.

"A conspiracy to defraud generally, by getting a settling day for shares of a new company. R. v. Aspinall, L. R. 1 Q. B. D. 730."

[1] Wright's Conspiracy, 11.

[2] Supra, § 1337.

[3] Ibid.

[4] See infra, §§ 1349, 1359.

tences," it has been much discussed whether the pretences should be specially averred. That such cannot always be done, is conceded.[1] It is easy to conceive of a case in which, while the pretences were not so far executed as to enable the pleader to specify them in complete detail, they were matured sufficiently to show that the statutory misdemeanor was in process of commission.[2] Under such circumstances it has frequently been held enough for the pleader to aver generally a conspiracy to cheat by "divers false pretences." The utmost that could be exacted in such a case would be, that the pleader should give the non-disclosure of the means as his reason for not setting them out. In England such is certainly the law; and a careful scrutiny of the cases collated below[3] enables us to say that it is there settled to be sufficient to

Enough if indictment charge "divers false pretences."

[1] See U. S. *v.* Crafton, 4 Dill. 145; Com. *v.* Rhoads, 15 Penn. St. 272. Compare People *v.* Brady, 56 N. Y. 183; State *v.* Rickey, 4 Halst. 293.

[2] See supra, §§ 1337 *et seq.*

[3] The leading case is R. *v.* Gill, 2 B. & A. 204; Whart. Prec. 611, &c., in which an indictment was sustained which merely charged the defendants with conspiring, "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., and to cheat and defraud them respectively thereof."

Notwithstanding, however, the statement of Lord Mansfield, that for an undigested conspiracy no form more stringent than this could be exacted, the courts were for some time in the habit of complaining of the precedent as too lax. R. *v.* Parker, 3 Q. B. 555. In 1834, a case was reported in which it appeared that R. *v.* Gill was seriously questioned by the King's Bench. R. *v.* Biers, 1 Ad. & El. 327.

In R. *v.* Peck, 9 A. & E. 686; 1 P. & D. 508 (1839), an indictment was held defective which charged the defendants with conspiring to defraud divers of her Majesty's subjects who should bargain with the defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to the defendants (not stating with particularity what the defendants conspired to do). It was said, however, to be no objection that the count does not name the parties who were to have been defrauded. And it was further ruled that a count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. (But in R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383 (1873), R. *v.* Peck, was declared by Miller, J., to be "virtually overruled.")

In none of these cases, however,

charge the defendants with a conspiracy to defraud the prosecutor of his moneys, "by divers false pretences and indirect

was the object of the conspiracy an offence *per se* indictable, and though on each of them the court animadverted with great pungency upon a laxity of pleading which gave the defendant no notice of what he was tried for, yet there was an express recognition of the distinction between a conspiracy to commit an indictable offence, where the means need not be set out, and a conspiracy to commit an act unindictable, where the means must appear.

In 1844, the question was canvassed on an indictment which charged that the defendants conspired to cheat and defraud certain liege subjects of the queen, being tradesmen, of quantities of their goods; that, in pursuance of the conspiracy, the defendant, B., fraudulently ordered and obtained upon credit from W. W. and C. W., upholsterers, divers goods of W. W. and C. W. (the count stated a like obtaining on credit from other tradesmen named, and from others whose names were unknown); and that, in further pursuance of their conspiracy, and in order that the goods might be taken in execution and sold, as after mentioned, the defendants ordered the same to be delivered by W. W. and C. W. at the house of B., and they were so delivered and never paid for; and in further pursuance, &c., and in order, &c., B. allowed them to continue in his house till they were taken in execution as after mentioned. That the defendants, in further pursuance, &c., did falsely and fraudulently pretend that certain debts were due from B. to K. and P., two others of the defendants, and K. and P. did, to obtain payment of such fictitious debts, by collusion with B., commence actions against B.; that K. and P. collusively signed judgment against B. in the actions, and issued execution thereon, by virtue of which the goods, before the expiration of the times of credit, were taken in execution, and sold to satisfy the fictitious debts: and so the jurors found the defendants, in manner and means aforesaid, did cheat and defraud W. W. and C. W. of the goods. The indictment was sustained in the Queen's Bench. R. *v.* King, 7 Q. B. 782; D. & M. 741. Error being brought upon the judgment, it was ruled in the Exchequer Chamber that the indictment was defective, not in the offence charged, but in the parties to be defrauded, it being held that the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named, or an excuse stated for not naming them, and that the allegation of conspiracy was not aided by the overt acts; and that the overt acts themselves did not, either in connection with the allegation of conspiracy or independently, amount to indictable misdemeanors. King *v.* R. (in error) 7 Q. B. 782, 795 (1844). See infra, §§ 1383–5–6.

In the King's Bench Lord Denman said: "I am of opinion that this count is sufficient. The general form used in Rex *v.* Gill has constantly been held good. Holroyd, J., says there: 'The conspiracy is the offence, and it is quite sufficient to state only the act of conspiring, and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain, by false pretences, money from a particular person. Now a conspiracy to do that would be indicta-

means." The only positive qualifications that have been grafted on the principle are, *first*, that it must appear from the indictble, even where the parties had not settled the means to be employed.' He does not lay it down that a conspiracy must be alleged to defraud a person described by name. And there are many cases where parties may conspire to injure others, without anticipating who the particular persons will be. I am not prepared, therefore, to say that the first part of this count is not good. But if it were not so, Rex *v.* Spragg, 2 Burr. 993, shows that the overt acts may support it. The objection, that the individuals mentioned to have been affected by them are not shown to be those against whom the defendants conspired, is answered by the remark made before, that, in the conspiring, particular individuals may not have been contemplated. It was argued the overt acts limit the allegation in the first part of the indictment, and that, even if that showed a criminal conspiracy, the statements afterwards reduced it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect. As to the last paragraph, I think it does not contain any distinct charge, but is only an unnecessary summing up." Patteson, J.: "I also think that the count is good. The general rule as to naming the parties, laid down by Mr. Starkie, applies only where, from the nature of the case, there is a person to be named; in conspiracy, for example, where the defendants have conspired to injure some given person; but if the conspiracy is to cheat any person out of all mankind, the rule cannot be applied. In Rex *v.* De Berenger, 3 M. & S. 67, no one could know who would be the purchasers of stock at a future day. So, here, it was not known whose goods would be obtained in pursuance of the conspiracy; and it appears by the overt acts that the defendants obtained certain goods of A., B., and C., and other goods from 'divers other tradesmen, the liege subjects,' &c., 'whose names are to the jurors unknown,' &c. Therefore, I think that the part of the indictment charging a conspiracy is good, though it does not name the persons to be defrauded. That it does not particularly specify the means is no objection, according to Rex *v.* Gill. So the indictment stands, independently of the overt acts. As to these, when the present motion was made, I understood the objection to be rather that the overt acts were not consistent with the general charge, than that they were insufficient to support a charge of conspiracy. It is contended that false pretences are alleged, and the pretences not negatived. But no false pretence, in the sense alluded to, is laid throughout the indictment. In the ordinary case of indictable false pretences, the pretence is laid as having been made to the person whose goods are obtained; but that is not so here; the averment is only that some of the defendants pretended that debts were due to two of them from a third, in whose possession the goods were, and then that, in pursuance of the conspiracy, and for the purposes stated, the two commenced an action against the third for such fictitious debts, and obtained judgment and execution, under which the goods were removed before the

ment that the property sought to be obtained was not the property of the defendant;[1] and, *secondly*, that if the indictment be

time of credit had transpired. That is a complete allegation of fraud upon the sellers; and the argument that no such fraud appeared was founded upon a fallacy, the defendant's counsel arguing upon each alleged act without reference to its being laid as done in pursuance of the conspiracy."

So, where the third count of an indictment to obtain money under false pretences charged the offence in general terms as a conspiracy to cheat the prosecutor of his money, without setting out the false pretences, the evidence was, that the prosecutor was told by the defendant that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse dealer, &c. All these statements were false, the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved. It was held that this count was sufficient, and that it charged an indictable offence. R. *v.* Kenrick, 5 Q. B. 49 (1843).

Nor is this the only case in which the Court of King's Bench has expressly reaffirmed R. *v.* Gill. In R. *v.* Gompertz, 9 Q. B. 824 (1846), the last of eight counts charged the defendants with conspiring "by divers false pretences and indirect means to cheat and defraud the said S. P. R. of his moneys, to the great damage, fraud, and deceit of the said S. P. R., to the evil example," &c. There was a verdict for the crown on each of the counts, before Lord Denman, C. J., at the Middlesex sittings, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Lord Denman, in giving the opinion of the court, "that there is no ground for arresting the judgment in this case; one count is good, on the authority of R. *v.* Gill, never overruled, but founded on excellent reason, and always recognized, though not without regret, because that form of indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in R. *v.* Biers, 1 Ad. & El. 327; but even from the expressions there used, and much more from what has been said in later cases, it appears plainly that the court has never doubted the correctness of the decision in R. *v.* Gill."

So, as recently as 1848, an indictment was sustained in the Exchequer Chamber, which averred merely that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the prosecutor of his goods and chattels, to the great damage," &c. Sydserff *v.* R. 11 Q. B. 245. "R. *v.* Biers," 1 Ad. & El. 327, said Wilde, C. J., "was relied on in support of the objection, and as overruling Rex *v.* Gill, from which we think the present case is not distinguishable. But, upon referring to the judgment in Rex *v.* Biers, there appears strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither Rex *v.* Gill, nor any other authority at all bearing on the point, was referred to in the judgment; and it appears distinctly from the recent case of Regina

[1] R. *v.* Parker, 11 L. J. (N. S.) 234; 3 Q. B. 292; 2 G. & D. 709.

general, the court will order the prosecutor to furnish particulars of the charges to be relied on, though it will not compel him to state the specific acts to be proved, and the time and place at which they are alleged to have occurred.[1] The weight of authority in the United States is that at common law these conclusions may be sustained;[2] and that an indictment averring that the

v. Gompertz that Rex *v.* Biers has never been considered by the Court of Queen's Bench as overruling Rex *v.* Gill. We are of opinion that this count is good." In a series of still later cases, the same view has been solemnly affirmed. R. *v.* Whitehouse, 6 Cox C. C. 38; R. *v.* Carlisle, 6 Cox C. C. 366; 25 Eng. L. & Eq. 577. In R. *v.* Yates, 6 Cox C. C. 441, a count charged the defendants with a conspiracy, by false pretences and subtle means and devices, to extort from T. E. one sovereign, his moneys, and to cheat and defraud him thereof. The evidence failed to prove that the defendants employed any false pretence in the attempt to obtain the money. It was held that so much of the count might be rejected as surplusage, and the defendants convicted of the conspiracy to extort and defraud.

In Latham *v.* R. (in error) 9 Cox C. C. 516; 5 B. & S. 635, the defendants were tried at a quarter sessions upon an indictment, one of the counts of which charged a conspiracy, "by divers false pretences against the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute." It was held that the count sufficiently charged a conspiracy to obtain money by false pretences.

And it may now be viewed as finally settled that an indictment charging that the defendants unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the prosecutor of his goods and chattels, is good. Sydserff *v.* R. (in error) 11 Q. B. 245; 12 Jur. 418 — Ex. Ch.; R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383. See also infra, § 1382. As suggesting due limits to R. *v.* Gill, see White *v.* R. 13 Cox C. C. 318 (Irish Q. B.).

It has been held that a party may be convicted of a conspiracy to cheat and defraud, by means of a false and fraudulent representation as to the solvency or the trade of another, although the representation was oral, and one for which, *per se*, he would not be civilly liable under 9 Geo. 4, c. 16, s. 14; and that in such case the question will be not merely whether the representation was false and fraudulent, but whether it was made in collusion with the co-defendant, for the purpose of cheating the prosecutor. R. *v.* Timothy, 1 F. & F. 39.

[1] R. *v.* Hamilton, 7 C. & P. 448; R. *v.* Kenrick, 5 Q. B. 49; Wh. Prec. 351. As to bill of particulars see infra, § 1386; Wh. Cr. Pl. & Pr. §§ 157, 702.

[2] See State *v.* Bartlett, 30 Me. 132; Com. *v.* Ward, 1 Mass. 473; Com. *v.* Tibbets, 2 Mass. 536; Com. *v.* Warren, 6 Mass. 72; Com. *v.* M'Kisson, 8 S. & R. 420; State *v.* Buchanan, 5 Har. & J. 317; People *v.* Richards, 1 Mich. 216, and cases hereafter cited.

It may, however, be open to question whether the rule just expressed has not been shaken in Massachusetts and Pennsylvania.[3] In Pennsylvania, down to 1847, the rule was never dis-

[3] See Com. *v.* Eastman, 1 Cush. 190; Com. *v.* Hartmann, 5 Barr, 60.

defendants did designedly and fraudulently conspire to cheat by

puted, and a series of convictions were sustained on its authority. In 1847, however, the Supreme Court examined in error the record of a case in which the defendants were convicted of conspiring to violate that section of the Act of 1842, abolishing imprisonment for debt, which makes it a misdemeanor for a debtor to secrete his property with intent to defraud his creditors. How far the indictment shrank below the statutory standard will be in a few moments examined, the inquiry now being whether there was anything in the reasoning of the court which would divert the application of the express point ruled in England from our own practice. After noticing the inadequacy of this indictment to sustain a conviction for the statutory offence, independent of the conspiracy, Gibson, C. J., said: "Now, though it may not be necessary in an indictment for conspiracy so minutely to describe the unlawful act, where it has a specific name which indicates its criminality, yet where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and without being so, it cannot be shown that the confederates had an unlawful purpose. It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described; but it can be as readily laid as proved."[1] It is true, that in a preceding passage, exception was taken to the omission in the indictment of a description of the place where the secreted goods were kept, and the person who had them in custody, and the time and place of the transaction, and it was argued that as a conspiracy to secrete goods abroad, having for its object no infraction of the laws of Pennsylvania, would not be criminal *in* Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy in such a way as to meet these difficulties, without essentially varying from the rules previously announced. By charging that the defendants conspired by "divers false pretences and indirect means, then and there to cheat and defraud the said A. B. of his goods," &c., describing the pretences as exactly as possible, an indictable offence will be made out.[2]

[1] Com. *v.* Hartmann, 5 Barr, 60.

[2] In Com. *v.* Eberle, F. E. with fifty others, members of a German Lutheran congregation in Philadelphia, were charged, in the first count, with conspiring "to prevent, by force and arms, the use of the English language in the worship of Almighty God, among the said congregation, and for that purpose did then and there wickedly and unlawfully and oppressively confederate and agree among themselves, and did then and there determine and firmly bind themselves before God, and solemnly to each other, to defend, with their bodies and lives, the German divine worship, and to oppose by every means, lawful or unlawful, the introduction of any other language into the church;" and that in pursuance of the conspiracy, &c., the defendants did afterwards, at an election, &c., create a great riot and tumult, &c., and did commit divers assaults. The second count charged simply the conspiracy, without any overt acts. Com. *v.* Eberle, 3 Serg. & R. 9. See Pamphlet Trial, 218. At the trial, before Yeates, J., exceptions were taken to the indictment, and its insufficiency was urged with great learning by the eminent counsel engaged. It was said that, casting out the overt acts, which were always considered mere aggravation, that there was nothing in the charging portion of the indictment to show that an offence was really committed. The object in the alleged conspiracy was clearly lawful; it

false pretences, setting out such pretences when practicable, and

In Massachusetts, it is said that in an indictment for a conspiracy to do an act, which is a well known and recognized offence at common law, the object of the conspiracy may be described in the general terms by which it is familiarly known; if the alleged purpose be the doing of an act which is not unlawful in itself, but which is to be effected by the use of unlawful means, those means must be particularly set forth; if it be the doing of an act which is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the terms of the statute. The words "cheat and defraud," it is held, do not necessarily import any offence, either by statute or at common law; and, therefore, an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud," must set forth in de-

was necessary, therefore, in order to make out the offence, that the record should show unlawful means were to have been employed. Judge Yeates, however, held both counts good (Pamphlet Trial, 208); and though a motion for a new trial was argued with great energy before the court in banc (Com. *v.* Eberle, 3 Serg. & Raw. 9), it does not appear from the report that the objections to the indictment were pressed. The judgment of the court below was sustained.

In an indictment shortly afterwards, the defendants were charged with conspiring to deceive and defraud divers citizens of the commonwealth of great sums of money, by means of false pretences, and false, illegal, and unauthorized paper writing in the form and similitude of bank notes, which were of no value, and purported to have been promissory notes for the payment of divers sums of money on demand, by a company which was in fact fictitious. The indictment was sustained, though at the time there was no statute in Pennsylvania making it indictable to obtain property on false pretences. Still, however, the passing of a batch of fictitious notes has been held a cheat at common law, and on this ground the case may be reconciled with the current of authority. Collins *v.* Com. 3 S. & R. 220.

In a case some years later, the second count, on which alone the prosecution laid stress, averred that the defendants "conspired to cheat and defraud J. S. of the aforesaid heifer." "There may be confederacies," said Gibson, J., in giving the opinion of the court, "which are lawful; and you must therefore set forth some object of the confederates which it would be unlawful for them to attain either singly, or which, if lawful singly, it would be dangerous to the public to be attained by the combination of individual means. For it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of such object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in stating the object, it is unnecessary to state the means by which it is to be accomplished, or the acts that were to be done in pursuance of the original design; they may, in fact, not have been agreed on. You need not set forth more of the object than is necessary to show it, from its general nature, to be unlawful; for that is all that is necessary to determine the character of what is, in truth, essentially and exclusively the crime, — the confederating together; and this is proved by the precedents produced on the part of the commonwealth." The count was held sufficient to support the indictment. Com. *v.* M'Kisson, 8 S. & R. 420.

To the same effect is Mifflin *v.* Com. 5 W. & S. 461. For the indictment in this case see Wharton's Prec. 379. So, even after Com. *v.* Hartmann, an indictment for a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination the circulation of which was forbidden by law, averred that the defendants, in pursuance of their conspiracy, did "offer to sell, pass, utter, and publish to," &c. It was held, that the means whereby the conspiracy was to be effected were sufficiently stated. Twitchell *v.* Com. 9 Barr, 211.

when not practicable duly excusing their non-specification, is good wherever obtaining goods by false pretences is indictable.

tail such other allegations as will show the object to be an offence, either by statute or at common law.[1] And such is also the rule in Maine,[2] in New Hampshire,[3] in New York, at common law,[4] and in Michigan.[5] The same conclusion is reached in Iowa,[6] in Vermont,[7] and in North Carolina.[8] Nor can the soundness of this view be disputed. "A conspiracy to cheat" may or may not be indictable, since cheat is a term capable of many significations, and there are some forms of cheating which the law does not subject to indictment. Hence the indictment, when it charges a conspiracy to cheat, must show that the cheating was of a kind cognizable by criminal law.[9] Thus in Pennsylvania in 1859, where the point decided was that a conviction for a conspiracy to cheat and defraud creditors did not disqualify the defendant as a witness, Judge Woodward, in giving the opinion of the court, quoted approvingly the language of Gibson, C. J., in Hartmann's case, that "a conspiracy is even less than an attempt," and that an attempt to commit an offence shall never be punished more severely than the perpetration of it. This was said *arguendo*, and it was admitted that a conspiracy to cheat by false pretences was indictable in Pennsylvania.[10] It was subsequently expressly held by the same court, that a conspiracy to cheat by false tokens cannot be more severely punished than the offence itself, that is, by imprisonment not exceeding one year.[11] "In an indictment for a conspiracy to do an act prohibited by the *common law*," said Lewis, C. J., in 1854, "where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that where the object of the conspiracy is merely forbidden by the statutes, it can be described only by its particular features.[12] But even in offences of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for perpetrating it."[13] And wherever a statute exists making cheating by false pretences indictable, an indictment charging a conspiracy to cheat by "divers false pretences" must, if further non-specification be excused, be good.[14] As long as the law makes an unexecuted conspiracy indictable, we must

[1] Com. *v.* Eastman, 1 Cush. 190. See Com. *v.* Shedd, 7 Cush. 514; Com. *v.* Prius, 9 Gray, 127.

[2] State *v.* Mayberry, 48 Me. 218. See State *v.* Roberts, 34 Me. 320.

[3] State *v.* Parker, 43 N. H. 83.

[4] Lambert *v.* People, 9 Cow. 578. See this case discussed infra, §§ 1350, 1351; and aff. People *v.* Brady, 56 N. Y. 183.

[5] Alderman *v.* People, 4 Mich. 414. See People *v.* Richards, 1 Mich. 216. "By divers false pretences and subtle means and devices" is a sufficient specification to sustain an indictment. People *v.* Clark, 10 Mich. 310.

[6] State *v.* Jones, 13 Iowa, 269.

[7] State *v.* Keach, 40 Vt. 113. Nor is this cured by insertion of the words "by divers false pretences and subtle devices." Ibid.

[8] State *v.* Younger, 1 Dev. 357.

[9] Rhoads *v.* Com. 15 Penn. St. 272; Clary *v.* Com. 4 Barr, 210; Twitchell *v.* Com. 9 Barr, 211; Com. *v.* McGowan, 2 Parsons, 341; Hazen *v.* Com. 23 Penn. St. 355.

[10] Bickel *v.* Faseg, 33 Penn. St. 465.

[11] Williams *v.* Com. 34 Penn. St. 178.

[12] Com. *v.* Hartmann, 5 Barr, 60; Lewis U. S. Crim. Law, 223.

[13] Hazen *v.* Com. 23 Penn. St. 362. Infra, §§ 1381, 1404.

[14] See State *v.* Rowley, 12 Conn. 101; People *v.* Clark, 10 Mich. 310; State *v.* Cawood, 2 Stewart, 360; State *v.* Younger, 1 Dev. 357; State *v.* Buchanan, 5 Har. & J. 317;

§ 1349. Where the means are developed, and show an entire fraudulent scheme, the offence is clearly indictable.[1] Thus it has been held that an indictment lies for a conspiracy to make a party drunk, and to cheat him while at cards;[2] a conspiracy to obtain money from another by false pretences, though the money is obtained mediately by a contract;[3] a conspiracy to impose pretended wine upon a man as and for true and good Portugal wine, in exchange for goods;[4] a conspiracy to defraud a bank by false pretences and other illegal means of large sums of money;[5] a conspiracy to defraud the government of taxes;[6] a conspiracy by a female servant and a man whom she got to personate her master and marry her, in this way to defraud her master's relations of a part of his property after his death;[7] a conspiracy to marry under a feigned name so as to raise a specious title to the estate of the person whose name is assumed;[8] a conspiracy (by false pretences) to injure a man in his trade or profession;[9] a conspiracy to charge a man as the reputed father of a bastard;[10] a conspiracy to cheat by offering to sell forged foreign bank notes of a denomination of

On the merits a conspiracy to defraud is punishable.

permit the offence to be set forth merely as an unexecuted conspiracy, without the specification of detail which the very idea of incompleteness excludes. Any indefiniteness in pleading in this respect will be cured, as will presently be seen, by requiring the prosecution to file a billof particulars.[11]

[1] See infra, § 1370.

[2] State *v.* Younger, 1 Dev. 357.

[3] R. *v.* Kenrick, 5 Q. B. 49; D. & M. 208. Infra, § 1370.

[4] R. *v.* Mackarty, 2 L. Raym. 1179. See State *v.* Rowley, 12 Conn. 101.

[5] State *v.* Buchanan, 5 Har. & J. 317.

[6] U. S. *v.* Boyden, 1 Low. 266; U. S. *v.* Smith, 2 Bond, 323; U. S. *v.* Dustin, 2 Bond 332. Infra, § 1373.

[7] R. *v.* Taylor, 1 Leach, 49.

[8] R. *v.* Robinson, 1 Leach, 44; 2 East P. C. 1010.

[9] R. *v.* Eccles, 1 Leach, 274. Eccles's case, so far as it goes to show that a mere conspiracy to impoverish another is indictable, may be regarded as overruled by R. *v.* Rowlands, 2 Den. C. C. 364; 5 Cox C. C. 460, 468; 17 Q. B. 671.

In R. *v.* Warburton, infra, Cockburn, C. J., argued that a conspiracy would be indictable even if no action or indictment would lie for such acts. But this is *obiter*, since the proposition on which the decision rests is that it is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. The case, therefore, was that of a conspiracy to commit an indictable offence.

[10] 1 Hawk. c. 72, s. 2.

[11] Infra, § 1385; Whart. Crim. Plead. & Prac. §§ 157, 702.

Bloomer *v.* State, 48 Md. 321; State *v.* Dewitt, 2 Hill (S. C.), 282; Isaacs *v.* State, 48 Miss. 234; as well as the Pennsylvania and English cases heretofore cited.

which the circulation is prohibited in the prosecuting State;[1] a conspiracy to manufacture spurious indigo, with intent to sell it at auction as good, to defraud the purchaser whoever he may be;[2] a conspiracy to defraud the public generally, though no specific persons were made its object;[3] a conspiracy to induce by means of false statements the prosecutor to make an absurd bet;[4] a conspiracy between N. and the book-keeper of a bank, that N. was to draw checks on the bank, and the book-keeper was to arrange the entries in the bank, so as to make it appear that N. was a creditor of the bank to the amount of the checks;[5] a conspiracy to file a fraudulent bond;[6] a conspiracy to extort a deed by means of a peace warrant;[7] a conspiracy to make real sales and pretended purchases of stock in order to induce brokers to advance large sums on such purchases, and thus defraud them;[8] a conspiracy to induce a party to forego a just claim by false representations as to its value;[9] a conspiracy to obtain possession of goods, under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, in fraud of the seller;[10] a conspiracy to induce persons to take shares in a new company, to which was to be transferred the business of an old company known to the conspirators to be hopelessly insolvent and worthless, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay;[11] a conspiracy to sell fraudulent railroad tickets.[12]

[1] Twitchell *v.* Com. 9 Barr, 211. See Clary *v.* Com. 4 Barr, 210; State *v.* Vanhart, 2 Harr. (N. J.) 327.

[2] Com. *v.* Judd, 2 Mass. 329.

[3] R. *v.* De Berenger, 3 M. & S. 67; R. *v.* Roberts, 1 Camp. 399; Gardner *v.* Preston, 2 Day, 205.

[4] R. *v.* Hudson, 3 Cox C. C. 305.

[5] Com. *v.* Fœring, 4 Clark, 29; Brightly R. 315.

[6] Com. *v.* Gallagher, 4 Penn. L. J. 58. Infra, § 1357.

[7] State *v.* Shooter, 8 Rich. 72.

[8] Com. *v* Supt. Phila. County Prison, 6 Phil. 169 (Ludlow, J., 1866.)

[9] R. *v.* Carlisle, 25 Eng. L. & Eq. 577; Dears. 337; 6 Cox C. C. 366. In this case the indictment alleged that S. sold B. a mare for £39; that while the price was unpaid, B. and C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for £27, to induce S. to accept £27, instead of the agreed price of £39, and thereby to defraud S. of £12. It was held, that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction.

[10] Com. *v.* Eastman, 1 Cush. 190.

[11] R. *v.* Gurney, 11 Cox C. C. 414.

[12] Bloomer *v.* State, 48 Md. 321.

§ 1350. But an indictment will not lie for a conspiracy to kill game, or to commit any other mere civil trespass;[1] nor for a conspiracy to sell a man an unsound horse, there being no fraudulent devices;[2] nor for a conspiracy to deprive a man of an office under an illegal trading company, there being no overt act;[3] nor for a conspiracy to procure an over insurance;[4] nor for an indictment against H., C., and D., township councillors, &c., and T., treasurer, for conspiring unlawfully and fraudulently to obtain and get into their hands £300 of the

Mere civil trespass or fraud not enough.

Three persons being in a public house with the prosecutor, one of them, in concert with the other two, placed a pen case on the table and left the room. While he was absent, one of the two remaining took the pen out of the case, and put a pin in its place, and the two induced the prosecutor to bet with the other, when he returned into the room, that there was no pen in the case, and the prosecutor staked 50*s*. On the pencil case being turned up, another pen fell into the prosecutor's hand, and the three took the money. It was held, that the evidence supported a conviction upon a count charging the three with conspiring by false pretences and fraudulent devices to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the three if he could. R. *v.* Hudson, Bell C. C. 263; 8 Cox C. C. 305.

As will be seen more fully (infra, § 1359), conspiring to cheat a partner by false entries at the time of the settlement of an account, though in a way which if executed by a single individual would not be indictable, is indictable as a conspiracy. R. *v.* Warburton, L. R. 1 C. C. 274 (1872).

Where the defendants started out on a fox chase, and then turned their attention to chasing cattle, some of whom were killed, it was held that this was indictable as a conspiracy, and that it was not necessary to prove any original malicious plan toward the party injured. Lowery *v.* State, 30 Tex. 402.

Mr. Wright (Conspiracy, 35) questions whether an indictment for conspiracy could be maintained in cases where the "proposed deceit is such that it could not have any effect in deceiving the persons intended to be defrauded." He proceeds to illustrate this by cases where conspiracies are made to effect impossible ends, *e. g.* to steal non-existent goods. In other words, he confounds unsuitability of means with non-accessibility of objects. This definition we have already fully discussed, giving the proper distinctions. Supra, §§ 174 *et seq.* To apply the rules there stated to conspiracies, we may say that a conspiracy to effect a criminal object is indictable, though the means employed are only apparently suitable, and that when a conspiracy to effect such an object is put in the process of execution, it is no defence that the thing which it was intended to attack was (unknown to the conspirators) removed from the range of their operations.

[1] Infra, § 1359; R. *v.* Turner, 13 East, 228; State *v.* Straw, 42 N. H. 393. As to R. *v.* Turner see comments, infra, § 1359.

[2] R. *v.* Pywell, 1 Stark. 402.

[3] R. *v.* Stratton, 1 Camp. 549, n.

[4] Com. *v.* Prius, 9 Gray, 127.

moneys of said council, then being in the hands of T. as treasurer, only the combination being averred.[1]

[1] Horseman *v.* R. 16 Up. Can. Q. B. 543. Infra, § 1359.

It has been held in Massachusetts that an indictment does not lie for a conspiracy to defraud a *feme covert* of a promissory note, given for her separate use in consideration of her distributive share in an estate. Com. *v.* Manley, 12 Pick. 173. But the point ruled, though the case has been cited for other purposes, was simply that, in such case, the property of the note being in the husband, the fraud should have been laid as directed against him. In New Jersey it has been held, under the statutes, not to be an indictable offence for several persons to conspire to obtain money from a bank by drawing checks on it when they had no funds there. State *v.* Rickey, 4 Halst. 293. Such a position, however, cannot stand at common law in those states in which obtaining money by false pretences is by statute indictable, and is questionable at common law. It is not, indeed, a cheat for a party to draw money out of bank beyond his deposits. But if this be done by a combination of persons, by means of tricks, by which the bank is imposed upon, a conspiracy is made up. Supra, § 1347.

The reasoning of the court in State *v.* Rickey rested principally on the assumption that the Revised Statutes of New Jersey limited conspiracies to the single act of getting an innocent man *indicted* by malice and false evidence. The indictment charged that the defendants conspired "to obtain large sums of money and bank bills, the property of the President, Directors, and Company of the State Bank at Trenton, by means of the several checks and drafts of the said" defendants "respectively, to be drawn on the cashier of the said the President, Directors, and Company of the State Bank of Trenton, when they, the said" defendants "had no funds in said bank for the payment of the said checks and drafts." Overt acts followed, none of them showing a specific misdemeanor; and with so lax a statement of the cause of prosecution, there is no ground for surprise that the court thought proper to quash the indictment, even had the statutory objection not obtained. There is no averment that the defendants *knew* they had no funds in the bank; there is no averment that they were to have no funds ready at the time the checks were presented. The indictment was to be treated in the same way as if it had charged the defendants with an attempt to "defraud" an individual by drawing bills on them when they had no funds in his hands. To make the offence a misdemeanor, it would be necessary to introduce averments, showing that by some fraudulent means the bank was to be induced to believe that the defendants really *had* funds in its custody. Now it is plain that unless the drawing checks on a bank where the drawer has no funds is made penal by statute in New Jersey, the indictment in State *v.* Rickey was too broad. It showed a conspiracy to effect an object neither *per se* indictable, nor a misdemeanor at common law. If such had been the case, the indictment, on the principle of R. *v.* Gill, would have been good.

In Lambert *v.* People, 7 Cowen, 167; 9 Cowen, 578, the indictment was even more general, — it merely charging the defendant with conspiring "*wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud*" the prosecutors

§ 1351. The bankrupt acts generally make indictable the removal of goods, in contemplation of bankruptcy, with intent to defraud creditors. Under the English act (and the same rule as to frauds on public justice would apply at common law), a conspiracy to remove goods in contemplation of bankruptcy is complete, even though no adjudication of bankruptcy has taken place.[1] Under the United States statutes, others than the bankrupt may be indictable for a conspiracy with him to violate the provisions of the statute.[2] The 26th section of the New York act "abolishing imprisonment for debt," [3] provides that "any person who shall remove any of his property out of any county, with intent to prevent the same from being levied on by any execution, or who shall secrete, assign, convey, or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent," &c., "shall, on conviction, be deemed guilty of a misdemeanor." This section, so far as it goes, was in its general features adopted by the Legislature of Pennsylvania in the Act of 12th July, 1842, § 20, but not until it had received, so far as the pleading is concerned, a definite construction by New York courts,[4] which construction sanctioned the form of indictment previously in use, of a character extremely general.[5] In New York, therefore, an indictment for a conspiracy to violate the provisions of this act would be good at common law, when the indictment follows the language of the act.[6] In Pennsylvania[7] greater particularity is

Conspiracy in fraud of bankrupt or insolvent laws indictable.

"of their goods, and chattels, and effects," &c. This is certainly loose pleading, but bad as it was, it was sustained in the Supreme Court, and the judgment on it only reversed in the Court of Errors, after a vigorous struggle, by a majority of one. But the opinion of the majority of the court has been subsequently recognized and reaffirmed. People *v.* Brady, 56 N. Y. 182–189.

[1] Heymann *v.* R., L. R. 8 Q. B. 102; 12 Cox C. C. 383. See 8 Cox App. 1432. For other illustrations, where conspiracies to violate a statute have been held indictable, see R. *v.* Bunn, 12 Cox C. C. 316.

[2] U. S. *v.* Bayer, 4 Dillon, 407. See supra, § 1340 *a*.

[3] Sessions Laws of 1861, p. 402. See supra, §§ 1238–39 *et seq.*

[4] People *v.* Underwood, 16 Wend. 546. See supra, §§ 1238–39.

[5] Ibid.

[6] See Wharton's Prec. 507.

[7] Com. *v.* Hartmann, 5 Barr, 60. See supra, § 1348, n, where this case is fully reported.

required, it being held that an indictment charging the defendant with "removing and secreting divers goods and merchandises of the value of $5,000, the description, quantity, and quality of the said merchandises being yet unknown," is bad. "Neither time, place, nor circumstances," said the chief justice, "is given, and the goods are not attempted to be described by the place where they were kept, or by the person who had them in custody. They may even not have been in the State, and a conspiracy to secrete them abroad, having for its object no infraction of our laws, would not be criminal at home. It is not averred even that the defendants had any merchandise at all, here or elsewhere; and unless they had it, a conspiracy to conceal it would have been a conspiracy to do what was impossible. It might be inferred from the motive imputed that they had it; but Hawkins says[1] that 'in an indictment nothing material shall be taken by intendment or implication.' Nor are all the creditors named whom the defendants are charged with having conspired to defraud. The prosecutors are named 'with divers other persons' not named; but unless the additional clause were rejected as surplusage at the trial, the accused would be called upon to defend themselves in the dark."[2]

§ 1352. The only cases in the books of conspiracies to violate lottery laws arise in Pennsylvania, and were produced by the rigor with which the courts in that State applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration it is no wonder that the pleader, under the pressure of a rule which held "Burrill" for "Burrall" to be a fatal variance in the setting forth of the ticket, should insure beforehand against any vices in the statutory count, by adding to it a count for conspiracy. This device was countenanced by the supreme court,[3] in a case virtually resting on the authority of R. *v.* Gill, discussed in a previous section.[4] The defendants were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale, and advertising them, — some of the counts setting out tickets in

And so of conspiracies to violate lottery laws.

[1] Hawk. b. 2, c. 25, s. 60.

[2] As to Iowa statute see State *v.* Harris, 38 Iowa, 242.

[3] Com. *v.* Gillespie, 7 S. & R. 469. See for form Wharton's Prec. 624.

[4] See supra, § 1348.

full, others merely charging the sale of "a lottery ticket," &c., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of the Commonwealth;" therein precisely following the statute. On motion for a new trial, and in arrest of judgment, the court held: 1. That the counts stating the offence in the words of the statute, without setting forth the ticket, were bad from want of sufficient particularity; 2. That there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but, 3. That the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, after a conviction on both classes of counts, on an indictment of the same character (except that there was but one defendant, who was charged with conspiring with others to the grand jury unknown), the court inflicted the statutory punishment, being a fine to the Union Canal Company on the statutory counts, and a fine at common law on the conspiracy counts.[1] Two points may be extracted from these cases: 1. That though under the lottery statute in force at the time, the indictment must go beyond the words of the statute and set out the tenor of the ticket, yet for a conspiracy to effect the sale of such a ticket, it is enough to follow the statute strictly without the specification of detail; 2. That the conspiracy, when properly pleaded, absorbs the constituent misdemeanor, and will be punished as a common law offence, without reference to the statutory penalty.[2]

[1] Com. *v.* Sylvester, 6 Pa. L. J. 283; Brightly R. 331.

[2] The first point is abundantly demonstrated in the argument of Duncan, J. After showing that to transcribe the language of the act was not the proper way to frame a count for the individual misdemeanor, he proceeded to recognize the distinction indicated by Ld. Mansfield in R. *v.* Eccles, between a conspiracy to commit an offence and its actual commission. "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly within the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence." 7 S. & R. 476. The second point is established by the fact, that though at the time the cases in question were determined, the statu-

§ 1353. No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which, in another relation, will be subsequently considered, viz.: conspiracies to hiss an actor from the stage, so as to stimulate a riot,[1] and to prevent by violent means the introduction of the English language into a church.[2] Precedents, also, are not uncommon for conspiracies to commit riots.[3] But whether the rioters themselves, according to the views heretofore expressed, could be indicted for conspiracy, is open to doubt.[4]

And so of conspiracies to commit breaches of the peace.

§ 1354. A conspiracy to commit an assault and battery is an indictable offence in Pennsylvania at common law.[5]

And so to assault.

§ 1355. So no doubt is it with a combination to falsely imprison. Yet in such case it is a good defence that the object was the restraint of a relative believed *bonâ fide*, and on probable ground, to be insane.[6]

And so to falsely imprison.

§ 1356. All conspiracies to "excite disaffection," to use the language of Alderson, B., are indictable at common law.[7] And it is sufficient to charge that the defendants did conspire and agree "to raise discontent and disaf-

So of seditious conspiracies.

tory punishment on the sale of lottery tickets *was a fine to the Union Canal Company*, the sentence imposed on the conspiracy counts was a fine at common law to the State. The position, however, may be considered as now qualified, in Pennsylvania (Com. *v.* Hartmann, 5 Barr, 60), in a case which determined that a conspiracy to commit a statutory offence is never to be punished more heavily than the offence itself.

[1] Clifford *v.* Brandon, 2 Camp. 358. In R. *v.* Leigh, 1 C. & K. 28, n.; 2 Camp. 372, the "defendants were convicted, but the matter being settled, no judgment was passed; and, therefore, as the learned reporters of Manning & Grainger's Reports (6 M. & G. 217, n.) observe, 'the defendants had no opportunity, if they had been so advised, of questioning the sufficiency of the indictment by a motion in arrest of judgment.' Moreover, it is doubtful whether the indictment (which is set forth in 4 Wentw. Pl. 443) in this case was for a conspiracy. The charge laid in each count is riot and obstruction of the play." Wright's Consp. 39. To the same effect is note in 1 C. & K. 28. The cases affirming civil liability in such cases are no authority for a criminal prosecution; and *dicta* in them to this effect are aside from the issue.

[2] Com. *v.* Eberle, 3 S. & R. 9. Supra, § 1348, n.

[3] 2 Chit. Cr. Law, 506 n. (*a*); R. *v.* Vincent, 9 C. & P. 91.

[4] See supra, § 1339.

[5] Com. *v.* Putnam, 29 Penn. St. 296.

[6] Mintzer's case, 28 Leg. Int. Rep. 372.

[7] R. *v.* Vincent, 9 C. & P. 91; 2

fection among the subjects of her majesty, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the government and constitution; and also to stir up jealousies, hatred, and ill-will between different classes of her majesty's subjects," &c.[1]

Russ. on Cr. 681. See R. *v.* Shellard, 9 C. & P. 277; R. *v.* Hunt, 3 B. & Ald. 566. See infra, §§ 1790 *et seq.*

"We agree," says Lord Macaulay, in his Report on the Indian Code, in language which may be here adopted, "with the great body of legislators in thinking, that though in general a person who has been a party to a criminal design which has not been carried into effect ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State; for state crimes, and especially the most heinous and formidable state crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have, therefore, not thought it expedient to leave such plots and preparations to the ordinary law of abetment. That law is framed on principles which, though they appear to us to be quite sound as respects the great majority of offences, would be inapplicable here. Under that general law, a conspiracy for the subversion of the government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions, and interchange promises of fidelity. A conspiracy for the subversion of the government, which should be carried as far as the gunpowder treason or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged check. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great state offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law."

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some act of parliament to be legal), for whatever purpose or object it may be formed; and the administering of an oath not to reveal anything done in such association is an offence within 37 Geo. 3, c. 123, s. 1. R. *v.* Lovelass, 6 C. & P. 596; 1 M. & Rob. 349.

The precise form in which the oath is administered is not material; it is an oath within the meaning of the act, if it was understood by the party tendering, and the party taking it, as having the force and obligation of an oath. Ib.

[1] O'Connell *v.* R. 11 C. & F. 155.

By the 30th section of the Act of Congress of Feb. 8, 1867,[1] where there is a conspiracy "to commit any offence against the government of the United States, or to defraud the United States in any manner whatever, and one or more of the parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor," &c. And any district in which a part of the offence is committed has jurisdiction.[2]

As it is settled that the United States courts have no common law jurisdiction,[3] this statute must be limited to conspiracies to do acts forbidden by statutes. Hence a conspiracy to defraud cannot be prosecuted under this statute unless the fraud be one for which a person could be singly indicted, nor can a seditious conspiracy be sustained for an offence, which, if consummated by an individual unaided, would not amount to sedition.[4]

§ 1357. A conspiracy to make false or illegal notes is indictable at common law.[5] The rule has been held to apply to the case of a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination whose circulation is prohibited in the State where the indictment is found;[6] to a conspiracy to destroy or erase an indorsement;[7] and to a conspiracy to induce others to violate the laws forbidding such notes to circulate.[8]

And so to make false or illegal notes.

But a count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. O'Connell *v.* R. *ut supra;* Roscoe's Cr. Ev. (by Sir J. Stephen) 421.

[1] Rev. Stat. § 440. This section is hereafter discussed in connection with revenue offences. Infra, § 1373.

[2] Bright. Dig. Sup. p. 158. Infra, §§ 1790 *et seq.*

[3] See supra, § 253.

[4] Infra, § 1785.

[5] Clary *v.* Com. 4 Barr, 210; Com. *v.* McGowan, 2 Parsons, 341. See Wh. Prec. 635 *a.*

[6] Twitchell *v.* Com. 9 Barr, 211. See supra, § 1349.

[7] State *v.* Norton, 3 Zabr. 33.

[8] Hazen *v.* Com. 23 Penn St. 355. Thus in 1854, on a conviction for conspiracy to "solicit, induce, and procure" the officers of a particular bank

III. CONSPIRACIES TO MAKE USE OF MEANS THEMSELVES THE SUBJECT OF INDICTMENT, TO EFFECT AN INDIFFERENT OBJECT.

§ 1358. This class is here separately mentioned because it has usually been placed under a distinct head by text writers, though on principle it is difficult to distinguish it from cases where an indictable offence is the direct and immediate object of the conspiracy. In one case the defendants conspire to commit an indictable offence for the sake of itself, in the other they conspire to commit it for the sake of some other object; but when the cases usually put under the first head are analyzed, they will be found, many of them, to fall under the second. Thus, in a conspiracy to produce the marriage of a young woman by coercion, to procure an appointment by corruption, to make a change in government by seditious means, and to fraudulently effect a change in the government of a corporation,[1] as well as in many parallel cases, the end is indifferent, but the means constitute the offence. It is enough to say, in such cases, that as the conspiracy rests on the alleged indictability of the constituent misdemeanor, such misdemeanor must be specified.[2]

When the illegality is in the means, these means must be set forth.

The general rule therefore is, that when the combination is to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth, and be such as to constitute an offence either at common law or by statute.[3] Thus, on an indictment for a combination to procure a marriage of paupers, in order to throw the burden of maintaining them on another parish, it is necessary to show that some threat, promise, bribe, or other unlawful device was used, because the act of marriage being in it-

to "violate and disobey the 28th and 49th sections of the Act of 16th of April, 1850," prohibiting the circulation of foreign notes under $5, the Supreme Court declared the conviction good, and that it was not necessary for the indictment to do more than to aver a conspiracy for this purpose, without setting forth the means or contract. Ibid.

[1] State v. Burnham, 15 N. H. 396.

[2] 1 Leach, 38; 3 Burr. 1439; 1 Wils. 41; 8 Mod. 321; People v. Barkelow, 37 Mich. 455.

[3] R. v. Fowler, 1 East P. C. 461, 462; R. v Seward, 3 N. & M. 557; Alderman v. People, 4 Mich. 414; State v. Mayberry, 48 Me. 218; Cole v. People, 84 Ill. 216; State v. Potter, 28 Iowa, 554.

self lawful, the procuring it requires this element in order to be charged as a crime. In such case it is essential to show the intent of the combination, by stating that the husband was a pauper, and the wife legally settled in the parish from which she was taken.[1]

IV. CONSPIRACIES TO DO AN ACT, THE COMMISSION OF WHICH BY AN INDIVIDUAL MAY NOT BE INDICTABLE, BUT THE COMMISSION OF WHICH BY TWO OR MORE, IN PURSUANCE OF A PREVIOUS COMBINATION, IS CALCULATED TO AFFECT THE COMMUNITY INJURIOUSLY.

Acts *quasi* criminal are to be distinguished from acts indifferent.

§ 1359. We here strike a distinction which is essential to the true conception of conspiracy as defined by the English common law. On the one side, we have arrayed before us a series of acts which have the essence but not the form of crime; and, wanting the necessary objective constituents, they escape judicial cognizance. On the other hand, we have a series of indifferent acts, not criminal in their essence, and which, therefore, no matter in what shape they are presented (provided that shape be not *per se* criminal), cannot become the objects of criminal prosecution. Acts of the first class (*e. g.* immoral acts, unindictable cheats), the courts have held to be invested by conspiracy with a garb which exposes them to the penalties of the law. Before this they had the essence of crime; now, it is argued, by means of a conspiracy which gives an unfair and mischievous advantage to the aggressors, they have its form presented in such definiteness that they can be taken hold of and punished.[2] For two or more persons to coöperate in effecting a fraud, one referring when required by the exigencies of the case to another, and each conspirator vouching the other as an innocent referee, gives to a cheat the quality of "false token" which makes it indictable at common law. It has both of the elements of such indictability, — it is latent, and it is so complex as to affect any one whom it may reach.[3] But acts though in themselves immoral if not attempted by a fraudulent combination of pretended innocent co-workers, may be com-

[1] R. *v.* Tanner, 1 Esp. 304, 307; R. *v.* Edwards, 8 Mod. 320. Infra, § 1572.

[2] See R. *v.* Rowlands, 2 Den. C. C. 364; 17 Q. B. 671; R. *v.* Carlisle, Dears. 337; State *v.* Rowley, 12 Conn. 101.

[3] See supra, §§ 1118, 1347.

mitted by a confederacy, and yet present nothing penal on which the courts can seize if they would not be indictable when committed singly by an individual.[1]

[1] R. *v.* Turner, 13 East, 228; R. *v.* Warburton, L. R. 1 C. C. 274; 12 Cox C. C. 584; State *v.* Straw, 42 N. H. 393; Com. *v.* Manley, 12 Pick. 173. R. *v.* Turner, if it decides that an agreement to make an armed trespass, is not a conspiracy, is not now sustainable. See remarks of Gibson, C. J., in Mifflin *v.* Com. 5 W. & S. 461. Sir J. Stephen, in Roscoe's Cr. Ev. p. 410, writes: "With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal the injury has been malicious, that is to say, the parties have not been under a *bonâ fide* mistake as to a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk over a field, or to pull down fences, would not be a conspiracy, if the object was to try a question as to a right of way, though it certainly would be a combination to commit an act unlawful in the sense of being a tort. On the other hand, a conspiracy to commit a fraud may be indictable though the fraud is not in itself indictable. In the case of R. *v.* Warburton, the defendant and another person conspired to defraud the defendant's partner of partnership property under such circumstances that the fraud was perhaps not criminal in itself. Cockburn, C. J., in delivering the judgment of (L. R. 1 C. C. R. 274–77) the Court for Crown Cases Reserved, said: 'It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i. e.* amount to a civil wrong.' The generality of these expressions must probably be confined by reference to the particular class of civil wrongs under consideration, namely, 'civil wrongs by fraud and false pretences.'"

To these remarks it may here be added that the facts in R. *v.* Warburton show that the defendants attempted to consummate the offence by fraudulent reciprocal references; and in this, by imposing on the party cheated, confederates, in the shape of innocent referees, were guilty of a common law cheat. Now, though it be conceded that neither the act itself, nor the means taken to effect it, were such that if undertaken by an individual they would have been indictable, yet as the object (cheating) was immoral and *quasi* criminal, it was, when infected by such conspiracy, purged of its indifference, and transmuted into a criminal act.

The same criticism applies to the numerous cases heretofore cited of bare conspiracies to cheat. Supra, § 1347.

An indictment charged the defendants with conspiring to cause goods which had been imported, and on which certain duties of customs were payable to the queen, to be carried away from port without payment of the duties, with intent to defraud the revenue, and there were also counts charging the defendants generally with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, with-

§ 1360. It is not essential, therefore, it should be repeated, in cases where the offence consists in the union of a *quasi criminal* act with a conspiracy, that the means employed should be of themselves of such a character as to make their employment *per se* the ground for indictment.[1] Cases to this effect have been already noticed,[2] and others will be given in the succeeding sections. At the same time it is important to keep in mind, especially at this point, the principles heretofore announced,[3] that indictments for conspiracy, always perilous to liberty from the extent and vagueness of the province which they overshadow, are never so perilous as when they undertake to punish acts of whose intrinsic criminality the law gives no prior notice. If indictments of this class, by stress of settled adjudications, must be hereafter tolerated, the doctrine on which they rest should be carried no further than the letter of these adjudications require. No man should be held penally responsible for acts which at the time of their commission were not pronounced by the law to be criminal. As to conspiracies of this class, such pre-announcement of criminality is not pretended. Neither the confederacy, nor the means, nor the end, are singly indictable. All that is claimed is that indictability is produced by the fact of a masked coöperation in the nature of a deceit. Unless these conditions be previously defined by statute, or by definite judicial exposition, to punish for a conspiracy supposed to fall within them is, independently of other objections, to punish by an *ex post facto* law, and hence virtually unconstitutional.[4]

When acts are *quasi* criminal conspiracy to commit is indictable.

1. *To commit an Immoral Act; such, for instance, as the Seduction of a Young Woman, or to produce an Abortion.*

§ 1361. A combination to assist in the elopement of a female infant from her father's house, with a view to her marriage without his consent, has been held to be a com-

Conspiracy to seduce or

out specifying facts to show either an indictable object or indictable means. R. *v.* Blake, 6 Q. B. 126; 13 Law J. N. S. M. C. 256.

[1] State *v.* Burnham, 15 N. H. 396. See R. *v.* Warburton, supra, § 1359.

[2] Supra, § 1349.

[3] Supra, § 1338.

[4] See U. S. *v.* Goldberg, 7 Biss. 175. That rights for whose infringement an indictment of conspiracy lies must be those secured by law, see U. S. *v.* Cruikshank, 92 U. S. 542.

abduct is indictable.

mon law offence, and is indictable as a conspiracy at common law; abduction, when consummated, being an indictable offence.[1] So a conspiracy to seduce without marriage is clearly indictable, even where seduction is not a misdemeanor, fornication being an ecclesiastical if not a common law offence.[2]

§ 1362. To conspire to procure a forced or fraudulent marriage is indictable at common law.[3] Hence a conspiracy to cause a marriage falsely to appear of record, with intent to prevent a person from contracting another marriage, is indictable.[4] An indictment also has been sustained which alleges a conspiracy falsely and fraudulently to seduce from virtue and carnally to know an unmarried female, by procuring the consent of herself and parents to her marriage with one of the conspirators, and then, in furtherance of such conspiracy, producing a forged license, assuring them of its genuineness by falsely and fraudulently representing another of the conspirators to be authorized to celebrate the espousals, who actually performed the ceremony, in consequence of all which the daughter and her father and mother were deceived, &c., and she cohabited with her pretended husband.[5] On the same reasoning a conspiracy to obtain a fraudulent divorce is indictable.[6]

So to procure a fraudulent marriage or divorce.

§ 1363. And, generally, a conspiracy to debauch is indictable. Of this we have a conspicuous illustration in an English case where the prisoners induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house; one of them pretended that she had known the deceased parents of the prosecutrix, and said that she should keep her until she got a place, and that they would both assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill-fame. It was false that either of them had known the parents of the pros-

So to debauch.

[1] Mifflin *v.* Com. 5 W. & S. 461.

[2] State *v.* Savoye, 48 Iowa, 562; Anderson *v.* Com. 5 Rand. (Va.) 627; Smith *v.* People, 25 Ill. 17. See, for forms, Whart. Prec. 651, &c.; and see R. *v.* Delaval, 3 Burr. 1435; R. *v.* Mears, infra; R. *v.* Grey, 1 East P. C. 460.

[3] Resp. *v.* Hevice, 2 Yeates, 114; R. *v.* Wakefield, 2 Townsend St. Tr. 112-6.

[4] Com. *v.* Waterman, 122 Mass. 43.

[5] State *v.* Murphy, 6 Ala. 765.

[6] Cole *v.* People, 84 Ill. 216. In this case two judges dissented on the ground, well put, that the indictment did not specify the fraudulent means.

ecutrix, and they took no steps whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. The prosecutrix refused to consent, and declared her intention of quitting the house; the prisoners refused to give her her clothes, and she left without them. It was held that the offence was conspiracy at common law as well as conspiracy under statute 12 & 13 Vict. c. 76.[1]

So to produce an abortion.

§ 1364. In cases of conspiracy to produce an abortion, it is unnecessary to aver specifically in what stage of pregnancy the mother was, or what were the instruments to be used.[2] If the conspiracy was unexecuted, it is proper, as in all cases of unexecuted conspiracies, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution. But an averment of conspiracy to murder a living infant will not be sustained by evidence of conspiracy existing before the birth of the child, unless the conspiracy be proved to have been pursued subsequently to the birth.[3]

To prevent interment of a dead body.

§ 1365. An indictment lies at common law for a conspiracy to prevent the interment of a dead body.[4]

[1] R. *v.* Mears, 1 Eng. L. & Eq. 581; 2 Den. C. C. 79; T. & M. 414; 4 Cox C. C. 423; 1 Bennett & H. Lead. Cas. 462.

In the last case it might be said that the appropriation of the girl's clothes, and her prior chastity, were essential constituents of the offence. The following case brought up the question separated from these differentiæ. The prisoners were found guilty upon an indictment charging them with conspiring to solicit, persuade, and procure an unmarried girl, of the age of seventeen, to become a common prostitute, and with having, in pursuance of that conspiracy, solicited, incited, and endeavored to procure her to become a common prostitute. It was held, that although common prostitution was not an indictable offence, it was unlawful, and the indictment therefore good, without averring that the prosecutrix was a chaste woman at the time of the conspiracy. R. *v.* Howell, 4 F. & F. 160.

[2] Com. *v.* Demain, Brightly R. 441. See supra, §§ 592 *et seq.*; Whart. Prec. 629.

[3] R. *v.* Banks, 12 Cox C. C. 393.

[4] Hood's Ex. 47. Infra, § 1432 *a*.

2. *To prejudice the Public or the Government generally; as, for Instance, by unduly elevating or depressing the Prices of Wages, or Toll, or of any Merchantable Commodity, or by defrauding the Revenue; or to impoverish or defraud any Individual or Class.*

§ 1366. The old law in relation to business combinations was an outgrowth of the old system of political economy, and of the theory of state supremacy which was essential to the maintenance of that system. Prices of the necessaries of life, at least, were to be fixed by the State; and as labor is as much a necessity as corn, the price of labor was to be fixed in the same way. The arguments for state direction in such matters it would be out of place here to recall; though it cannot be denied that in some relations, — *e. g.* in sustaining a protective tariff for mere purposes of protection, and in excluding certain classes of laborers from the market, — they are still appealed to; nor can it be denied that there is a reactionary tendency in Germany, if not elsewhere, to assert both the right and authority of the government to intervene for the purpose of regulating labor.[1] We

Conspiracy to forcibly or fraudulently raise or depress the price of labor is indictable.

[1] Thus, in the preface to "Lothair," Lord Beaconsfield declares it is a "principle" that labor requires regulating no less than property.

See, as authorities bearing on the position in the text, R. *v.* Ferguson, 2 Stark. 489; R. *v.* Rowlands, 17 Q. B. 671; 5 Cox C. C. 436; R. *v.* Duffield, 5 Cox C. C. 404; R. *v.* Hewitt, 5 Cox C. C. 162; Hilton *v.* Eckersley, 6 E. & B. 47; R. *v.* Shepherd, 11 Cox C. C. 325; R. *v.* Bunn, 12 Cox C. C. 316; R. *v.* Hibbert, 13 Cox C. C. 82; Master Stevedores' Ass. *v.* Walsh, 2 Daly, 1; State *v.* Donaldson, 3 Vroom, 151; Com. *v.* Carlisle, 1 Journ. Juris. 225. For forms see Whart. Prec. 656 *et seq.*

In Hilton *v.* Eckersley, 6 E. & B. 62, Lord Campbell said: "I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the dictum of Grose, J., in R. *v.* Mawbey. Other loose expressions may be found in the books to the same effect, and if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprison-

must also remember that it is now settled by the Supreme Court of the United States that a State has the constitutional power

ment. The object is not illegal, and therefore if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why, in the one case, workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters, in the other, can be considered guilty of a crime in trying by lawful means to lower them."

On this Sir J. Stephen, in Roscoe's Cr. Ev. p. 424, comments: "It is difficult to answer this reasoning upon general grounds, but the authorities quoted above appear to prove that the opinion of Lord Campbell's predecessors as to what sort of conduct was highly injurious to the public interests differed from those of Lord Campbell himself. Surely the judgments referred to above are not adequately described by the phrase 'loose expressions.' Of the four cases cited two are decisions of the Court of Queen's Bench, directly upon the very point itself. The *dicta* of Lord Mansfield and Grose, J. (that the agreement of several journeymen to stand for higher wages is illegal) are closely pertinent to the matters then under discussion, and are the more weighty because each of the judges assumes that the illegality of the combinations in question is so clear that it may be used as a proof of matter in itself more obscure. They are certainly as much in the nature of judgments as Lord Campbell's own language in Hilton *v.* Eckersley; and the language of the now repealed statute of 6 Geo. 4, c. 129, is unintelligible if the legislature did not believe that the combinations which it expressly permitted would have been crimes in the absence of such express permission. The general result appears to be, that all combinations to effect any alteration in the rate of wages, except those which were expressly excepted by 6 Geo. 4, c. 129, ss. 4, 5, were indictable conspiracies at common law.

"The result, however, cannot be regarded as free from doubt, and it would be difficult to find a stronger illustration of the uncertainty produced by the absence of precise and universally binding definitions of crimes than is supplied by this branch of the law. The whole matter is discussed in full detail by Mr. Wright (Law of Criminal Conspiracies, pp. 43–62)."

In R. *v.* Bunn, 12 Cox C. C. 316, 339, 340, Brett, J., when summing up, said: "Now I shall first ask you this: Was there an agreement or combination, which is practically the same thing, between the defendants, or between the defendants and others, or by some of them, to force Mr. Trewby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is an annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this gas company was conducting. . . . . I tell you that the mere fact of these men being members of a trade union is not illegal, and ought not to be pressed against them in the least. The mere fact of their leaving their work — although they were bound by contract, and although

to regulate the prices to be received by railroad corporations who are common carriers within its borders; and that the reasoning

they broke their contract — I say the mere fact of their leaving their work and breaking their contract is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable." See, to same general effect, remarks of Bramwell, J., in R. *v.* Druitt, 10 Cox C. C. 592.

In Fawcett's Political Economy (London, 1865) the subject of trades unions and strikes occupies a chapter from which are taken the following conclusions: —

1. Any combination to limit the number of workmen is calculated to depress trade and injuriously affect all classes of the community.

2. As to the abstract question of the union of workmen to strike for higher wages there can, it is argued, be no doubt as to the "right." "If employers are freely permitted to invest their capital to the greatest possible advantage, we conceive that the employed may equally claim to be allowed to obtain the highest wages they can for their labor. If, therefore, any of them choose to form themselves into a combination, and refuse to work for the wages which are offered to them, they are, we think, as perjectly justified in doing this as capitalists would be if they refused to embark their capital because the investment offered was not sufficiently remunerative. Workmen, however, do an illegal and most mischievous act, which ought to be punished with the utmost rigor of the law, if they attempt to sustain the combination by force, and if they coerce individuals to join in it by threatening to subject those who keep aloof either to annoyance or personal violence."

3. The increase of wages implies a diminution of profits, and therefore cannot be permanent unless the number of laborers is restricted.

4. The interests of workmen and their employers are only identical in the sense in which the interests of buyers and sellers are identical, which, though true in the long run, is not so at the immediate moment.

5. Temporary influences giving the buyer of labor special advantages over the seller may be put right by combinations of workmen. This cannot be done in periods of adversity, as in such cases strikes rather benefit the employer, enabling him to weed out his force and reduce his expenses, while the result is ruinous to the employee. In times of prosperity, however, strikes, conducted in good temper, and without such violence as to incur penal responsibility, may produce a temporary benefit. The work-

on which this conclusion rests would authorize the statutory imposition by law of fixed prices of labor in other industries beside

man says, "Why should I wait until you choose to arrive at this joint decision (to raise wages)?" "The master would very naturally persist in his refusal; for he would feel confident that the workman, being a poor man, could not live without employment; and as the wages paid in the trade are uniform, the workman would have no chance of obtaining higher wages from another employer." Supposing, however, there should be a general union of the workmen in the business to the same effect, "the masters would know that they themselves would suffer a most severe loss, if such a determination were carried out; for their business would be stopped at a time when it was most profitable. They would, therefore, have every inducement to grant their workmen what they claimed, if the demands were really justifiable." "If the employers possess a power of combination and the laborers do not, then we think that one party has a chance of obtaining a better bargain than the other; but if this power of combination is exerted by both, then they are both placed in a position of perfect equality."

6. Combinations of this class may become beneficial to both the employer and the employee, these advantages being by no means dependent upon strikes. "When this power of combination is fully recognized, all that can be received by it will be peacefully conceded; and, therefore, instead of enmity being perpetuated, increased harmony and good will will be guaranteed. The workman will become a participator in his master's prosperity; and if he shares in his prosperity, he will learn to suffer with him in the time of adverse trade. The workman will be thus gradually taught one of the most valuable of lessons, namely this, that capital is not a tyrannical power which oppresses him, but is the source from which he obtains his livelihood."

Professor Walker, of Yale College, in his work on the Wages Question, N. Y. 1876, c. xix., discusses at length the question whether any advantages may be acquired by the "wages class" through strikes or trades unions. That these are legal, he very properly assumes, viewing the old legislation and the old jurisprudence to this effect as now obsolete. It is admitted, at the outset, that in cases where wages appear inadequate, "if bodies of labor can be put under discipline so that they shall proceed in order and with temper, great injury may be averted, injury which once wrought may be permanent." It is stated that illustrations might be multiplied "showing how an advance of wages which masters were unwilling to concede, and which workmen through their isolated and mutually jealous and suspicious action would be unable to command, if effected through united action might prove to be for the interest of both master and men." While admitting that strikes are "only of questionable utility in the first stages of the elevation of masses of labor long abused and much abused," he justly attributes the repeal of the English combination statutes, noticed hereafter, to the fear produced by the "strikes." A summary of subsequent legislation is then given. But while for temporary purposes trades unions are held to have produced valuable effects, the value of their permanent existence, as wages-settling agencies, is seriously questioned.

those of the common carrier. Yet, after making all these allowances, though we may not hold absolutely that the State has no

In Roscher's Political Economy (N. Y. 1878), and in Lalor's notes, vol. ii. § 176, pp. 84 *et seq.*, the history of strikes is given in detail. The result in such cases, it is said, "must generally issue in the victory of the richer purchasers of labor." On the other hand, "when wages in general tend to rise, but by force of custom are kept below their natural level, a strike may very soon attain its end. And workmen are all the more to be wished God-speed as employers are slow to decide of their own motion upon raising wages." It is of course otherwise with the struggle of workmen against the natural conditions which determine the rate of their wages, in which they might in turbulent times possibly succeed temporarily, but would in the long run have to fail.

Attention is called, also, to the fact that trades unions, so far as concerns their action in adjusting wages, and providing a provident fund, are the successors of the old "guilds," whose legality was never disputed. See Thornton on Labor, iii. c. 4; London Quart. Rev. Oct. 1867; Edinburgh Rev. Oct. 1867.

On the question of lawfulness, we have the following conclusion: —

"Where there exists a very high degree of civilization, there is a balance of reasons in favor of the non-intervention of governments, but only so as the striking workmen are guilty of no breach of contract and of no crime. . . . . Coalitions of purchasers of labor for the purpose of lowering wages, which are most frequent, though noiselessly formed, the police power of the State cannot prevent. If now it were attempted to keep the working class alone from endeavoring to correspondingly raise their wages, the impression would become general, and be entertained with right, that the authorities were given to measuring with different standards."

Professor Bonamy Price (Political Economy, London, 1878, chap. viii.) speaks as follows: —

"Adam Smith declared that masters were always in tacit combination against workmen. The laborers are apt to fall into a spirit of acquiescence. . . . . These and other considerations of the same kind warrant a joint understanding, and, if thought desirable, joint action on the part of the workmen. They may with reason say, that under such circumstances union is strength. But this principle by no means implies hostility and combat." Unions of this class, he further argues, are useful for ameliorating some of the harder conditions of labor, *e. g.* as to overwork of children and general inadequacy of accommodations. Another important object is the collection and dissemination of information as to the market value of wages. But when trades unions transcend these limits, and undertake to determine what laborers shall be employed, and to fix a uniform price to be given to workmen irrespective of their merits, then their action, it is ably shown, is detrimental to all classes. And so it is with action fixing the hours of labor, condemning payment by the piece, enforcing diminished production, and requiring strikes if non-unionists are employed.

A valuable history of recent strikes is given, showing the injury in the main produced by them to the strikers.

Several English statutes must be taken into consideration in connection with the rulings of the courts. The

right to intervene to settle prices of either labor or produce, we must assert that it has no right to make such settlements by

first is the now repealed Act of 6 Geo. 4, c. 120, making threats to effect certain ends indictable. Under this statute the "threats" of trades unions have been, by some judges, considered included. Walsby *v.* Anley, 3 E. & E. 516; though see *contra*, R. *v.* Druitt, 10 Cox C. C. 592; R. *v.* Selsby, 5 Cox C. C. 495, n.; R. *v.* Sheridan, cited Wright's Conspiracy, 47. This statute, it should be remembered, was only in force in England for a few years, and is not to be found in any of our American codes. A statute also was adopted in England in 1871, 34 & 35 Vict. c. 32, by which agreements in restraint of trade, when no force or fraud is used, are treated as non-indictable; but this statute does not change the common law. Of the statutes regulating breaches of contract by workmen Mr. Wright (Conspiracy, 59) thus speaks: —

"Where, however, the agreement is for conduct involving a breach of contract by workmen, different considerations occur. Acts have been for many years in force for punishing breaches of contract by workmen of most kinds, and an agreement to break those acts, or to procure a breach of them, may be criminal on the general principle established in the seventeenth section. A difficulty may, indeed, occur at the present time from the fact that 'The Master and Servant Act, 1867,' appears to suspend the provisions of most of the former acts for punishing breaches of contract, and to substitute the discretion of a magistrate as to whether the wrong ought to be regarded as criminal or as merely civil, so that a breach of contract may be thought to be of an indeterminate character, both when it is proposed and when it is executed; nor does there seem to be any case in which the effect of this condition of the law has been considered in its relation to combinations. Either view of its effect is attended with difficulty. On the one hand, the provisions of the nineteenth section, which expressly preserves the procedure by indictment in cases of malicious injury to person or property, may perhaps raise some presumption that procedure by indictment was intended to be excluded in the case of other kinds of misconduct within the purview of the statutes whose penal clauses are suspended. On the other hand, it seems unlikely that the legislature should have intended to relieve without express words from the criminality which has long attached to agreements for breaches of contract, where those breaches were in violation of penal acts.

"Agreements for breaches of contracts of service, in cases to which no penal act applies, seem never to have been determined to be criminal."

In Sheridan's case, 1868 (Wright's Consp. 50), Lush, J., is said to have ruled that there was nothing unlawful either in a strike for compelling a master to comply with certain regulations, or informing him of the object of the strike, or in picketing his premises, so long as there was no violence or intimidation.

In R. *v.* Shepherd, 11 Cox C. C. 325 (1869), the same view was repeated by the same judge.

Rowland's case, 2 Den. C. C. 364; 5 Cox C. C. 407; 17 Q. B. 671 (1851), is explained by the fact that "molestation" was made penal under 4 Geo. 4, c. 34. Infra, § 1367.

"Neither in Druitt's case nor in Bunn's case," says Mr. Wright, in his

means of common law criminal prosecutions. Undoubtedly if a statute is passed (however impolitic it may be) making it a

work on Conspiracy, "was there any apparent opportunity of obtaining a confirmation or explanation of the rules laid down for the guidance of the jury by appeal on a case reserved for the Court of Criminal Appeal." See Act of 34 & 35 Vict. determining that no act shall be illegal merely because in restraint of trade.

In a New York case, on a statute making it indictable to conspire to commit acts "injurious to trade or commerce," where journeymen shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a price below the rate thus fixed, he should pay a penalty of ten dollars; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work with him, and would quit his employment; and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge him; it was held that the parties thus conspiring were guilty of a misdemeanor. People *v.* Fisher, 14 Wend. 9. But this decision goes too far, and cannot now be sustained. Master Stevedores' Ass. *v.* Walsh, 2 Daly (N. Y.), 1. Undoubtedly to absorb, by fraud or coercion, all of a particular class of the staples, or currency, or labor, in a community, so as to produce a dearth in any actual necessity of life, and in this way to produce misery on one side and extortionate gains on the other, is an indictable offence. 1 Hawk. P. C. c. 80, s. 3; 3 Inst. 196; 4 Bl. Com. 158; R. *v.* Webb, 14 East, 406; R. *v.* Waddington, 1 East, 143; 7 Dane Ab. 39; Morris Run Coal Co. *v.* Barclay Coal Co. 68 Penn. St. 173. And *a fortiori* is a conspiracy to effect any of these objects indictable. On the same reasoning a conspiracy by coercion or bribes to compel a raising of wages, or prevent a fellow-workman from obtaining employment, is indictable. Com. *v.* Hunt, 4 Met. 111. But a mere combination between workmen of a particular group not to work for a particular master except for higher wages, when such a combination does not include the whole market, so as to prevent the employer from obtaining other employees, or when the means adopted by those thus combining are not in themselves unlawful (*e. g.* intimidation through threats of injury), is not in itself the subject of criminal prosecution. If it were, there are few joint operations for money making which could escape indictment. The regulation of industry would be left, not to private enterprise and experience, but to the criminal courts.

In Pennsylvania, by the Act of June 14, 1872, "it shall be lawful for any laborer or laborers, workingman or workingmen, journeyman or journeymen, acting either as individuals or as the member of any club, society, or association, to refuse to work or labor for any person or persons whenever, in his, her, or their opinion, the wages are insufficient, or the treatment of such laborer or laborers, workingman or workingmen, journeyman or journeymen, by his, her, or their employer is brutal or offensive, *or the continued labor by such laborer or laborers, workingman or workingmen, journeyman or journeymen, would be contrary to the rules, regulations, or by-*

criminal offence to refuse to work at a fixed price, or to sell a commodity at a fixed price, the courts, should such a statute be held constitutional, would be bound to enforce it. But when there is no such statute, the day is past when, either in England or in the United States, a court is justified in pronouncing indictable a combination of laborers agreeing, in furtherance of this combination, only to work at prices fixed by themselves. And this is not merely because such rulings would unduly impair the liberty of the laborer, and rudely interfere with the adjustment of business relations which depend upon the consent of the parties, influenced by the condition of the markets. These are strong reasons against such interference, but there is another reason, which, if not equally strong, is certainly equally practical. We cannot indict employees who combine, without indicting capitalists who combine. If inadequacy of remuneration is no defence for laborers refusing to invest their labor in an enterprise, then inadequacy of remuneration is no defence to capitalists who decline to venture their capital in an enterprise in which laborers might be employed. If in the one case it is a crime to agree to withhold labor from the market, in the other case it is a crime to agree to withhold capital from the market. The capitalist would be compelled by indictment to keep his capital constantly active, if the workman is thus compelled to keep his labor constantly active. But I am entitled to sell either my labor or my capital for what I can get; and if I can do this without penal liability when acting by myself, I can do so without penal liability when acting with others.[1] At the same time I am not en-

laws of any club, society, or organization to which he, she, or they might belong, without subjecting any person or persons, so refusing to work or labor, to prosecution or indictment for conspiracy under the criminal laws of this Commonwealth: *Provided*, that this act shall not be held to apply to the member or members of any club, society, or organization, the constitution, by-laws, rules, and regulations of which are not in strict conformity to the Constitution of the State of Pennsylvania, and to the Constitution of the United States: *Provided*, that nothing herein contained shall prevent the prosecution and punishment, under existing laws, of any person or persons who shall in any way hinder persons, who desire to labor for their employers, from so doing, or other persons from being employed as laborers."

[1] As an illustration of the change of opinion in England in reference to trades unions may be mentioned the following: —

On Nov. 13, 1879, a deputation of leading trades unionists, men and wo-

titled, by force or threats or false pretences, to prevent others from accepting the terms which I reject. To assault, to threaten, for the purpose of obtaining from another anything of value, to obtain anything of value from him by false pretences, are offences either at common law or by statute. If so, conspiracies to effect any of these objects are indictable at common law.

Unlawful means should be averred.

§ 1367. As the gist of the offence, according to the view just stated, consists in the unlawfulness of the means, these means must be set forth. Hence it has been held in Massachusetts, that an indictment which charged that the defendants, journeymen boot-makers, unlawfully, &c., confederated and formed themselves into a club, and agreed together not to work for any master boot-maker, or other person, who should employ any workman or journeyman not a member of said club, after notice given to such master or other person to discharge such workman, contains no sufficient averment of any unlawful purpose or means. An indictment for a conspiracy, it was said, which does not directly aver facts sufficient to constitute the offence, is not aided by matter which precedes or follows the direct averments; nor by qualifying epithets, as "unlawful, deceitful, pernicious," &c., attached to the facts averred.[1]

Yet the means, when unlawful by statute, need not be given in detail. Thus in conspiracy to injure a tradesman, under 6 Geo. 4, c. 129, it is sufficient to allege that the defendants conspired,

men, waited upon the Archbishop of Canterbury, at Lambeth Palace, to request him, as President of the National Society, to induce the society to withdraw a book containing certain passages from sale, and to stop the reading of those passages in the national schools. The objectionable paragraphs, which were quotations from Archbishop Whately's "Lessons on Political Economy," were duly read out to Archbishop Tait, and commented upon by various speakers, with the view of showing their injustice and untruthfulness. Archbishop Tait, while speaking highly of Archbishop Whately as a liberal statesman, went on substantially to say that when Whately wrote, the science of political economy was in its babyhood, and further thought and discussion, from various points of view, have done much to modify principles and conclusions which he announced with absolute confidence; and, upon the other hand, the action of trades unions has within recent years been moderated by the softening temper and improving manners of the times. The book containing the extracts, it was further announced, was consequently withdrawn from among the publications of the society. London World, Nov. 21, 1879.

[1] See Com. v. Hunt, 4 Met. 111, and cases cited supra.

&c., by "molesting," "using threats," "intimidating," and "intoxicating" workmen hired by the tradesman, in order to force them to depart from their work; and also that they conspired, &c., to "molest" and "obstruct" the tradesman and the workmen with the same object, and in order to force him to make an alteration in the mode of carrying on his trade; the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, &c., more specifically.[1] It was also held, that counts framed upon this statute, which charged that the defendants conspired, &c., by "molesting" and "obstructing," and by "using threats and intimidations," to obstruct such workmen as might be willing to be hired by the tradesman, and to prevent them from hiring themselves to him, were sufficient.

So of conspiracy by unlawful means to keep an operative out of employment.

§ 1368. On the same reasoning a conspiracy to prevent, by means of threats or other unlawful means, an operative from obtaining any employment in his business, is indictable.[2] It is also indictable, as we have seen, to conspire to molest and obstruct workmen, with a view to induce them to leave their employment.[3]

So to engross any particular business staple.

§ 1369. It has also been held to be indictable to combine to engross by coercion or fraudulent means, under one control, any particular business staple (*e. g.* wheat, gold, cotton, coals), so as to force its purchase by the community at exorbitant prices.[4] A learned Pennsylvania judge has gone so far as to say that a combination between miners in a particular market, controlling the coal in that market, to hold up the price of coal in such market, is indictable at common law. "When competition is left free," said Agnew, J., "individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the

[1] R. *v.* Rowlands, 9 Eng. Law & Eq. 287; 17 Q. B. 671; 5 Cox C. C. 436.

[2] R. *v.* Hewitt, 5 Cox C. C. 162.

[3] R. *v.* Rowlands, *ut supra*; R. *v.* Hibbert, 13 Cox C. C. 82; 13 Moak's Eng. R. 433. See to same case a valuable note by Mr. Moak.

[4] R. *v.* Norris, 2 Kenyon, 300. Supra, § 1366.

markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. . . . . The influence of a lack of supply, or the rise in the price of an article of such prime necessity, cannot be measured. It permeates the whole mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence."[1] But this cannot be sustained unless the combination acts through coercive or fraudulent means. If there is no fraud, or no intimidation, in the means adopted, rulings making penal such a combination, if they are rested on grounds of public policy, are open to the following objections: (1.) They would be futile. Combinations, if desirable to the owners of a particular commodity to keep up its price, would consist of a tacit understanding, which no legal process could reach. (2.) If effective, such rulings would cover every combination to obtain remunerative prices; yet without such a combination, no great staples could be brought into the market. (3.) They put a prerogative which can be best exercised by individuals, as the exigencies of the time prompt, into the hands of the State, in defiance of the principle that it is not within the province of the State to do that which can be best done by individuals. (4.) They establish a standard which is fixed, and therefore often harsh and oppressive, in place of one which is elastic, yielding to the necessities of the market. A governmental standard once fixed can only be changed by long and difficult processes. But combinations to keep up prices of staples, even if occasionally operative, are short-lived from their own nature. And if all combinations to keep up prices are made indictable, the only reliable guard against sudden and destructive panics is removed.

To suppress competition at a public auction.

§ 1370. It has been also said that it is an indictable offence for parties attending an auction to agree together that one only of them should bid for each article sold, and that all articles thus bought by any of them should be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among

[1] Morris Run Coal Co. *v.* Barclay Coal Co. 68 Penn. St. 173.

the several parties concerned in the fraud.[1] It is clearly a conspiracy to agree by fraudulent contrivances to cheat at a mock auction.[2]

§ 1371. Whenever there is a combination to oppress or defraud the public by a fraudulent or coercive confederacy, such combination is an indictable conspiracy at common law.[3] Thus an indictment holds for a conspiracy to raise the price of the public funds by false rumors, as being a fraud upon the public;[4] for a conspiracy to cheat by betting;[5] for a conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen;[6] for a conspiracy, as in a case already noticed, by violence, threats, contrivance, or other sinister means to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both;[7] for a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm;[8] for a conspiracy fraudulently to induce brokers to advance money;[9] for a conspiracy untruly and fraudulently to overvalue a commodity;[10] for a conspiracy to cheat railroad companies by fraudulently filling up stolen blank tickets;[11] for a conspiracy fraudulently to raise tolls on the public works;[12] for a conspiracy fraudulently and corruptly to interfere with or to pervert public justice;[13] for a conspiracy

And so to combine to do public wrong.

[1] Levi *v.* Levi, 6 C. & P. 239.

"The ruling in Levi *v.* Levi," says Mr. Wright, "may be explained on the ground that had the auctioneer known of the combination he would not have knocked down the goods to any of the persons concerned in it; that his consent to the transfer of property was obtained by a false appearance of competition." Wright's Conspir. 34. Perhaps a better view is that for two or more persons to attempt to get property by deceptive reciprocal references is a cheat at common law, in the nature of the presentation of false tokens.

[2] R. *v.* Lewis, 11 Cox C. C. 404.

[3] See supra, § 1349.

[4] R. *v.* De Berenger, 3 M. & S. 67.

[5] R. *v.* Bailey, 4 Cox C. C. 390; R. *v.* Hudson, 8 Cox C. C. 305.

[6] R. *v.* Roberts, 1 Camp. 399; Gardner *v.* Preston, 2 Day, 205. See State *v.* Clary, 64 Me. 369.

[7] R. *v.* Tarrant, 4 Burr. 2106; R. *v.* Tanner, 1 Esp. 304; R. *v.* Seward, 1 Ad. & El. 706; and see 1 East P. C. 461, 462; 8 Mod. 620.

[8] R. *v.* Hevey, 2 East P. C. 858. See State *v.* Norton, 3 Zabr. 33.

[9] Com. *v.* Wrigley, 6 Phila. 169.

[10] R. *v.* Stenson, 12 Cox C. C. 111; R. *v.* Kenrick, Dav. & M. 208; 5 Q. B. 49; R. *v.* Levine, 10 Cox C. C. 374. Supra, § 1349.

[11] Bloomer *v.* State, 48 Md. 321.

[12] Wharton's Prec. 658.

[13] Supra, § 1332; infra, § 1380.

to obtain money by selling a public office.[1] But public officers who purchase supplies without advertising for bidders, in contravention of a statute of the State, are not guilty of an indictable conspiracy unless they act corruptly in refusing to advertise.[2]

So to use fraudulent means to effect an election.

§ 1372. It is clear that to fraudulently tamper with an election is indictable at common law when the election is appointed by the State.[3] The same principle extends to elections in private corporations. Thus an indictment for a conspiracy alleged that the defendants, fraudulently contriving to procure the election of certain persons as directors of an insurance company, and thereby cause themselves to be employed in the service of the company, fraudulently conspired to induce persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting of the company and vote for directors. It was held, that while the ultimate object of the respondents, that is, to procure themselves to be employed by the company, was lawful, the means were fraudulent, immoral, and illegal, it appearing that the defendants had agreed with the insured that the policies should be held and treated as mere nullities for every purpose but that of authorizing the holders to vote thereon at the annual meeting, although the defendants agreed also that the policies should be duly approved by the requisite number of directors, not cognizant of the intended fraud, upon applications in regular form, and although the policies might be binding on both parties.[4]

So to defraud revenue.

§ 1373. A conspiracy to defraud the government of revenue is indictable under the federal statutes.[5]

[1] R. v. Pollman, 2 Camp. 229; R. v. Vaughan, 4 Burr. 2494. Infra, § 1375.

[2] People v. Powell, 63 N. Y. 88.

[3] Infra, § 1832. See 7 Cox App. 15; R. v. Haslam, 1 Den. C. C. 73. As to Ku-Klux prosecutions see U. S. v. Crosby, 1 Hugh. 448.

[4] State v. Burnham, 15 N. H. 396.

[5] U. S. v. Boyden, 1 Low. 266; U. S. v. Smith, 2 Bond, 323; U. S. v. Rindskopf, 6 Biss. 259; U. S. v. Babcock, 3 Dill. 581. For conspiracy to import goods without duty see U. S. v. Graff, 14 Blatch. 381.

In U. S. v. Hirsch, S. Ct. U. S. 1879, the court were called upon to interpret section 5440 United States Revised Statutes, which is as follows: "If two or more persons conspire, either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties shall be liable," &c. This section, it was held, was originally section 30 of the Act of March 2, 1867 (14 U. S. Stats.

§ 1374. We now recur to the same distinction as was announced in discussing cheats at common law. Mere bragging declarations, being matters of opinion, are not indictable; when, however, there is a combination to induce, by means of artful falsification of fact, the public to take stock in a worthless concern, then

So to publish a false statement of the affairs of a banking or trading company.

484), which was a revenue law, but does not, as found in the Revised Statutes, or in the original act, make any special reference to the revenue or to revenue laws. It was held to be not a revenue law, and a person indicted thereunder for defrauding the revenue is entitled to plead the limitation of Revised Statutes, section 1044, of three years, and the limitation of section 1046, of five years, for "any crime arising under the revenue laws," does not apply. It was said that *specific acts* which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, but a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws. 20 Alb. L. J. 454 — Miller, J.

In U. S. *v.* Donan, 11 Blatch. 168, it was said by Benedict, J.: "The 30th section of the Act of March 2, 1867, creates an offence which may be committed without any other action on the part of the accused than that of conspiring with another to commit an offence against the laws of the United States, or to defraud the United States. The unlawful agreement is, therefore, the gist of the offence which this section intended to create. The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators is intended to afford a *locus poenitentiae*. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the agreement may withdraw, and thus escape the effect of the statute. After such an act all are liable to the penalty. The act to effect the object of the conspiracy, which the statute calls for, is not designated as an overt act, and was not intended to be made an element proper of the offence. The offence is the conspiracy. Some act by some one of the conspirators is required, to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offence of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offence intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation.

"If then an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient. if the act be so described as to apprise the defendant what act is in-

the offenders are guilty of conspiracy.[1] Thus in an English case, tried in 1858, the directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance sheet showing a profit, and thereupon declared a dividend of six per cent. They also issued advertisements inviting the public to take shares, upon the faith of their representations that the bank was in a flourishing condition. On an *ex officio* information filed by the attorney general they were found guilty of a conspiracy to defraud.[2]

So to attempt corrupt bargains with or for government.

§ 1375. It has been just seen,[3] that a conspiracy to corruptly procure office is indictable. In an early Virginia case it was held indictable for two justices, in whom was vested certain county nominations, to agree that one would vote for A. as commissioner, if the other would vote for B. as clerk.[4] But if this principle be logically extended,

tended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud, or to commit an offence; but the object of requiring proof of some act in furtherance of the unlawful agreement is, to show that the unlawful combination became a living, active combination." For statute see supra, § 1356.

[1] In an English case determined in 1876, the second count alleged that the defendants, who were directors, &c., of a new company, had conspired to deceive the members of the committee of the Stock Exchange, and to induce them, contrary to the intent of certain of their rules, to order a quotation of the shares of the company in the official list of the Stock Exchange, and "thereby to persuade divers liege subjects, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied with the said rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange." It was ruled (affirming the decision of the Queen's Bench Division below), that the second count contained averments which, if taken to be proved in a sense adverse to the defendants, sufficiently supported the charge of criminal conspiracy. R. *v.* Aspinall, 36 L. T. Rep. (N. S.) 297; 13 Cox C. C. 563; L. R. 1 Q. B. D. 730.

[2] R. *v.* Brown, 7 Cox C. C. 442; R. *v.* Esdaile, 1 F. & F. 213. See R. *v.* Gurney, 11 Cox C. C. 414. Supra, § 1349.

[3] R. *v.* Pollman, 2 Camp. 229. Supra, § 1371.

[4] Com. *v.* Callaghan, 2 Va. Cas. 460.

few legislative or executive compromises could stand.[1] To constitute a conspiracy in such cases it is necessary that there should

[1] See supra, § 1360.

This principle, however, was declared by the late Judge B. R. Curtis, in his address on behalf of the Whig representatives to the people of Massachusetts, to apply to the coalition, in 1851, of the Free Soil and Democratic representatives in the Massachusetts legislature; the purpose of which coalition was the election of Democrats to state offices and a Free Soiler to the U. S. Senate. He thus characterizes it: —

"But this is not a coalition. A compact between two distinct parties, having different political principles, for the purpose of dividing public offices between them, — a compact to do this by electing a man for governor in whom the one party does not confide, — is not a coalition, but a factious conspiracy. And when such a compact is made between those who have merely a delegated authority, held in trust, to be used, under the sanction of an oath, to place in office only those in whom the trustees do confide, *it is a factious conspiracy to violate a public trust, and as such criminal, not only in morals, but in the law of the land.* It is true the statute of the State has not defined this offence, as it has failed to do others. . . . . But the common law which pervades society, and enters into the relations of life both public and private, with its benign but bracing influence, deems such an abuse of a public trust a misdemeanor, punishable by indictment. And there is high authority that a bargain like this, even when made by single persons, and in reference to subjects of far less public concern than this, is an indictable offence. In the year 1825 a case came before the highest criminal court of one of our sister States, wherein it appeared that A. and B. were justices of the peace, and as such had the right to vote in the county court for certain county officers; that they agreed together that A. would vote for C. for commissioner, in consideration that B. would vote for D. for clerk; that they voted in pursuance of that agreement. The statute of the State, like ours, did not reach the case. But their common law, the same as ours, declared: 'The defendants were justices of the peace, and as such held an office of trust and confidence. In that character they were called upon to vote for others, for offices also implying high trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet, upon the pleadings in this case, it appears that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior their qualifications to their competitors. It would seem, then, upon these general principles, that the offence in the information is indictable at common law.' Com. *v.* Callaghan, 2 Va. Cas. 460.

"This is the manly and clear response of the common law, — the inheritance of our fathers and ourselves, — not only in that State, but wherever it prevails. And now what are the differences between that crime and the case we lay before you? The parties to that bargain were the electors in the court of a county; the parties to this bargain were electors in the Legislature of Massachusetts. The

be a corrupt intent to contravene either a statute or a settled provision of the common law.[1]

8. *To falsely accuse another of Crime, or use other Improper Means to injure his Reputation, or extort Money from him.*

Conspiracy to falsely prosecute is indictable.

§ 1376. A conspiracy to falsely charge a man with any indictable offence has frequently been held the subject of indictment;[2] but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion.[3]

Conviction no bar.

§ 1377. Even the legal conviction of an innocent man is no bar to an indictment against those who by such combination procured the conviction.[4] And an indictment was sustained against three defendants for a conspiracy in com-

parties to that bargain were two individuals, and their compact controlled two votes; the parties to this bargain were numerous, and their compact controlled many votes; and every reflecting man must see that a conspiracy becomes more criminal the more persons it embraces, and the more power it wields. The parties to that bargain made it 'without reference to the qualifications of the candidates;' the parties to this bargain entered into it with an open declaration that one of the candidates was distrusted by one party, and the person who was to be voted for by the other party was not even selected, nothing being known, except that he was not to act on the principles which one of the parties who were to vote for him had long professed to hold dear. The subjects of the bargain in that case were a county clerk and a county commissioner; the subjects of this bargain were the governor of Massachusetts and one of its senators in the Congress of the United States. And finally, in that case, it does not appear that the officers voted for by the criminals were actually elected; while in this case it is known that this corrupt agreement made one man governor, and caused another to be declared elected a senator in Congress." Life and Writings of B. R. Curtis, vol. i. pp. 143–145.

[1] People *v.* Powell, 63 N. Y. 88.

[2] Foster, 130; 1 Hawk. c. 72, s. 2; R. *v.* M'Daniel, 1 Leach, 45; R. *v.* Spragg, 2 Burr. 993; R. *v.* Best, 2 L. Raym. 1167; Salk. 174; Com. *v.* Tibbetts, 2 Mass. 536; Elkin *v.* People, 58 N. Y. 177; State *v.* Buchanan, 5 Har. & J. 317; Johnson *v.* State, 2 Dutch. 313; Slomer *v.* People, 25 Ill. 70.

As to extorting hush money see R. *v.* Hollingberry, infra, § 1379. That a conspiracy to slander is indictable see State *v.* Hickling, S. C. N. Jer. 1879. Infra, § 1379.

Accusations for the purpose of extortion are elsewhere discussed. Infra, § 1664.

[3] R. *v.* Best, 1 Salk. 174; 2 L. Raym. 1167; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Dupuy, Brightly, 44.

[4] Com. *v.* M'Clean, 2 Parsons, 367.

bining to arrest one C. C., a resident of the county of Philadelphia, on the false charge of deserting the army of the United States, in the year 1847; and after arresting him, in forcibly carrying him to New York, for the purpose of obtaining the reward of $30, which had been offered by the government for the arrest and safe delivery of a soldier who had deserted by that name.[1]

It has been held a conspiracy to combine to induce a tavern-keeper to furnish beer on Sunday, and thus to violate the Sunday liquor law.[2]

Indictment need not detail imputed crime.

§ 1378. When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired to indict him of a crime punishable by the laws of the land, and then it may be alleged that they, according to the conspiracy, did falsely indict him.[3] It is not necessary to aver that the man is innocent of the offence;[4] for he will be presumed to be innocent until the contrary appear.[5]

Conspiracy to extort money is indictable.

§ 1379. A conspiracy to extort money by charging the prosecutor with an offence or scandal is indictable,[6] and this whether the offence is criminal or not;[7] or whether the person charged is guilty or not.[8]

So to defame.

Even when there is no extortion, and no criminal offence charged, it is indictable to conspire to degrade the character of another by charging him with disgrace-

[1] Ibid. A count in an indictment for conspiracy, averring that defendants corruptly charged one with being the father of a child to be born bastard, and did various acts to effect the object of the conspiracy, is good. Johnson *v.* State, 2 Dutch. 313.

[2] Com. *v.* Leeds, 9 Phila. 569.

[3] R. *v.* Spragg, 2 Burr. 993.

[4] R. *v.* Kinnersley, 1 Str. 193; Johnson *v.* State, 2 Dutch. 313.

[5] R. *v.* Best, 1 Salk. 174; 2 Ld. Raym. 1167.

On an indictment for a conspiracy to prosecute a person who was not guilty, it is inadmissible to prove that the defendants prosecuted other persons who were not guilty, no system being set up. State *v.* Walker, 32 Me. 195.

[6] R. *v.* Hollingberry, 6 D. & R. 345; 4 B. & C. 329; Com. *v.* Wood, 7 Bost. Law Rep. 58; Whar. Prec. 58.

[7] R. *v.* Rispal, 1 W. Bl. 368; 3 Burr. 1320.

[8] R. *v.* Hollingberry, supra. In this case it was held that the means of extortion need not be stated. See, as to threats to extort money, infra, § 1664.

ful offence.[1] And wherever libelling is indictable, an attempt or conspiracy to libel is indictable.

4. *Conspiracies to obstruct Justice.*

§ 1380. Any confederation whatever, tending to obstruct the course of justice, is indictable.[2] Thus, a conspiracy by certain justices of the peace to certify that a highway was in repair, when they knew it to be otherwise, was held indictable.[3] So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, they were indicted for the conspiracy and convicted.[4] It is indictable to conspire to destroy a will, with a view to defraud the devisee.[5] And the same rule applies where the offence is the suppression or false concoction of testimony to be used in a judicial proceeding.[6]

So to obstruct public justice.

V. GENERAL REQUISITES OF INDICTMENT.

1. *Executed Conspiracies, and herein of Overt Acts.*

§ 1381. When the conspiracy is executed it is better that the facts should be stated specially, so that not only the record may present a graduated case for the sentence of the court, but also that the case, when it goes to the jury, may not be open to the objection that the grand jury having it in their power, from the examination of the witnesses for the prosecution, to find specially the agency through which the conspirators worked, confined themselves to a general finding of an unexecuted conspiracy.[7] It is not pretended that any of the cases go so far as to prescribe this doctrine, nor is it denied that

Executed conspiracy should be so averred.

[1] Gibson, C. J., in Hood *v.* Palm, 8 Barr, 237; State *v.* Hickling, supra, § 1376.

[2] R. *v.* Hamp, 6 Cox C. C. 167; State *v.* Noyes, 25 Vt. 415; State *v.* De Witt, 2 Hill (S. C.), 282; Com. *v.* M'Clean. 2 Parsons, 367; State *v.* Norton, 3 Zabr. 33; State *v.* McKinstry, 50 Ind. 465.

[3] R. *v.* Mawbey, 6 T. R. 619.

[4] R. *v.* M'Daniel, 1 Leach, 45; Fost. 130.

[5] State *v.* De Witt, 2 Hill (S. C.), 282.

[6] Ibid.; R. *v.* Mawbey, 6 T. R. 619. Supra, §§ 1334 *et seq.*

[7] U. S. *v.* Cruikshank, 92 U. S. 542; State *v.* Clary, 64 Me. 369; State *v.* McKinstry, 50 Ind. 465; Elkin *v.* People, 28 N. Y. 177.

very frequently, especially in the earlier cases, the courts have sustained counts for unexecuted conspiracies (*e. g.* conspiracies "to cheat by false pretences"), where on the trial it appeared that the supposed naked conspiracy had been fully executed, and had resolved itself into an independent misdemeanor.[1] But wherever there has been such execution of the conspiracy, it is prudent to include in the indictment at least one count setting forth specially the overt acts.[2]

Overt acts not necessary when conspiracy is *per se* unlawful.

§ 1382. Hence it is usual to set out the overt acts, that is, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not requisite, if the indictment charge what is in itself an unlawful conspiracy.[3] The pleading of the offence is complete in the conspiracy, and the overt acts, though it is proper to set them forth, may be either regarded as matters of aggravation, or discharged as surplusage.[4] As has already been seen, in an indictment for conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the statute, without giving overt acts.[5]

[1] See Alderman *v.* People, 4 Mich. 414. This is still the law in England (R. *v.* Esdaile, 1 F. & F. 213; R. *v.* Brown, 7 Cox C. C. 442), subject to the defendant's right to call for a bill of particulars. And compare supra, § 1348, note.

[2] See supra, § 1348.

[3] R. *v.* Kinnersley, 1 Str. 193; R. *v.* Gompertz, 9 Q. B. 824; Sydserff *v.* R. 11 Q. B. 245; R. *v.* Seward, 1 Ad. & El. 706; 3 N. & M. 557; R. *v.* Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 383; R. *v.* Gill, 2 B. & Al. 204; U. S. *v.* Dustin, 2 Bond, 332; State *v.* Bartlett, 30 Me. 132; State *v.* Ripley, 31 Me. 386; State *v.* Noyes, 25 Vt. 415; Com. *v.* Eastman, 1 Cush. 190; Com. *v.* Shedd, 7 Cush. 514; March *v.* People, 7 Barb. 391; Clary *v.* Com. 4 Barr, 210; Isaacs *v.* State, 48 Miss. 234; Alderman *v.* People, 4 Mich. 414; Landringham *v.* State, 49 Ind. 186. See infra, § 1400. And it is not necessary that the character of the relation between the act and the conspiracy should be detailed in the indictment. U. S. *v.* Donan, 11 Blatch. 168. See Cole *v.* People, 84 Ill. 216; State *v.* Potter, 28 Iowa, 554; State *v.* Stevens, 30 Iowa, 391, cited infra, § 1384.

[4] O'Connell *v.* R. 11 Cl. & Fin. 155; U. S. *v.* Ulrici, 3 Dill. 532; State *v.* Ripley, 31 Me. 386; State *v.* Bartlett, 30 Me. 132; State *v.* Noyes, 25 Vt. 415; State *v.* Straw, 42 N. H. 393; Com. *v.* Davis, 9 Mass. 415; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Eastman, 1 Cush. 189; Collins *v.* Com. 3 S. & R. 220; State *v.* Buchanan, 5 Har. & J. 317; State *v.* Cawood, 2 Stew. 360.

[5] R. *v.* Rowlands, 2 Den. C. C. 364; 9 Eng. L. & Eq. 287; State *v.* Hewett, 31 Me. 396; State *v.* Noyes, 25 Vt. 415. Supra, §§ 1345, 1348, 1352.

§ 1383. How far the overt acts can be taken in to aid the charging part is thus discussed by Tindal, C. J.:[1] —

Overt acts useful as explaining the conspiracy charge.

"But it was then urged by the learned counsel for the crown that supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment the part stating the overt acts, as well as that stating the conspiracy; and Rex *v.* Spragg[2] was cited as authority that the whole ought to be read together. The point decided in that case appears to have been merely this, that in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without proper cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.

"But if we examine the allegations in this indictment, there is no sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to have been done in pursuance of the conspiracy above mentioned, it must be taken to be an equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods; and, secondly, another answer is, that if the averment is to be taken to be equivalent to one that the goods

[1] R. *v.* King, 7 Q. B. 782, 807.

[2] 2 Burr, 993.

were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a *direct and positive* averment that he did conspire to cheat and defraud these persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain."[1] At the same time, overt acts may be used as indicating the object of the conspiracy.[2] And such overt acts are divisible.[3]

§ 1384. In several States overt acts are by statute made essential to conspiracy. Yet it is not necessary that these acts should be completed. If they be in any way embodied into shape, it is enough.[4] In Illinois they need not be set forth.[5]

Overt acts may be required by statute.

2. *Unexecuted Conspiracies.*

§ 1385. Where the conspiracy is unexecuted, and nothing more is likely to appear in evidence than a mere inoperative confederacy on the part of the defendants to do an indictable act, it would seem prudent to explain the fact of the non-setting out of the features of the offence by stating that it never was consummated, and that the grand

Fact of their omission may be explained.

[1] See, to same effect, Com. *v.* Shedd, 7 Cush. 514.

[2] R. *v.* Esdaile, 1 F. & F. 213. This has been reaffirmed in the following case: An indictment averred that C. died possessed of East India stock, leaving a widow; that the defendants conspired, by false pretences and false swearing, to obtain the means and power of obtaining such stock; that, in pursuance of such conspiracy, they caused to be exhibited in the Prerogative Court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that deponent was one of her children; and that the defendants fraudulently obtained for deponent, as one of the children of C., a grant of administration on his estate. On motion to arrest the judgment, on the ground that a charge of conspiracy to obtain the means and power of obtaining the stock did not describe any offence, it was said, that the statement of the overt act done in furtherance of the objects of conspiracy was so interwoven with the charge of conspiracy itself, as to show an unlawful conspiracy. Wright *v.* R. (in error) 14 Q. B. 148. But it was held, that at all events the overt acts in themselves constituted a misdemeanor on which the court could legally pronounce judgment. Ibid.

[3] See Whart. Cr. Pl. & Pr. § 133.

[4] People *v.* Mather, 4 Wend. 229; People *v.* Chase, 16 Barb. 495; State *v.* Norton, 3 Zabr. 33; State *v.* Porter, 28 Iowa, 554; State *v.* Stevens, 30 Iowa, 39. See infra, § 1400.

[5] Cole *v.* People, 84 Ill. 216.

jury therefore were ignorant of its particular character. Thus in a leading case already cited,[1] Tindal, C. J., very pointedly intimates that where the prosecutor is shown to have had it in his power to describe any of the objects of the conspiracy, a failure to do so is a sensible defect; and his reasoning leads to the position that, where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery, where the grand jury are unable to describe the forged instrument from the fact of its loss or destruction, is shown,[2] and the same reasoning may be not inaptly applied to the present case. At the same time it is clear that when the conspiracy is to do an act *per se* indictable, neither means nor overt acts need be stated.[3]

Bill of particulars may be required.

§ 1386. Whenever the court deem it necessary, a bill of particulars will be ordered, to supply the defendant with the facts on which the prosecution relies to establish the general offence.[4]

3. *Joinder of Counts.*

Counts for conspiracy can be joined with counts for substantive offence.

§ 1387. The policy of our courts, as has already been seen in a kindred line of offences, has permitted a joinder of counts, which, though originally discountenanced in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, are frequently joined in the same indictment.[5] When the defendant is tried on the two charges together, he has the advantage of bringing to bear on the lighter offence the full number of challenges awarded to him on the heavier; nor can he be said to be

[1] R. *v.* King, 7 Q. B. 782, 807.

[2] Supra, § 1344; Whart. Cr. Pl. & Prac. § 156. See State *v.* Hewett, 31 Me. 396.

[3] Supra, §§ 1345, 1348, 1352, 1382; infra, § 1400. See also R. *v.* Hollingberry, 6 D. & R. 345; 4 B. & C. 329; O'Connell *v.* R. 11 C. & F. 155; R. *v.* Carlisle, Dears. C. C. 337; 6 Cox C. C. 366.

[4] R. *v.* Kenrick, per Lord Denman, C. J.; 5 Q. B. 49; R. *v.* Hamilton, 7 C. & P. 448. See R. *v.* Brown, 8 Cox C. C. 69; R. *v.* Rycroft, 6 Cox C. C. 76; R. *v.* Esdaile, 1 F. & F. 213. Whart. Cr. Pl. & Pr. §§ 157, 702.

[5] Harman *v.* Com. 12 S. & R. 69; Burk *v.* State, 2 Har. & J. 426; State *v.* Coleman, 5 Port. 32; State *v.* Montague, 2 McC. 257; State *v.* Gaffney, Rice, 431; State *v.* Boise, 1 McMull. 190. Whart. Cr. Pl. & Pr. §§ 290–1.

embarrassed in the preparation of his defence, as precisely the same evidence which would disprove the attempt would disprove the consummation. The only difference is, that after an acquittal of the felony, instead of being subjected to another binding over and trial on the constituent misdemeanor, the two charges are tried at the same time, when the evidence on each side is fresh and at hand, when neither can take advantage of a prior knowledge of the antagonist's case. That this practice extends as properly to conspiracies to commit indictable offences, as to attempts or assaults with intent to commit the same, may be urged with great reason. By such a course the difficulty of merger will be avoided; for if the attempt was completed, the verdict attaches to the completed offence; if not, to the conspiracy.[1]

Where an indictment for conspiracy contains several counts, if only a single conspiracy is proved, the verdict may nevertheless be taken on so many of the counts as describe the conspiracy consistently with the proof.[2]

4. *Joinder of Defendants.*

§ 1388. A conspiracy must be by two persons at least: one cannot be convicted of it, unless he has been indicted for conspiring with persons to the jurors unknown.[3] So on an indictment for conspiracy against two, the acquittal of one is the acquittal of the other.[4] But where three persons were engaged in a conspiracy, and one was acquitted and another died before trial, it was held that the third could nevertheless be tried and convicted.[5]

Two or more persons necessary to offence.

Whether a conviction can take place when two defendants being joined, one of them is insane, has been doubted.[6] Certainly if one defendant is incompetent to conspire, no one can

[1] See supra, § 1344.

[2] R. v. Barry, 4 F. & F. 389.

[3] 1 Hawk. c. 72; R. v. Denton, Dears. C. C. 3; R. v. Thompson, 16 Q. B. 832; 5 Cox C. C. 166; Mulcahy v. R., L. R. 3 H. L. 306; U. S. v. Cole, 5 McLean, 513; Com. v. Irwin, 8 Phila. 380. As to joinder of defendants see Whart. Cr. Pl. & Pr. § 305; as to verdict, Ibid. § 755; and see Whart. Crim. Ev. § 136; as to effects of allegation "unknown" see Whart. Cr. Pl. & Pr. §§ 104, 111. Infra, § 1393.

[4] State v. Tom, 2 Dev. 569.

[5] People v. Olcott, 2 Johns. Cas. 301. See R. v. Kinnersley, 1 Str. 193; R. v. Niccolls, 2 Str. 1227; R. v. Kenrick, 5 Q. B. 49; D. & M. 208. Infra, § 1391.

[6] Brackenridge's Law Miscellanies, 223.

be convicted of conspiracy with him. And this obtains in cases of acquittal or *nolle prosequi* on an indictment against a single co-conspirator.[1]

Prosecution may elect co-conspirators to proceed against.

§ 1389. It is in the discretion of the prosecution to include only as many of the alleged co-conspirators in the indictment as it may deem expedient; and the non-joinder of any such, provided there is enough alleged on the record to constitute the offence *aliunde*, is not matter for exception, although the party omitted was a *particeps criminis*.[2] Nor is it necessary that a co-conspirator when named should be indicted.[3]

All contributing with knowledge of common design may be joined.

§ 1390. In a case where several conspired to procure by corrupt means an employment under government, it was held that a banker who knowingly received the money, in order to pay it over to accomplish the purpose, became a party to the conspiracy.[4] Nor is it a defence that there was a sub-plot among the co-conspirators to cheat each other.[5]

Acquittal of one defendant evidence on trial of other.

§ 1391. Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried.[6]

Husband and wife without other defendant not sufficient.

§ 1392. A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless other parties are charged.[7] But it is otherwise of a conspiracy consummated before their marriage.[8]

Unknown co-conspirators

§ 1393. An indictment charging the defendant with conspiracy with persons unknown is good, notwithstanding the names of some of the persons alleged unknown

[1] State *v.* Jackson, 7 S. C. 283.

[2] R. *v.* Ahearne, 6 Cox C. C. 6; Com. *v.* Demain, Brightly, 441. Infra, § 1407.

[3] Heine *v.* Com. S. C. Penn. 1879.

[4] R. *v.* Pollman, 2 Camp. 229.

[5] R. *v.* Hudson, Bell C. C. 263; 8 Cox C. C. 305.

[6] R. *v.* Horne Tooke, Old Bailey, 1794; Burn's Justice, tit. "Conspiracy."

When one defendant in conspiracy dies between indictment and trial, it is no ground of *venire de novo* for a mistrial if the trial proceeds against both, no suggestion of the death being entered on the record. R. *v.* Kenrick, 5 Q. B. 49; R. *v.* Nicholls, 13 East, 412, n. Supra, § 1388; infra, § 1407.

[7] Supra, § 82; Whart. Cr. Pl. & Prac. § 305. See R. *v.* Locker, 5 Esp. 107; Com. *v.* Wood, infra; Com. *v.* Manson, 2 Ashmead, 31.

[8] R. *v.* Robinson, 1 Leach, 37.

must necessarily have transpired to the grand jury.[1] But it might be otherwise if *all* the co-conspirators were known to the grand jury.[2] can be introduced.

§ 1394. On indictments for conspiracy the judgment should be against each defendant severally, and not against them jointly.[3] Judgment should be several.

§ 1395. Where two or more persons have been convicted of a conspiracy, a new trial of one involves a new trial of all.[4] New trial for one is new trial for all.

5. *Enumeration of Parties injured.*

§ 1396. It is essential to set forth the names of the parties to be injured if they are capable of definite ascertainment, unless a good reason be given for their non-specification. Thus,[5] Tindal, C. J., said: "Mr. Pashley, for the plaintiffs in error, argued that the indictment was bad, because it contained a defective statement of the charge of conspiracy; and we agree that it is defective. The charge is, Parties injured must be named if practicable.

[1] People *v.* Mather, 4 Wend. 229. See R. *v.* Steel, C. & M. 337; 2 Mood. C. C. 246. Supra, § 305.

[2] Whart. Cr. Pl. & Pr. §§ 104, 111; Whart. on Crim. Ev. § 97.

Where an indictment charged a man and his wife with conspiring with a person unknown to extort hush-money, &c., it was held that A., though alleged by the prosecution to be the person averred, unknown, was admissible as a witness for the defence, he not appearing to be a party on the record. Com. *v.* Wood, 7 Bost. Law Rep. 58.

In a case in 1851, before the Queen's Bench, the defendants, A., B., and C., were charged with conspiring "with divers persons unknown." The evidence applied only to A., B., and C., none being given as to the "persons unknown." The jury found that A. had conspired with either B. or C., but that they could not say which. Lord Campbell, C. J., said: "I think that under these circumstances the verdict against A. cannot be supported. It is conceded, that if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. Then, I cannot draw a distinction between the cases of two and of three persons, if one only is found guilty. If three are indicted, and two found not guilty, the third must also be acquitted. But then it is argued that B. and C. may be included in the words, 'persons to the jurors unknown;' but I cannot say that they can come under the category of persons who were not known to the jury." R. *v.* Thompson, 4 Eng. L. & Eq. 287; 16 Q. B. 832; 5 Cox C. C. 166; R. *v.* Denton, Dears. C. C. 3.

[3] March *v.* People, 7 Barb. 391. See Whart. Cr. Pl. & Pr. § 940.

[4] Com. *v.* McGowan, 2 Parsons, 341.

[5] R. *v.* King, 7 Q. B. 806, reversing S. C. 7 Q. B. 782; D. & M. 741. See infra, § 1400. For fuller statement of R. *v.* King see supra, § 1348.

that the defendants below conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is, that these persons should have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as, for instance, those whom they should afterwards deal with or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of Rex *v.* De Berenger,[1] and The Queen *v.* Peck;[2] and it was argued that if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct."

Where, therefore, the persons injured were defined at the time of the conspiracy, and ascertainable by the pleader, their names should be specified in the indictment. Where, however, the conspiracy was to defraud a class not capable of being at the time resolved into individuals, or to defraud the public generally, then the specification of names is impracticable, and hence unnecessary.[3]

An intent to cheat A. as an individual is not sustained by evidence of an intent to cheat the public generally.[4]

6. *Venue.*

Venue may be in place of act.

§ 1397. Although technically the place where the conspiracy is entered into is the place of venue,[5] yet it is generally held that the venue may be laid, as to any or all of the conspirators, in the county in which an act was

[1] 3 M. & S. 67.
[2] 9 Ad. & El. 686.
[3] Ibid.; R. *v.* De Berenger, 3 M. & S. 67; Com. *v.* Judd, 2 Mass. 329.
[4] Infra, § 1403.
[5] R. *v.* Best, 1 Salk. 174; 2 Ld. Raym. 1167; R. *v.* Kohn, 4 F. & F. 68.

done by any of them in furtherance of their common design; and consequently in this county all the co-conspirators are indictable.[1]

If a conspiracy be once established, although it was concocted out of the jurisdiction of the court, an overt act committed by one of the conspirators within the jurisdiction of the court, in the pursuit of the common object of said conspiracy, is the act of each conspirator. In such case we are to view the overt act, wherever committed, as a renewal of the original conspiracy by all the conspirators.[2]

An acquittal in one State, where one overt act was performed, is no bar to a prosecution in another State, where another overt act was performed.[3]

[1] Supra, § 287; R. *v.* Ferguson, 2 Stark. (N. P.) 489; Com. *v.* Corlies, 3 Brews. 575; S. C., 8 Phila. 450.

"It has been said by the Court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. R. *v.* Brisac, 4 East, 171. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint coöperation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. R. *v.* Bowes, cited in R. *v.* Brisac, supra." Roscoe's Crim. Ev. p. 422.

[2] Supra, § 280; Wh. Confl. of Laws, §§ 877, 924; Com. *v.* White, 123 Mass. 430; Com. *v.* Corlies, 3 Brews. 575; S. C., 8 Phila. 450; Bloomer *v.* State, 48 Md. 321; Johns *v.* State, 19 Ind. 421; State *v.* Chapin, 17 Ark. 561; State *v.* Hamilton, 13 Nev. 386; and other cases cited infra, § 1405.

[3] Bloomer *v.* State, *ut supra*.

"Questions of great difficulty may occur with respect to jurisdiction in conspiracy. In Brisac's case (1803) it was held, that although the agreement was made at a place out of the jurisdiction of the common law courts, it was yet triable in the ordinary criminal courts in England if an overt act in execution of it was done in England by an innocent agent of one of the conspirators for this purpose. In Bernard's case, 1 F. & F. 240 (1858), a question occurred whether a person could be indicted in England for having counselled in England the murder of an alien in Paris. The defendant was acquitted, and the point was not determined; but in 1861 the 24 & 25 Vict. c. 100, s. 4, provided for conspiracies and other offences of this kind, not however by applying to the offenders the general clauses relating to accessaries, but by a special enactment making the offence a misdemeanor. See 1 Russ. by Gr. 760, 967. In Kohn's case, 4 F. & F. 68 (1864), a conspiracy was formed in England by the defendant and others

VI. EVIDENCE.

Proof of Conspiracy.

§ 1398. The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved.[1] Any joint action on a material point, or collocation of independent but coöperative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove the coöperation of any individual conspirator.[2] If, therefore, it appear that two persons, by their acts, are pursuing the same object, often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy.[3]

Proof of conspiracy inferential.

for casting away a foreign ship in order to prejudice the underwriters. The ship was scuttled when out of the jurisdiction, by the defendant and others, who appear all to have been foreigners. Willes, J., is reported to have told the jury that 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal in our law. And this case does not raise the question which arose in R. *v.* Bernard, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . . For the principal offence . . . . the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign, and the offence was committed on the high seas.'" But see supra, § 287.

[1] R. *v.* Parsons, 1 W. Bla. 392; R. *v.* Whitehouse, 6 Cox C. C. 38; U. S. *v.* Babcock, 3 Dill. 581; U. S. *v.* Graff, 14 Blatch. 381; U. S. *v.* Cole, 5 McLean, 513; Kelley *v.* People, 55 N. Y. 566; Bloomer *v.* State, 48 Md. 321.

[2] R. *v.* Cope, 1 Stra. 144; Com. *v.* Crowninshield, 10 Pick. 497.

[3] R. *v.* Murphy, 8 C. & P. 297; Com. *v.* Warren, 6 Mass. 72.

"In prosecution for criminal conspiracies," says Judge King, "the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration, the case is rarely found in which direct and positive evidence of criminal combination

§ 1399. All who join a conspiracy at any time after its formation become conspirators;[1] and, as will be seen, the prosecutor may go into general evidence of the conspiracy, before he gives evidence to connect the defendants with it.[2] It is not necessary, therefore, to show a complicity of the defendants in the preliminary stages of the offence. Thus, on an indictment for a conspiracy to defraud by false representation of solvency, it was held by Lord Campbell that defendants may be convicted who had no knowledge of the transactions which resulted in insolvency, provided they were aware of the result, and concurred in the representations in furtherance of the common design, even though they did so with no motive of particular benefit to themselves.[3] Nor does the entrance of new parties affect the identity of a conspiracy.[4]

Complicity in prior stages unnecessary.

§ 1400. The offence of conspiracy, in fact, is rendered complete by the bare engagement and association of two or more persons to break the law, without an overt act

No overt act necessary.

exists. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men so circumstanced to envelop themselves, and to trace their movements from the slight, but often unerring, marks of progress which the most adroit cunning cannot so effectively obliterate, as to render them unappreciable to the eye of the sagacious investigator. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the results not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole; that they have sprung from a common object, and have in view a common end. The adequacy of the evidence in prosecutions for a criminal conspiracy to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury." Com. *v.* M'Clean, 2 Pars. 363, 368–9. See, to same effect, R. *v.* Parsons, 1 W. Bl. 392; R. *v.* Murphey, 8 C. & P. 297; U. S. *v.* Goldberg, 7 Biss. 175; Street *v.* State, 43 Miss. 2; State *v.* Sterling, 34 Iowa, 443.

[1] People *v.* Mather, 4 Wend. 229; Den *v.* Johnson, 3 Har. (N. J.) 87; State *v.* Trexler, 2 Car. L. Rep. 90. See R. *v.* McMahon, 26 Up. Can. (Q. B.) 195.

[2] Infra, § 1401; R. *v.* Hammond, 2 Esp. 718.

[3] R. *v.* Esdaile, 1 F. & F. 213; S. C., *nom.* R. *v.* Brown, 7 Cox C. C. 442.

[4] U. S. *v.* Nunnemacher, 7 Biss. 111.

completed by the conspirators.[1] But the consent of two or more is essential.[2]

If any overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties.[3]

If any overt act is introduced as descriptive of the offence and as limiting the conspiracy charge, a variance in the statement of the act is fatal.[4] It is otherwise when the conspiracy charge is complete in itself, in which case the overt act may be treated as surplusage.[5]

Order of evidence at discretion of court.

§ 1401. It was considered in the Queen's case, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence by which it is to be shown that the individual defendants were guilty participators in such conspiracy; and that this is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of individual defendants. In such cases the general nature of the whole evidence intended to be adduced should be opened to the court; and if upon such opening it should appear manifest that subsequently no particular proof sufficient to affect the individual defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.[6] But ordinarily it is only necessary to prove the acts of particular de-

[1] Supra, §§ 1338, 1382; O'Connell *v.* R. 11 Cl. & Fin. 155; 9 Jur. 25; Resp. *v.* Ross, 2 Yeates, 1; Collins *v.* Com. 3 S. & R. 220; Com. *v.* McKisson, 8 S. & R. 420; State *v.* Young, 37 N. J. L. 184; Bloomer *v.* State, 48 Md. 321; State *v.* Buchanan, 5 Har. & John. 317; Landringham *v.* State, 49 Ind. 186; State *v.* Cawood, 2 Stew. 360; Alderman *v.* People, 4 Mich. 414; State *v.* Pulle, 12 Minn. 164. That there must be an embodiment in acts see supra, § 1338; U. S. *v.* Goldberg, 7 Biss. 175.

[2] Mulcahy *v.* R., L. R. 3 H. L. 306. Supra, § 1388.

[3] R. *v.* Bowes, cited 4 East, 171. See supra, §§ 287 *et seq.*, 1397.

[4] Infra, § 1403.

[5] Supra, § 1382.

[6] Queen's case, 2 Brod. & Bing. 284. Supra, § 1399.

fendants in the first place, leaving the question of conspiracy to be determined by inference.[1]

§ 1402. But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy.[2] There must be shown some sort of active participation by the parties charged.[3] Of this we have an illustration in an English trial before

Mere cognizance of fraudulent action no conspiracy.

[1] R. *v.* Brittain, 3 Cox C. C. 76; R. *v.* Blake, 6 Q. B. 126; Bloomer *v.* State, 48 Md. 321.

The authorities are thus noticed by Sir J. Stephen, Rosc. Cr. Ev. 414:—

"It is a question of some difficulty how far it is competent for the prosecutor to show, in the first instance, the existence of a conspiracy amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of the case to be subsequently proved. The rule laid down by Mr. East is as follows: 'The conspiracy or agreement among several to act in concert for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts.' 1 East P. C. 96. But it is observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. 2 Stark. Ev. 234, 2d ed. So it seems to have been considered by Mr. Justice Buller that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. 'In indictments of this kind,' he says, 'there are two things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy.' He afterwards proceeds, 'Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz., that he consented to the extent that the others did.' R. *v.* Hardy, Gurney's ed. vol. i. pp. 306, 369; 2 Stark. Ev. 234, 2d ed. . . . .

"It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within R. *v.* Hunt, 3 B. & Ald. 566, where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. R. *v.* Frost, 9 C. & P. 129; 2 Russ. by Greav. 700." See infra, § 1404.

[2] See supra, § 227.

[3] Ibid.

Martin, B., where certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire. It was held, that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood and knew of the devices used to conceal it, was no evidence to sustain the charge of a fraudulent conspiracy between the employers and servants.[1] There must be a concurrence in the common design.[2] And we may also hold that mere sympathy with a conspiracy not exhibiting itself in overt acts does not make a person a co-conspirator.[3]

§ 1403. Any material variance as to the means used is fatal.[4] Thus an indictment for a conspiracy, charging the object of the

[1] R. *v.* Barry, 4 F. & F. 389.

[2] R. *v.* Boulton, 12 Cox C. C. 87.

[3] Supra, §§ 227, 1340; State *v.* Cox, 65 Mo. 29; Connaughty *v.* State, 1 Wis. 169; People *v.* Leith, 52 Cal. 251.

[4] R. *v.* Whitehouse, 6 Cox C. C. 38. See R. *v.* Barry, 4 F. & F. 389; R. *v.* Banks, 12 Cox C. C. 392; Com. *v.* Harley, 7 Met. 506; Com. *v.* Kellogg, 7 Cush. 473.

In R. *v.* Whitehouse, supra, the indictment alleged that I. W., C. W., and J. W., being persons in indigent circumstances, and intending to defraud tradesmen who should supply them with goods upon credit, conspired to cause J. W. to be reputed and believed to be a person of considerable property and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers persons, being tradesmen, who should bargain with them for the sale to J. W. of goods, the property of such last-mentioned persons, of great quantities of such goods, without paying for the same, with intent to obtain to themselves money and other profits. This, it was held, was not supported by proof that C. W. and J. W., being the wife and daughter of I. W., represented that they were in independent circumstances, their income being interest of money received monthly; at another time, when engaging lodgings, that they were not in the habit of living in lodgings, and that they obtained various goods from tradesmen on credit, under circumstances that showed an intent to defraud, but no proof being adduced that those goods were obtained by reason of any of those general statements. It was further ruled that a count charging the defendants with conspiring, by divers subtle means and false pretences, to obtain goods and chattels from a tradesman, without paying for them, with intent to defraud him thereof, is supported by proof of overt acts from which a conspiracy may be inferred, without proof of any such false pretence as is required in an indictment for obtaining goods by false pretences. Ibid.

conspiracy to be to cheat and defraud the citizens at large, or particular individuals, out of their land entries, is not supported by evidence that the defendants conspired to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating lands to their own use and excluding others.[1] Variance as to time is immaterial.[2]

Material variance as to means, fatal.

§ 1404. Whether, in an indictment for a conspiracy to commit a wrong, evidence of an attempt about the same time, by the same defendants, with the same or similar means, to commit a similar wrong, has been elsewhere generally discussed.[3] On the one hand, it is argued that such evidence is proper to show the conspiracy; on the other, that it should be excluded as showing a distinct and substantive offence. On an in-

System of conspiracy may be proved.

[1] State *v.* Trammel, 2 Ired. 379. Supra, § 1396.

An averment, in an indictment for conspiracy, that the defendants conspired to defraud A., is not supported by proof that they conspired to defraud the public generally, or any individual whom they might be able to defraud. Com. *v.* Harley, 7 Met. 506. Supra, § 1396.

We have already seen that in cases of this class it is sufficient to prove overt acts from which such a conspiracy could be inferred, without proof of any technical false pretence. R. *v.* Whitehouse, 6 Cox C. C. 38. Supra, § 1364.

[2] U. S. *v.* Graff, 14 Blatch. 381; Wh. Cr. Ev. §§ 91 *et seq.*

[3] Whart. Cr. Ev. §§ 23 *et seq.*

The question in such cases is whether the transaction proposed to be proved was part of a system with that under trial.

In R. *v.* Hunt, 3 B. & Ald. 566, it was held that on an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and disaffection, resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professed object of which meeting was to fix the meeting mentioned in the indictment, are admissible to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided.

And large bodies of men having come to the latter meeting from a distance, marching in regular order, it was held admissible, to show the character and intention of the meeting, that within two days of the same great numbers of men were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again; and it was admissible, for the same purpose, to show that another body of men in their progress to the meeting, on passing the house of one of the persons who had been so ill-treated, expressed their disapprobation at his conduct by hissing. See Wh. Cr. Ev. §§ 23 *et seq.*

dictment tried before Lord Ellenborough, at *nisi prius*, charging that the defendants, being persons of evil fame, and in low and indigent circumstances, conspired together to cause themselves to be reputed persons of considerable property, and in opulent circumstances, for the purpose of defrauding one A. B., evidence being given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune, a witness was called to show that at a different time they had made a similar representation to another tradesman. It was objected that the evidence formed a new offence; and that the prosecutor having elected in his indictment to press a particular charge, it was not just to enable him to spring another on the defendants without notice. The court, however, admitted the evidence, and the defendants were convicted.[1]

But in a later case, where the defendant was charged with conspiring with other persons unknown "to cheat and defraud J. D. and others," and the overt acts laid were, that the defendant did falsely pretend to J. D. that he was a merchant named G., and did, under color of pretended contract with J. D., for the purchase of certain goods of "the said J. D. and others," obtain a large quantity of the goods "of the said J. D. and others," with intent to defraud "the said J. D. and others," it was held by the judges that the words "and others," throughout this indictment, must be taken to mean the other partners of J. D., and not other persons wholly unconnected with J. D., and that, on the trial of the indictment, evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with J. D.[2]

[1] R. *v.* Roberts, 1 Camp. 399. See Resp. *v.* Hevice, 2 Yeates, 114.

[2] R. *v.* Steel, C. & M. 337. See supra, § 1396.

On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on a *habeas corpus*, was allowed to be given in evidence. Resp. *v.* Hevice, 2 Yeates, 114. So where the defendants were charged with a conspiracy, in several counts, alleging several conspiracies of the same kind on the same day, the prosecutor was permitted to give evidence of several conspiracies on different days. R. *v.* Levy, 2 Stark. 458; but see R. *v.* Steel, C. & M. 337.

§ 1405. Each co-conspirator is liable for the overt acts of his confederates, committed in pursuance of the conspiracy, during its continuance;[1] and it has been shown that each is liable in the place of an overt act.[2]

Co-conspirators are liable for each other's acts.

§ 1406. The declarations of one conspirator, in furtherance of the common design, are admissible against his co-conspirators, though such declarations cannot be received if made after the execution of the conspiracy, nor are they admissible to prove the conspiracy.[3] A party acting as a decoy cannot be regarded as a co-conspirator, so as to make those with whom he acts responsible for what he does.[4]

Declarations of co-conspirators admissible against each other.

[1] Supra, §§ 213–247, 397; U. S. *v.* Donan, 11 Blatch. 168; U. S. *v.* Goldberg, 7 Biss. 175; Collins *v.* Com. 3 S. & R. 220; Brown *v.* Smith, 83 Ill. 291; Smith *v.* State, 52 Ala. 407; Jackson *v.* State, 54 Ala. 234; State *v.* Jackson, 29 La. An. 354.

[2] Supra, §§ 287, 1397. See Whart. Cr. Ev. § 693.

[3] Whart. Crim. Ev. §§ 698 *et. seq.* "It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design; a principle wholly unaffected by the consideration of their being jointly indicted. 2 Stark. Ev. 237, 2d ed., supra, p. 89. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a chartist association, and that Jones was also a member, and that in the evening of the 3d of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day, to certain parties to meet on the race-course, was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. R. *v.* Shellard, 9 C. & P. 277. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. R. *v.* Whitehead, 1 Dow. & Ry. N. P. 61." Rosc. Cr. Ev. p. 418.

[4] Williams *v.* State, 55 Ga. 391.

VII. VERDICT.

§ 1407. Two or more defendants must be joined to constitute the offence; and if only two are joined, an acquittal of one is an acquittal of the other, unless there be allegation and proof of co-defendants unknown. A husband and wife cannot be joined as the sole conspirators.[1]

Verdict acquitting all but one defendant is a general acquittal.

[1] Supra, §§ 1337–9, 1392–3; Wh. Cr. Pl. & Pr. 305.

Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. O'Connell *v.* R. 11 Cl. & F. 155.

Upon a count in an indictment against eight defendants charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue, of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. Ibid.

In a case already noticed (supra, § 1393), A. was indicted for conspiring with Y. and Z., and other persons to the jurors unknown. The evidence was confined to A., Y., and Z., and the jury was of opinion that A. conspired with either Y. or Z., but said that they did not know with which. Y. and Z. were thereupon both acquitted. It was held, that A. was entitled to be acquitted also. R. *v.* Thompson, 16 Q. B. 832; 5 Cox C. C. 166; R. *v.* Denton, Dears. C. C. 3.

As has been already seen, where one defendant in conspiracy dies between the indictment and trial, it is no ground of a *venire de novo* for a mistrial, if the trial proceeds against both, no suggestion of the death being entered on the record. R. *v.* Kenrick, 5 Q. B. 49; D. & M. 208; 7 Jur. 848; 12 L. J. M. C. 135.

One of several prisoners indicted for conspiracy may be tried separately, and upon conviction, judgment may be passed on him, although the others, who have appeared and pleaded, have not been tried. R. *v.* Ahearne, 6 Cox C. C. 6.

It has been held that where three prisoners have been jointly indicted for a conspiracy to murder, and severally pleaded not guilty, but have severed in their challenges, and the Crown has, consequently, proceeded to try one of such prisoners; that, upon conviction of such prisoner, judgment must follow, although the others have not been tried; and that the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment) is not ground by itself for reversal. Ibid.

CHAPTER XXII.

NUISANCE.

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I. GENERAL CONDITIONS.

§ 1410. A common nuisance is a condition of things resulting either from an omission to discharge a duty, or from an act unauthorized by law, which condition is prejudicial to the health, comfort, safety, or property of citizens at large, or interferes with their right to pass to and fro on roads common to the public. Whoever, by omitting a duty, or by an act unauthorized by law, produces such a condition of things, is indictable for misdemeanor. It is not necessary that all members of the community should be affected by the nuisance. It is enough if the liberty of all members of the com-

Nuisance must be an offence deleterious to community at large.

munity be abridged by their being precluded from approaching without risk the thing complained of.[1] In other words, it is no defence that I might avoid being offended by a nuisance, if my liberty would be abridged by my having to avoid it.

§ 1411. The offence must not be confined to individuals, but must have within its range the community or vicinage as a class. Hence it is not a nuisance to dig and forcibly keep up, within a neighbor's enclosure, a pit which exposes him to danger as he goes to and fro on his own soil. It is a nuisance, however, to dig a pit in front of that neighbor's house, in the public road, so as to imperil all persons passing and repassing. So for a man to make a noise on a particular occasion before a limited audience is not indictable; but it is otherwise if he make loud noises continuously and habitually to the disturbance of the citizens at large.[2] The offence must be in a populous neighborhood, or in a place sufficiently contiguous to a public highway, to affect persons passing and repassing.[3] In other words, a nuisance, to be indictable, must have within its

Not enough if offence is special.

[1] See Com. *v.* Webb, 6 Rand. (Va.) 726; Brooks *v.* State, 2 Yerg. 482; State *v.* Baldwin, 1 Dev. & Bat. 195.

The definition in the English Draft Code of 1879, s. 150 is as follows:—

"A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her majesty's subjects.

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who commits any common nuisance which endangers the lives, safety, or health of the public, or which injures the person of any individual.

"Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

"Every one shall be guilty of an indictable offence, and shall upon conviction thereof be liable to one year's imprisonment with hard labor, who knowingly and wilfully exposes, or causes to be exposed, for sale, or has in his possession, with intent to sell for human food, articles which he knows to be unfit for human food. (See infra, § 1434.) Every one who is convicted of this offence, after a previous conviction for the same offence, shall be liable to two years' imprisonment with hard labor."

[2] Com. *v.* Smith, 6 Cush. 80. Infra, § 1449.

[3] R. *v.* Pappineau, 2 Str. 686; R. *v.* White, 1 Burr. 333; Com. *v.* Webb, 6 Rand. (Va.) 726.

range either the community generally, or those persons passing and repassing on a public road, or chancing to be on public resorts.[1]

Not necessary that nuisance be detrimental to health.

§ 1412. It is not necessary to prove that the nuisance is one that is positively deleterious to health. It is enough if it offends the senses, or disturbs the comfort of the community,[2] or, as will be seen, shocks public morality.[3]

Hence a large pig-sty or swine-yard, in a populous neighborhood, is a nuisance, and indictable as such;[4] but it is otherwise with horses in stables, which are essential to city life, and as to which a particular neighbor cannot complain, though one of the horses may "kick violently and noisily," and the stench of the manure be offensive to the immediate neighbors.[5] Tanneries,[6] petroleum refineries,[7] and dams on the owner's pri-

[1] Ibid.; Com. *v.* Smith, 6 Cush. 80; Com. *v.* Oaks, 113 Mass. 8; State *v.* Wright, 6 Jones (N. C.), 25; People *v.* Jackson, 7 Mich. 432; State *v.* Schlottman, 52 Mo. 164, and infra, §§ 1472–3.

[2] R. *v.* Neil, 2 C. & P. 485; R. *v.* White, 1 Burr. 333; Stoughton *v.* Baker, 4 Mass. 522; Com. *v.* Brown, 18 Met. 365; People *v.* Cunningham, 1 Denio, 524; Lansing *v.* Smith, 8 Cow. 146; State *v.* Wetherall, 5 Harring. 487; Ashbrook *v.* Com. 1 Bush, 139; Hackney *v.* State, 8 Ind. 494; State *v.* Rankin, 3 So. Car. 438.

[3] See infra, §§ 1432, 1458.

[4] R. *v.* Wigg, 2 Salk. 460; Com. *v.* Vansickle, Brightly, 69; 4 Cr. Rec. 26. Infra, § 1437.

In State *v.* Kaster, 35 Iowa, 221, the indictment charged that the defendant "unlawfully and injuriously did erect, continue, and use a certain enclosure or pen in which cattle and hogs were confined, fed, and watered, and the excrement, decayed food, slop, and other filth were retained," whereby were occasioned "noxious exhalations and offensive smells greatly corrupting and infecting the air; and other annoyances dangerous to the health, comfort, and property of the good people residing in that immediate neighborhood," &c. The prosecution offered evidence that the noise made by hogs in said pens was very great and annoying at night to persons residing in that neighborhood. It was ruled by the Supreme Court that while the evidence offered was not admissible under the general charge of "other annoyances," it was admissible as constituting a part of the facts connected with the nuisance charged, and also as corroborative of the fact that hogs were kept in the pen at night. It was further held, in conformity with the law hereafter expressed (infra, § 1416), that in a prosecution for nuisance, the defendant will not be permitted to show in justification that the public benefit resulting from his acts is equal to the public inconvenience.

[5] Lawrason *v.* Paul, 11 Up. Can. Q. B. 537.

[6] State *v.* Trenton, 36 N. J. L. 283.

[7] Com. *v.* Kidder, 107 Mass. 188.

vate land,[1] and buildings projecting in such a way as to expose travellers to danger,[2] may become nuisances when conducted in such manner as to incommode the community. And again: it is a nuisance for persons to collect, in the night season, in populous localities, so as to disturb the neighborhood; and such persons, and those inviting them, are alike open to indictment.[3] But it is otherwise with a special and single assemblage. Brick-making, also, is not a nuisance unless offensively conducted.[4]

§ 1413. At the same time, in discussing the question of nuisance in such cases, the degree of populousness is to be taken into consideration. Some trades are *per se* offensive; yet they are necessary to the community, and must be carried on somewhere. But where? The distinction heretofore alluded to is here to be applied. For conducting such trades in secluded and thinly populated districts no indictment lies.[5] A gunpowder manufactory, not a nuisance *per se*, may become so when placed in a populous neighborhood.[6]

Offensive trades not necessarily indictable.

§ 1414. It is not enough for a thing to be annoying to the community, but it must be reasonably so. Gas, for instance, on its first introduction, was declared to be deleterious to the health of the community, and in some communities steam railways were at one time so offensive to particular local authorities, that attempts to prosecute them as nuisances were not infrequent. So, in times of high political feeling, the presence, in a community almost unanimous, of a small outspoken minority is very distasteful; and such minority may readily be regarded by the majority as a nuisance, deserving of condign chastisement. The keeping of kerosene, also, by individuals in a populous neighborhood may to some persons be a cause of anxiety; but unless the kerosene be kept negligently, it

Annoyance must be reasonably such.

[1] State *v.* Close, 35 Iowa, 570; Douglass *v.* State, 4 Wis. 387.

[2] Grove *v.* Fort Wayne, 45 Ind. 429. See Garland *v.* Towne, 55 N. H. 55; Meyer *v.* Metzler, 51 Cal. 142. Infra, § 1474.

[3] Bankus *v.* State, 4 Ind. 114. See Walker *v.* Brewster, L. R. 5 Eq. 25; 17 L. T. (N. S.) 135.

[4] Huckenstine's App. 70 Penn. St. 102.

[5] See R. *v.* Cross, 2 C. & P. 483; R. *v.* Carlisle, 6 C. & P. 636; R. *v.* Watts, M. & M. 281; Ellis *v.* State, 7 Blackf. 534.

[6] Wier's appeal, 74 Penn. St. 230. See State *v.* Hart, 34 Me. 36; People *v.* Sands, 1 Johns. 78; Bradley *v.* People, 56 Barb. 72. Infra, § 1441.

is not indictable as a nuisance to the public at large. It is necessary, in order to convict, that the annoyance complained of should be substantial, and needlessly inflicted. If the grievances of the prosecutors are sentimental or speculative, — if the defendant in the act complained of, is simply exercising a constitutional right, — then, no matter how much he may offend the community, process of this kind cannot be used for his correction.[1]

Prescription no defence.

§ 1415. No length of time legitimates a nuisance;[2] and in fact, time, by bringing an accession of population to a particular district, when such district is set apart by the State as a village or city, may make a thing a nuisance ultimately which was not a nuisance in its inception,[3] though it may be otherwise as to a district not so set apart.[4]

[1] Infra, § 1428.

[2] 1 Hawk. bk. 1, c. 32, s. 8; Weld *v.* Hornby, 7 East, 199; R. *v.* Cross, 3 Camp. 227; Elliotson *v.* Feetham, 2 Bing. N. C. 134; Bliss *v.* Hall, 4 Bing. N. C. 185; State *v.* Falls Co. 49 N. H. 240; Com. *v.* Tucker, 2 Pick. 44; Com. *v.* Upton, 6 Gray, 473; Mills *v.* Richards, 9 Wend. 315; People *v.* Cunningham, 1 Denio, 524; People *v.* Mallory, 4 Thomp. & C. 567; Com. *v.* Alburger, 1 Whart. 469; Ashbrook *v.* Com. 1 Bush, 139; Elkins *v.* State, 2 Humph. 543; Douglass *v.* State, 4 Wis. 387; State *v.* Phipps, 4 Ind. 515; State *v.* Rankin, 3 So. Car. 438; R. *v.* Brewster, 8 Up. Can. (C. P.) 208.

"It is a public nuisance to place a wood-stack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. Fowler *v.* Sanders, Cro. Jac. 446. In one case, however, Lord Ellenborough ruled that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used as a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. Under these circumstances, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. R. *v.* Smith, 4 Esp. 111." Roscoe's Cr. Ev. p. 796.

[3] Douglass *v.* State, 4 Wis. 387. Thus in Com. *v.* Vansickle, Brightly, 69, which was an indictment for maintaining a large establishment for pigs in the limits of the old city of Philadelphia, Judge Sergeant properly charged the jury that though when the establishment was first opened it was not a nuisance, it became so when population gathered largely in that neighborhood.

[4] "If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it

Hence it is no defence that a nuisance was erected in a comparatively secluded place, remote from habitations, and that the complaining parties subsequently voluntarily built within the range of its noxious odors.[1] Even a charter, granted before the site became populous, may fail to protect.[2] At the same time, when a question of the dedication by the owners of a particular spot to a particular purpose arises, lapse of time may be used to sustain such dedication.[3]

§ 1416. A mere volunteer, starting an enterprise for his own benefit, cannot, if prosecuted for nuisance proved to arise from such enterprise, set up collateral benefits to the community arising from his act.[4] Eminently is this the case with stoppages of public highways or navigable streams. These are sacred to public use; and no one can justify himself in choking them by reason of general benefit to the community collateral to his act.[5] But it is otherwise with works of public improvement constituted or authorized by the State. They may work injury to particular neighborhoods: *e. g.* a railroad may take away the business of a country town on the line, or a canal basin may breed local malaria; but these special injuries cannot be treated as public nuisances, and as such indicted.[6] When,

Collateral public advantage no defence.

that the carrying on of the trade become a nuisance to the persons using the road; in those cases, the party is entitled to continue his trade, because it was legal before the erecting of the houses in the one case, and the making of the road in the other. Per Abbott, C. J., R. *v.* Cross, 2 C. & P. 483." Roscoe's Cr. Ev. p. 736.

[1] Crunden's case, 2 Camp. 89; R. *v.* Watts, M. & M. 281; Com. *v.* Upton, 6 Gray, 473; Taylor *v.* People, 6 Parker C. R. 347; Com. *v.* Vansickle, Brightly, 69; 4 Clark, 104; Ashbrook *v.* Com. 1 Bush, 139; though see R. *v.* Neville, Peake (N. P.), 91.

[2] Fertilizing Co. *v.* Hyde Park, 97 U. S. 659. See Patterson *v.* Kentucky, 97 U. S. 501.

[3] See R. *v.* Allan, 2 Up. Can. Q. B. (O. S.) 97.

"The effect of time in legalizing a nuisance is somewhat similar (to that of public advantage.) It has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not, in fact, a nuisance. See cases in 1 Russ. Cr. 421, 442. The view taken by the criminal law commissioners is rather different. See 7th Rep. p. 59." Steph. Dig. C. L. art. 176.

[4] R. *v.* Betts, 16 Q. B. 1022; Com. *v.* Vansickle, Brightly, 69; Caldwell's case, 1 Dall. 150; State *v.* Kaster, 35 Iowa, 221; State *v.* Rankin, 3 S. C. 438.

[5] R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Tindal, 6 Ad. & El. 143; Com. *v.* Belding, 13 Met. 10. See R. *v.* Russell, 6 B. & C. 566, where the question was discussed at large, and Steph. Dig. C. L. art. 176.

[6] Com. *v.* Reed, 34 Penn. St. 275.

however, the managers of such roads by negligence engender a nuisance, an indictment lies.[1]

No defence that similar nuisances coexist.

§ 1417. Nor is it a defence that nuisances, equally objectionable with that under indictment, have been tolerated by the public authorities.[2]

No defence that thing complained of has no other place.

§ 1418. Many necessary trades — *e. g.*, gunpowder making — have particular places assigned to them by the authorities. It is, however, no defence that the nuisance complained of, though necessary, has had no such place assigned to it. It may be no nuisance if carried on in a sequestered site. It becomes a nuisance when it exposes a large population to anxiety and risk.[3]

§ 1419. As each period in which a nuisance is continued exhibits a distinct offence, a prior acquittal or conviction for the maintenance of a nuisance is no bar to an indictment for continuing the nuisance on a subsequent day.[4]

Prior conviction no defence.

§ 1420. As the object of the prosecution is to remove an injury to the public with which the intent of the defendant has nothing to do, his intent is irrelevant.[5] As illustrating this may be given the cases elsewhere cited,[6] where the principal is held responsible in this form of action for the servant's negligence.

No defence that there was no evil intent.

§ 1421. Nor is it a defence that the intent was to benefit the community. If the act be a nuisance to the community, the question of intent is irrelevant, and evidence of good intent is immaterial.[7]

Good intent no defence.

§ 1422. That all parties concerned, whether agents or organizers, are principals, follows from the familiar doctrine that in misdemeanors all are principals.[8] To nuisance

All concerned are principals.

[1] Del. Canal Co. *v.* Com. 60 Penn. St. 367. Infra, § 1424.

[2] People *v.* Mallory, 4 Thomp. & C. 567; Francis *v.* Schoellkopf, 53 N. Y. 152; Robinson *v.* Baugh, 31 Mich. 290; Douglass *v.* State, 4 Wis. 387.

[3] State *v.* Hart, 34 Me. 36. See Wier's Appeal, 74 Penn. St. 230. Supra, § 1413.

[4] Whart. Cr. Pl. & Pr. § 475; Beckwith *v.* Griswold, 29 Barb. 29; People *v.* Townsend, 3 Hill (N. Y.), 479.

[5] See Chute *v.* State, 19 Minn. 271. Supra, § 119.

[6] Supra, § 247; R. *v.* Stephens, L. R. 1 Q. B. 702.

[7] R. *v.* Ward, 4 Ad. & El. 384. See supra, §§ 119, 1416.

[8] Supra, §§ 223, 246; Com. *v.* Mann, 4 Gray, 213; Com. *v.* Gannett, 1 Allen, 7; Com. *v.* Tryon, 99 Mass. 442; Com. *v.* Kimball, 105 Mass. 465.

this doctrine has been frequently applied in cases where an agent sets up as a defence that he acted only for another, who is the real principal and manager of the enterprise, controlling it, and enjoying its profits. But the agent is nevertheless held responsible.[1] Of course the converse is true, that the principal is indictable for the acts of his agent, performed by the agent within the orbit of his delegated office.[2] And if he share the profits, he is penally responsible for his agent's acts creating a nuisance within the range of employment, though these acts were done without his knowledge and contrary to his general orders.[3]

§ 1423. Neglects and omissions, as has heretofore been shown,[4] are virtually commissions; for he who undertakes to do a thing and neglects or omits his duty does the thing wrongfully. But to make a neglect or omission indictable for a nuisance produced by it, it is essential that the neglect or omission should have been by one undertaking specially to discharge the particular duty.[5] When such a duty is thus neglected, and a nuisance is thereby produced, an indictment lies.[6]

Person undertaking public duties indictable for neglect.

§ 1424. Lawful authority to do a particular thing is no defence to an indictment for doing such thing so negligently or badly as to create a nuisance.[7] But if the license be strictly followed, and a nuisance results, no prosecution can be maintained, where there is no negligence or evil intent alleged on part of the defendant.[8] Hence a

A license from government no excuse for unnecessary nuisance.

[1] Com. v. Park, 1 Gray, 553; Com. v. Nichols, 10 Met. 259; Lowenstein v. People, 54 Barb. 299; Com. v. Gillespie, 7 S. & R. 469; State v. Bell, 5 Porter, 365; Thompson v. State, 5 Humph. 138; 2 Humph. 399; State v. Matthis, 1 Hill (S. C.), 37; Com. v. Major, 6 Dana, 293. See supra, §§ 247, 341.

[2] Supra, §§ 247, 248; Tuberville v. Stampe, 1 Ld. Raym. 264; Com. v. Nichols, 10 Met. 259; State v. Abrahams, 6 Iowa, 117.

[3] R. v. Stephens, L. R. 1 Q. B. 702; R. v. Medley, 6 C. & P. 292. See supra, § 246–8.

[4] Supra, §§ 125 *et seq.*

[5] R. v. Wharton, 12 Mod. 510. Supra, §§ 125 *et seq.*; infra, § 1476.

[6] R. v. Medley, 6 C. & P. 292; People v. Corporation of Albany, 11 Wend. 539; Indianapolis v. Blythe, 2 Ind. 75. Infra, § 1485.

[7] R. v. Scott, 2 Gale & D. 729; R. v. Morris, 1 B. & Ad. 441; Com. v. Kidder, 107 Mass. 188; Com. v. Church, 1 Barr, 105; Del. Canal Co. v. Com. 60 Penn. St. 367; State v. Buckley, 5 Harring. 508; State v. Mullikin, 8 Blackf. 260. See Wh. Cr. Pl. & Pr. § 125. Infra, § 1476.

[8] Com. v. Kidder, 107 Mass. 188;

gas company, duly chartered by an act of legislature to supply gas to a city, cannot be convicted of nuisance when the acts complained of were necessary to the exercise of its trust, and were performed carefully and judiciously.[1] The same distinction applies, *mutatis mutandis*, to railroads.[2]

§ 1425. A defendant is not liable for a nuisance unless it is a natural and ordinary consequence of his conduct.[3] Hence, it has been correctly held that a party is not guilty of a public nuisance, unless the injurious consequences complained of are the natural, direct, and proximate result of his own act. If such consequences are caused by the culpable acts of others so operating on his acts as to produce the injurious consequences, then he is not liable.[4]

Nuisance must be in causal relation with defendant's act.

II. ABATEMENT FOR.

§ 1426. Independently of judgment of fine and imprisonment,[5] there may be, when the offence is continuous and there is a *continuando* in the indictment, a judgment by the court that the nuisance abate.[6] But for this purpose the *continuando* is essential.[7] The usual course is to order the abatement; and if the defendant neglect or refuse to obey, to direct an abatement by the sheriff.[8] Private citizens may, at their own risk, abate a public nuisance; though they will be compelled to answer in damages in case they use violence be-

Nuisance may be stopped by abatement.

Easton *v.* R. R. 24 N. J. Eq. 49; Com. *v.* Reed, 34 Penn. St. 275; Danville *v.* R. R. 73 Penn. St. 29; Butler *v.* State, 6 Ind. 165; Stoughton *v.* State, 5 Wis. 291; State *v.* London, 3 Head, 263. Supra, § 1416; infra, §§ 1476, 1484.

[1] People *v.* N. Y. Gas Light Co. 64 Barb. 55. See R. *v.* Pease, 4 B. & Ad. 30.

[2] Wh. on Neg. § 271. Infra, § 1476.

[3] Supra, §§ 125 *et seq.*, 152 *et seq.* See Whart. on Neg. §§ 73 *et seq.*

[4] State *v.* Rankin, 3 S. C. 438; and see R. *v.* Medley, 6 C. & P. 292; Moses *v.* State, 58 Ind. 185. Supra, § 1416; infra, §§ 1441, 1484. As to tippling-houses see, distinctively, U. S. *v.* Elder, 4 Cranch C. C. 507. Infra, § 1498.

[5] State *v.* Noyes, 10 Foster, 279. Infra, § 1487.

[6] McLaughlin *v.* State, 45 Ind. 338. See Meigs *v.* Lister, 25 N. J. Eq. 489.

[7] R. *v.* Stead, 8 T. R. 142; R. *v.* Pappineau, 2 Strange, 686; State *v.* Haines, 30 Me. 65; State *v.* Noyes, 10 Foster, 279; Manson *v.* People, 5 Park. C. R. 16; Taylor *v.* People, 6 Park. C. R. 347; Del. Canal Co. *v.* Com. 60 Penn. St. 367; Wroe *v.* People, 8 Md. 416; Smith *v.* State, 22 Oh. St. 539.

[8] Taggart *v.* Com. 21 Penn. St. 527; Barclay *v.* Com. 25 Penn. St. 503; McLaughlin *v.* State, 45 Ind. 338; Campbell *v.* State, 16 Ala. 144; Crippen *v.* People, 8 Mich. 117.

yond what is actually needed, or in case the nuisance be not such as to authorize this peremptory intervention.[1] But when the nuisance becomes the object of public prosecution, legal proceedings being instituted to test the right, then the right of private citizens to abate ceases.[2] The abatement may be enforced even to the destruction, if necessary, of the property from which the nuisance springs.[3] But this is not permissible when

[1] Low *v.* Knowlton, 26 Me. 128; Hopkins *v.* Crombie, 4 N. H. 520; Arundel *v.* McCulloch, 10 Mass. 70; State *v.* Paul, 5 R. I. 185; State *v.* Keenan, 5 R. I. 497; Renwick *v.* Morris, 7 Hill (N. Y.), 575; Wetmore *v.* Tracey, 14 Wend. 250; Meeker *v.* Van Rensselear, 15 Wend. 397; Rung *v.* Shoneberger, 2 Watts, 23; Barclay *v.* Com. 25 Penn. St. 503; Moffett *v.* Brewer, 1 Greene, Iowa, 348; Manhat. Man. Co. *v.* Van Keuren, 23 N. J. Eq. 251; State *v.* Dibble, 4 Jones (N. C.), 107; King *v.* Saunders, 2 Brev. 111. As to right to kill a dog when a nuisance see supra, §§ 97 *et seq.* As to right of self-defence in this relation see supra, § 97.

[2] Com. *v.* Erie & N. E. R. R. 27 Penn. St. 339. The more prudent coursei n cases of disputed right is to leave the question of abatement to the courts. See Taggart *v.* Com. 21 Penn. St. 527. It has been said that when a breach of the peace would ensue the right cannot be exercised. Day *v.* Day, 4 Md. 262. But as the right is absolute, this qualification is not good. It might as well be said that the right of self-defence ceases when its exercise involves a breach of the peace. See supra, §§ 97–102.

[3] Penruddock's case, 5 Co. 100; Penns. *v.* Wheeling Bridge Co. 13 How. 518; Lancaster *v.* Rogers, 2 Barr, 114.

In State *v.* Parrott, 71 N. C. 311, it was held that individual citizens were justified in tearing down a railroad bridge over Neuse River, when by so doing they removed obstructions to the free navigation of the river.

"The Neuse, at the place under consideration," said Reade, J., "is a navigable river. Any obstruction of a navigable river is a common or public nuisance. A common or public nuisance may be abated by any person who is annoyed thereby. The railroad bridge across the Neuse obstructed the navigation thereof by the defendants' steamboat, and for that reason the defendants tore it down. It follows that the defendants are not guilty. It is not necessary to display the learning and decisions in support of these positions, although we have fully considered them, because they may be found collected in a well considered case in our own court, and we think it respectful and sufficient to support our decision in this case by that. State *v.* Dibble, 4 Jones, 107."

In the latter case it was said by Battle, J.: "The first question which arises on the bill of exceptions filed by the defendants is whether the Neuse River was a navigable stream at the place where the alleged offence was committed.

"It is now well settled that the rule adopted in England by which navigable waters are distinguished from others, to wit, the ebb and flow of the tides, is entirely inapplicable to our situation, and, therefore, has been abrogated. Wilson *v.* Forbes, 2 Dev. Rep. 30; Collins *v.* Benbury, 3 Ire.

the nuisance can be abated without such destruction.[1] Thus the destruction of a house of ill-fame cannot be defended on this

Rep. 277; S. C., 5 Ire. Rep. 118; Fagan *v.* Armstead, 11 Ire. Rep. 438. No precise criterion for determining the question in this State has, as yet, been established by our courts. In Wilson *v.* Forbes, Henderson, J., said: 'What general rule shall be adopted, this case does not require me to determine, were I competent to it. But I think it must be admitted that a creek or river, such as this appears to be, wide and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean, and the limit of whose waters is not higher, nor as high, as the flowing of the tides upon our sea-coasts, is a navigable stream within the general rule.' In Collins *v.* Benbury, as reported in 3 Ire., Ruffin, C. J., said: 'Any waters which are sufficient in fact to afford a common passage for all people in sea vessels are to be taken as navigable.' We are not aware that any more precise rule has been elsewhere laid down.

"Whether the river Neuse, between the port of Newbern, in Craven County, and the town of Smithfield, in Johnston County, which is stated to be navigable for eight months in the year for flat-boats and small steamboats, comes within the terms of this rule; or whether the rule can be extended by analogy to embrace it, we need not inquire. The legislature has the undoubted right to declare it to be a navigable stream, and, we think, that has been done, either directly or inferentially, by the following acts: . . . .

"The Neuse River having been thus recognized as a navigable water, the defendants had the right, in common with all other citizens, to navigate it with their boats, and, as an incident to such right, to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in the present case is the general assembly of the State. It would have been the general government, had the Congress of the United States passed any act relating to the river Neuse in execution of the power 'to regulate commerce with foreign nations, and among the several States.' Cons. of the U. S. art. 1, sec. 8; Wilson *v.* Black Bird Creek Marsh Company, 2 Peters, 248; 8 Curtis, 105.

"This raises, upon the record, the second main question in the cause, — whether the bridge, for the removal of which the defendants are indicted, was erected and kept in the condition in which the defendants found it by or under the authority of the general assembly of the State.

. . . . "In the case which we have under consideration, if the bridge had been a toll-bridge, built by the owner of a ferry, under authority vested in him by law, or by a contractor, under the authority of the county court, it would undoubtedly have become a nuisance, liable to abatement as soon as the draw had, from decay or want of repair, failed to answer its purpose. The special authority to build the bridge with a draw, and to keep the same in good order, would not have protected its owner longer than the terms of the authority were observed. So a public bridge, built by the justices of the county court across a navigable water-course, must be subject

[1] Roberts *v.* Rose, 3 H. & C. 162.

ground.[1] The right of abatement, it should be remembered, is a part of the right of self-defence; and it may be exercised in behalf, not only of self, but of others whom the party is called upon to protect.[2]

In cases of indictments against municipal corporations for neglect in repairing roads, the order of abatement goes virtually to the reparation of the road, which may be compelled by fine.[3]

III. INDICTMENT.

Indictment must conclude to common nuisance.

§ 1427. The technical term "common nuisance" is essential as a term of art, when the indictment is at common law.[4] But this is not by itself enough. The term "common nuisance" must be so directed as to be pointed, not at particular individuals, but at the community at large; *e. g.* the offence must be declared to be to the "common nuisance" "of all the citizens of the said State residing in" the neighborhood; or "of all the citizens of said State there passing and repassing."[5]

Must show a public offence.

§ 1428. The indictment, also, must show an offence not private but public.[6] Thus, frequenting houses of ill-fame, if done secretly, is not indictable; the indictment, to make the offence a nuisance, must aver it to be done openly, notoriously, and scandalously.[7] So, when a necessary

to the same conditions and restrictions. As agents of the legislature, the justices, sitting in court, could do nothing beyond what their principal had authorized. They were not empowered to do anything which might impede the free navigation of Neuse River; and it followed as a necessary consequence, that when their bridge became an obstruction to navigation, it was a nuisance which the defendants, or any other person, had a right to abate. See Angell on Tide Waters, 115."

[1] Ely *v.* Niagara Co. 36 N. Y. 297.

[2] See supra, § 97; Aldrich *v.* Wright, 53 N. H. 398; State *v.* Keenan, 5 R. I. 497; State *v.* Dibble, 4 Jones N. C. 107. See infra, §§ 1540 *et seq.*

[3] R. *v.* West Riding, 7 T. R. 467; R. *v.* Incledon, 13 East, 164; R. *v.* Claxby, 3 C. L. R. 986; 1 Jur. (N. S.) 710. Infra, § 1487.

[4] R. *v.* Holmes, 20 Eng. L. & Eq. 597; 3 C. & K. 360; State *v.* Stevens, 40 Me. 559. When the offence is statutory, the term is unnecessary unless prescribed by statute. State *v.* Stevens, supra.

[5] Com. *v.* Faris, 5 Rand. (Va.) 691; Graffins *v.* Com. 3 Penn. R. 502.

[6] See Wertz *v.* State, 42 Ind. 161; State *v.* Kaster, 35 Iowa, 221; State *v.* Close, 35 Iowa, 570; Chute *v.* State, 19 Minn. 271.

[7] Brooks *v.* State, 2 Yerg. 482. See Parkinson *v.* State, 2 W. Va. 589. Infra, § 1446.

business or concern is indicted as a nuisance, it must be alleged to be so situated as to make it a nuisance to the public;[1] and when a dam is claimed to produce stagnant water and to corrupt the air, this must be alleged to be in such a way as to affect a populous neighborhood, or persons passing on a public highway.[2]

It has also been held that the indictment must show that the alleged "nuisance" is not merely offensive to the community, but that it is reasonably so. In other words, it must appear that the act complained of is such as the law would pronounce to be a nuisance. For the pleader to limit himself to the mere conclusion of law, "to the common nuisance," is clearly insufficient.[3] But as to common scolds, and descriptive designations of this class, the generic description is enough.[4]

Bill of particulars may be required.

§ 1429. The generality of the indictment in nuisance, as in conspiracy, in many cases entitles the defendant to a bill of particulars, the practice as to which is elsewhere stated at large.[5]

IV. PROOF.

Nuisance to be proved inferentially.

§ 1430. Whether the acts complained of are nuisances to the community is to be determined inferentially from the facts in the case, as well as from testimony of experts as to the probable operation of the constituents of which the nuisance is composed on the health or comfort of the community. But only the nuisance specifically charged in the indictment can be proved.[6] "General reputation," of course, cannot be admitted to prove or disprove nuisance.[7] But, as will be seen, the bad character of persons haunting a house of ill-fame may be put in evidence.[8]

[1] State v. Purse, 4 McCord, 472.

[2] Com. v. Webb, 6 Rand. (Va.) 726. Infra, § 1480.

[3] Supra, § 1419; Whart. Cr. Pl. & Pr. § 154; Com. v. Boynton, 12 Cush. 499; People v. Cunningham, 1 Denio, 524; Com. v. Webb, 6 Rand. (Va.) 726; State v. Baldwin, 1 Dev. & Bat. 195; State v. Purse, 4 McCord, 472. See, as to indictment for noxious trade, State v. Hart, 34 Me. 36.

[4] See infra, § 1442.

[5] See supra, § 1386; Whart. Cr. Pl. & Pr. §§ 157, 702; and see R. v. Curwood, 5 Nev. & M. 369.

[6] Com. v. Brown, 13 Met. 365.

[7] State v. Foley, 45 N. H. 466; Com. v. Stewart, 1 S. & R. 342; Com. v. Hopkins, 2 Dana, 418; Overstreet v. State, 3 How. (Miss.) 328. Infra, § 1451–4; Whart. Crim. Ev. § 255.

[8] Clementine v. State, 14 Mo. 112. Infra, § 1451.

V. OFFENCES TO RELIGION.

§ 1431. Any public act that grossly and wantonly shocks the religious sense of the community as a body is a nuisance.

Whatever shocks common religious sense is a nuisance.

Hence it is a nuisance to disturb public rest on Sunday by any unnecessary conspicuous and noisy action.[1] Hence, also, public, gross, and scandalous profanity is a nuisance;[2] though it is essential that such profanity should be alleged and proved to be *in the hearing* of divers persons.[3]

[1] Com. *v.* Jeandelle, 2 Grant, 506; 3 Phila. 509; Com. *v.* Dupuy, Bright. 44; Lindenmüller *v.* People, 33 Barb. 548. As to disturbing congregation see infra, § 1556.

[2] 1 Hawk. P. C. 358; State *v.* Chandler, 2 Harring. 553; State *v.* Powell, 70 N. C. 67; State *v.* Graham, 3 Sneed, 134. Infra, § 1605. See Holcomb *v.* Cornish, 8 Conn. 375; Com. *v.* Hardy, 1 Ashm. 410.

[3] State *v.* Pepper, 68 N. C. 259. See infra, § 1442.

In State *v.* Pepper, 68 N. C. 259, Rodman, J. said: "The only question which it is necessary to consider arises on the face of the indictment. Does it charge any criminal offence?

"It charges that the defendant, 'in the public streets of the town of Lumberton, with force and arms, and to the great displeasure of Almighty God and the common nuisance of all the good citizens of the State then and there being assembled, did, for a long time, to wit: for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance as aforesaid,' &c.

"We think no indictable offence is charged, and that the indictment is defective in several respects.

"In the learned and instructive opinion of the court, in State *v.* Jones (9 Ired. 38), delivered by Nash, J., it is said that a single act of profane swearing is not indictable. The acts must be so repeated in public as to have become an annoyance and inconvenience to the public. The fact must be so, and it must be so charged. That is not charged in the bill before us. The question is too clear, both upon reason and authority, to require more to be said.

"To make profane swearing a nuisance, the profanity must be uttered in the hearing of divers persons, and it must be charged in the bill to have been so uttered. This principle is fully established by State *v.* Jones, and the cases there cited, especially State *v.* Waller (3 Mur. 229), which was an indictment for drunkenness.

"In this case, the averment that the profanity was 'to the common nuisance of all the good citizens of the State then and there being assembled,' is equivocal. Taken literally, it would mean that all the citizens of the State were assembled in Lumberton on this occasion, which would be absurd. If it be understood as alleging that the profanity was to the nuisance of all such citizens of the State as were then and there assembled, it is not a direct and positive averment that any citizens were so assembled. The averment might be true, although there were no persons assembled. It is not the same as saying, 'in the presence of divers persons being then and there assembled,

§ 1431 *a.* As embodying the principle just stated, statutes prohibiting secular labor on Sunday have been held constitutional;[1] and the same view has been taken as to a

Unnecessary labor

for that contains a direct averment of the presence of divers persons.

"We were referred to State *v.* Roper (1 Dev. & Bat. 208), as an authority that it was not necessary to charge the act to have been done in the presence of any person, it being charged to have been done in a public place.

"In that case the indictment charged the defendant with an indecent exposure of his person on a public highway, but omitted to allege that it was in the presence of divers persons or of any person.

"Gaston, J., delivering the opinion of the court, says, that such an allegation was unnecessary; it was sufficient if it was probable from the circumstances that the exposure could have been seen by the public, and the indictment was sustained. The authority upon which that decision professes to be founded is R. *v.* Crunden, 2 Camp. 89. But we conceive that case does not sustain the form of indictment adopted in State *v.* Roper.

"The form of the indictment in R. *v.* Crunden is given in 2 Chit. Cr. Law 41, from which it appears that it was charged in both counts that the defendant exposed himself naked in a public place, and 'in the presence of divers of the king's subjects.' The evidence was that the defendant bathed in the sea at Brighton, near to and in front of a row of inhabited houses. Although there was no direct evidence that any occupant of the houses or others had seen him, yet clearly there was evidence from which the jury might have inferred that they did. The most that can be gathered from that case is, that if one person (the witness) saw the indecent exposure, and others were actually present and might have seen it, though there is no proof that they did, 'yet the law recognizes the probable risk of their seeing it as sufficiently proximate to be dealt with as a reality.' Note 7 to R. *v.* Webb, 1 Den. C. C. 338.

"In the last case cited, the indictment charged that the defendant exposed his person 'in a public place, in a certain victualling ale-house, in the presence of one M. A., the wife of E. C., and of divers others,' &c. The evidence was that the defendant exposed his person to the view of M. A., she alone being present. The court doubted about the sufficiency of the indictment, upon grounds not pertinent to the present point, and held, that if the words, 'of divers others,' had been omitted, it would have been bad, and as this allegation was not proved, there was no evidence to support this conviction. See also R. *v.* Watson, 2 Cox C. C. 376."

From these cases it was inferred that when the nuisance is one whose offensiveness is to the hearing, it must be charged to have been heard by divers persons. This was affirmed in State *v.* Powell, 70 N. C. 67. See further, infra, § 1432.

[1] State *v.* Gurney, 37 Me. 149; State *v.* Barker, 18 Vt. 195; Com. *v.* Harrison, 11 Gray, 308; Specht *v.* Com. 8 Barr, 312; Com. *v.* Jeandelle, 2 Grant, 506; S. C., 3 Phila. 509; Schlit *v.* State, 31 Ind. 346; Foltz *v.* State, 33 Ind. 215; Shover *v.* State, 5 Eng. (Ark.) 259; State *v.* Anderson, 30 Ark. 131; State *v.* Ambs, 20 Mo. 214; Bird, ex parte, 19 Cal. 130. See Com. *v.* Crowther, 117 Mass. 116.

statute forbidding theatrical exhibitions on Sunday.[1] Even as to Jews and persons conscientiously keeping the seventh day as the Sabbath, such statutes are to be enforced;[2] and when the overt act is proved, intent is irrelevant.[3] But labor which is necessary to the maintenance of any industry authorized by the State (*e. g.*, coaling of locomotives engaged in carrying live stock) does not offend against the statute.[4] Selling liquor, even to a sojourner, by a licensed innkeeper, is within the statute;[5] though it is otherwise as to driving to church.[6] The statute, however, unless there be an express exception, has been held to prohibit the running of passenger cars on Sunday.[7] But for a barber to shave his customers on Sunday is a "necessary" labor.[8]

on Sunday a statutory offence.

[1] Lindenmüller *v.* People, 33 Barb. 548. As to ninepin alleys see Com. *v.* Colton, 8 Gray, 488.

[2] Com. *v.* Hyneman, 101 Mass. 30; Com. *v.* Has, 122 Mass. 40; Com. *v.* Wolf, 3 S. & R. 48; Specht *v.* Com. 8 Barr, 312.

[3] Supra, § 23 *a*, 88; Brittin *v.* State, 5 Eng. (Ark.) 299.

In R. *v.* Howarth, 33 Up. Can. (Q. B.) 537, 2 Green's C. C. 76, the evidence was that the defendant, a druggist in the city of Toronto, sold five cents' worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shown that peppermint lozenges were generally kept and sold by druggists as medicine. The defendant having been convicted on this evidence under the "Act to prevent the Profanation of the Lord's Day," and fined twenty dollars and costs, the conviction was removed by *certiorari*. It was held by the Upper Canada Queen's Bench, 1. That the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by this court. 2. That there was no evidence to sustain the conviction; for the article, sold as it was by a druggist, must be considered *primâ facie* a medicine, though it was not expressly asked for or sold as such, and the case was within the exception in the act, "selling drugs and medicine;" Wilson, J., doubting.

[4] Com. *v.* Conway, 3 Leg. Chron. (Pa.) 27; Murray *v.* Com. 24 Penn. St. 270; Com. *v.* Knox, 6 Mass. 76; Crocket *v.* State, 33 Ind. 416 (a case of turning barley in a kiln). See *contra*, Com. *v.* Sampson, 97 Mass. 407, as to gathering seaweed; and see Johnson *v.* Irasburgh, 47 Vt. 28; McGrath *v.* Mervin, 112 Mass. 467.

[5] Omit *v.* Com. 21 Penn. St. 426; Voglesong *v.* State, 9 Ind. 112. See Eitel *v.* State, 33 Ind. 201; State *v.* Anderson, 30 Ark. 131.

[6] Com. *v.* Nesbit, 34 Penn. St. 398. As to what is religious worship see Feital *v.* R. R. 109 Mass. 398.

[7] Com. *v.* Jeandelle, 2 Grant, 506; S. C., 3 Phil. 509; afterwards corrected by statute. *Contra*, Augusta R. R. *v.* Renz, 55 Ga. 126.

[8] Com. *v.* Jacobus, 1 Leg. Gaz. 491; 17 Pitts. L. J. 154.

"Shooting at a dog" is a violation of the Alabama statute against

VI. OFFENCES TO PUBLIC DECENCY.

So of whatever shocks public decency.

§ 1432. Any public exhibition of gross and wanton indecency is in like manner a nuisance. Hence it is indictable to indulge in habitual, open, and notorious lewdness;[1] to permit dependents (in old times, slaves) to roam the streets in a state of nakedness;[2] to openly and notoriously haunt houses of ill-fame;[3] to use habitually indecent or profane language in the presence of passers-by and the public generally;[4] to parade stud horses through a city, letting them out to mares on the public streets;[5] and to be addicted to public and notorious drunkenness.[6] The exhibitor of an unnatural and monstrous birth is thus indictable;[7] and so is a herbalist who publicly exposes and exhibits in his shop, on a highway, a picture of a man naked to the waist, and covered with eruptive sores, thus constituting an exhibition offensive and disgusting, although there is nothing immoral or indecent in the picture, and his motive is innocent.[8] The same has been ruled as to any scandalous exhibition.[9] But in all these cases the indictment must aver, and

Sabbath breaking. Smith *v.* State, 50 Ala. 159. See, as to hunting, State *v.* Carpenter, 62 Mo. 594.

Hunting and fishing on Sunday may be indictable as a nuisance, notwithstanding the fact that they are punishable by summary proceedings before justices. Gunter *v.* State, 1 Lea (Tenn.), 129.

[1] Peak *v.* State, 10 Humph. 99; State *v.* Moore, 1 Swan, 136. Infra, § 1446; supra, § 1428.

[2] Britain *v.* State, 3 Humph. 203. Infra, § 1606.

[3] See Brooks *v.* State, 2 Yerg. 482; State *v.* Cagle, 2 Humph. 414; State *v.* Brunson, 2 Bailey, 149.

[4] Barker *v.* Com. 19 Penn. St. 412; State *v.* Kirby, 1 Murph. 254; State *v.* Ellar, 1 Dev. 267; Bell *v.* State, 1 Swan, 42. Supra, § 1431.

As has been seen, the offence must be "in the presence and hearing of divers persons then and there assembled," and the acts must have been so repeated in public as to have become an annoyance and inconvenience to the public. The words also must be given in the indictment, State *v.* Barham, 79 N. C. 646; aff. State *v.* Pepper, 68 N. C. 259; State *v.* Powell, 70 N. C. 67. See, under Georgia statute, Brady *v.* State, 48 Ga. 311.

[5] Nolen *v.* Mayor, 4 Yerg. 163.

[6] Infra, § 1433. See Smith *v.* State, 1 Humph. 396; State *v.* Waller, 3 Murph. 229; State *v.* Sowers, 52 Ind. 311.

[7] Harring *v.* Watson, 1 Russ. on Cr. 5th ed. 436.

[8] R. *v.* Grey, 4 F. & F. 73. See R. *v.* Bradford, Comb. 304.

[9] R. *v.* Saunders, L. R. 1 Q. B. D. 15; 13 Cox C. C. 116; Knowles *v.* State, 3 Day, 103. In Com. *v.* Hazleton, New Bedford, Mass. 1873, the defendant was indicted for the exposure in a shop window of a nude statuette of Antinous. The charge left

the proof must show, exposure and offence to the community generally; as mere private lewdness or indecency is not indictable as a nuisance at common law.[1]

§ 1432 *a*. Indecency in treatment of a dead human body is an offence at common law, as an insult to public decency. Hence, it is indictable to expose such a body without proper burial,[2] to wantonly or illegally disturb it,[3] to sell it, for mere purposes of private gain, for dissection,[4] or to disinter it, unless so directed by the deceased in his life or by his relatives after his death.[5] Want of means to bury a relative is

Indecent treatment of the dead indictable.

the question mainly to the jury, who did not agree. See pamphlet report in Harvard Library. As to nude pictures, see Com. *v.* Dejardin, 126 Mass. 46. Infra, §§ 1606 *et seq.*

[1] State *v.* Waller, *ut supra.*

[2] Kanavan's case, 1 Greenl. 226.

[3] 2 East P. C. 652; R. *v.* Giles, R. & R. 367; R. *v.* Sharpe, 7 Cox C. C. 214; 40 Eng. L. & E. 584; Com. *v.* Loring, 8 Pick. 370.

[4] R. *v.* Cundick, D. & R. (N. P.) 13; R. *v.* Feist, D. & B. 590; 8 Cox C. C. 18; R. *v.* Lynn, 2 T. R. 733; Com. *v.* Cooley, 10 Pick. 37.

[5] R. *v.* Sharpe, 7 Cox C. C. 214; Com. *v.* Loring, 8 Pick. 370; Com. *v.* Marshall, 11 Pick. 350; Tate *v.* State, 6 Blackf. 110. See Whart. Prec. §§ 821 *et seq.*

"An indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence that no case was reserved. R. *v.* Gilles, 1 Russ. by Grea. 464; Russ. & Ry. 366 (*n*). So to take up a dead body, even for the purpose of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores;* that the purpose of taking up the body for dissection did not make it less an indictable offence; and that as it had been the regular practice at the Old Bailey in modern times to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments was a proof of the universal opinion of the profession upon this subject. R. *v.* Lynn, 2 T. R. 733; 1 Leach, 497. See also R. *v.* Cundick, Dowl. & Ry. N. P. C. 13. And it makes no difference what are the motives of the person who removes the body; the offence being the removal of the body without lawful authority. R. *v.* Sharpe, Dears. & B. 160; 26 L. J. M. C. 45, where the defendant, from motives of filial affection, had removed the corpse of his mother from its burying place. The defendant had in this case committed

a defence to an indictment for non-burial;[1] though this defence would not be good if the party on whom the duty primarily lay neglected to call in the proper authorities.[2] It has further been ruled that a person is indictable who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner, or who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrefied.[3]

[*As to exposure of person, see infra*, § 1468.]

VII. OFFENCES TO HEALTH.

So of whatever is likely to generate disease.

§ 1433. Any acts or omissions which, in the regular course of events are likely to generate disease or communicate infection, expose the person so acting or omitting to act to an indictment for nuisance. It is not necessary that the result should *certainly* flow from the cause. In view of the great stakes involved, and of the anxiety which the defendant's misconduct is likely to produce, a high probability of disease is sufficient.[4]

1. *Unwholesome Food or Drink.*

As in case of exposure of pu-

§ 1434. Whoever knowingly and wilfully exposes for sale, or has in his possession with intent to sell for human food, articles which he knows to be unfit for human food, is

a trespass against the owner of the soil of the burying place; but *quære* whether if no such trespass was committed the offence might not be still complete." Roscoe Cr. Ev. p. 429.

[1] R. *v.* Vann, 2 Den. C. C. 325; 5 Cox C. C. 379.

[2] See infra, § 1565; Bettison, in re, L. R. 4 Ecc. 294; 12 Eng. R. 655 with Mr. Moak's note. The offence in the text is regulated in most States by statute. Philanthropic or scientific intentions are in such cases no defence. Com. *v.* Cooley, 10 Pick. 37; 1 Russ. 464. See supra, § 119; and compare articles in 18 Alb. L. J. 486–7 *et seq.*; 1 Am. L. Rev. N. S. 57. As to statutes see Com. *v.* Loring, 8 Pick. 370; Com. *v.* Slack, 19 Pick. 307. In R. *v.* Stewart, 12 A. & E. 773, 779, it was held that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial, if there is no one else who is bound to bury it.

[3] Steph. Dig. C. L. art. 175.

[4] State *v.* Buckman, 8 N. H. 203; Meeker *v.* Van Rensselaer, 15 Wend. 397; People *v.* Townsend, 3 Hill (N. Y.), 479; State *v.* Close, 35 Iowa, 570; Watson *v.* Toronto Gas Co. 4 Up. Can. (Q. B.) 158; State *v.* Rankin, 3 So. Car. 438. See supra, §§ 152 *et seq.*

indictable for a nuisance;[1] but, to sustain the indictment, it is necessary that the food must be something that it does not purport to be; *e. g.* that it must be putrid, or infected with some disease or other injurious quality, making it prejudicial to health.[2] Guilty knowledge is necessary to constitute the offence.[3] The carrier who knowingly brings such food to the market is equally responsible with the vendor;[4] but if the meat is to be used for other than human food the indictment does not lie.[5] The same rule applies to the furnishing others with unwholesome water,[6] and to the furnishing others (children in a military asylum) with unwholesome bread.[7]

Putrid or infectious food or drink.

§ 1435. It should be remembered that much food is unwholesome which it is not indictable to sell as human food; *e. g.* rich and highly seasoned dishes. Hence it is not enough in the indictment to aver the selling of "unwholesome food;" but the kind of food (*e. g.* beef) must be mentioned, and it must be averred to be diseased, or so spoilt or infected as to make it unwholesome.[8] But the offence is completed by the sale of food the seller knows to be diseased and poisonous, without proof of sickness caused thereby, or aver-

Mere unwholesomeness is not sufficient.

[1] Report of English Commissioners, 1879. Supra, § 1410; R. *v.* Haynes, 4 M. & S. 214; State *v.* Smith, 3 Hawks, 378; Hunter *v.* State, 1 Head, 160. In England, victuallers, brewers, and other common dealers in victuals, who in the course of their trade sell provisions unfit for the food of man, are criminally responsible under 51 Hen. 3, "Pillor et Tumbrel, &c.," and of Edw. 1, "De Pistoribus et Hasiatoribus et aliis Vitellariis," and are liable civilly to the vendee, without any fraud on their part or warranty of the soundness of the thing sold; but a private person, not following any of these trades who sells an unwholesome article for food, is not so liable. Burnby *v.* Bollett, 16 M. & W. 644.

[2] R. *v.* Stevenson, 3 F. & F. 106; People *v.* Parker, 38 N. Y. 85; Goodrich *v.* People, 19 N. Y. 574; State *v.* Norton, 2 Ired. 40; State *v.* Smith, 3 Hawks, 378. See Stein *v.* State, 37 Ala. 123. Supra, § 1118.

[3] Ibid. See supra, § 87; Whart. Crim. Ev. § 39.

[4] R. *v.* Jarvis, 3 F. & F. 108.

[5] R. *v.* Crawley, 3 F. & F. 109. See supra, § 1118.

[6] State *v.* Buckman, 8 N. H. 203.

[7] R. *v.* Dixon, 3 M. & S. 11.

[8] Goodrich *v.* People, 3 Parker C. R. 622; 19 N. Y. 574.

Sir J. Stephen (Dig. C. L. art. 187) thus states the law: —

"Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article." This is defective in not averring "for human use."

ment or proof that the food was sold to the vendees to be eaten by them, if the sale were for human use.[1] The names of the vendees, not being material to the offence, need not be averred.[2]

2. *Contagious Diseases.*

And so as to communication of infection.

§ 1436. For the same reasons, it is indictable to expose to the public a human being or brute animal having a contagious disease; nor is it necessary in such case that the indictment should aver a nuisance.[3] And so, as has been seen, doing anything, or maintaining any building or institution, likely to generate infection, is indictable.[4]

VIII. OFFENSIVE INDUSTRIES.

§ 1437. Can an industry which is essential to the public welfare be convicted and abated as a nuisance, because it is offensive to the vicinity? This is a question that has been already discussed, and will be noticed in some of its relations hereafter. It has been seen that no prescription can be pleaded for a nuisance,[5] and that neither its collateral benefit to the community,[6] nor the good intent of the projector,[7] is a defence. It has also been seen that when population moves up to a nuisance, which previously was in a solitude, then, as a general rule, the nuisance must recede.[8] As, however, this is a rule subject to some exceptions, it is better to view it as it bears on three distinct conditions of fact.

Offensive industry cannot be planted in populous community.

§ 1438. First, when the industry is originally planted in a populous community. Here there can be no question. The industry, if a nuisance, must be abated.

Offensive industry indictable if placed within city limits.

§ 1439. Secondly, when the industry is originally planted within the limits of an incorporated city or village, but where there are no dwelling-places in the vicinity at the time of its origination. The law, in this case, is clear. Whoever builds in a district set apart especially by the law for urban purposes, does so with notice that anything inconsistent with such purposes must be

[1] Goodrich *v.* People, *ut supra.*

[2] Ibid.

[3] R. *v.* Vantandillo, 4 M. & S. 73; R. *v.* Burnett, 4 M. & S. 272; R. *v.* Henson, Dears. C. C. 24.

[4] Supra, § 1433. Meeker *v.* Van Rensselaer, 15 Wend. 397.

[5] Supra, § 1415.

[6] Supra, § 1416.

[7] Supra, § 1421.

[8] Supra, § 1415.

abandoned when the comfort of the population requires the surrender.

§ 1440. Thirdly, when the industry is originally planted in an uninhabited district, not part of an incorporated city or village, and is subsequently approached by population to whom it is a nuisance. Here the law also is, that in such case the industry must retire, to take up its seat in a district to which population has not yet reached. Yet it is impossible to study the cases without seeing that the question is treated as one of expediency, as the issue (that of comfort) indeed invites. Whose expulsion would produce the most general inconvenience — the "nuisance" or the population? If the "nuisance" is essential to the community at large, — if it cannot be pushed into remoter and more desolate regions without great inconvenience, — if the population affected by it can with comparatively little inconvenience retire, — then the latter cannot claim that the former be expelled.[1] Of such cases as these we have illustrations in various public works instituted by government, and in chartered corporations for travel.[2] On the other hand, when the "nuisance" can be readily sequestered to a more secluded spot, while the population has taken root, and cannot readily be moved, then the former must give way to the latter.[3] It should be remembered, however, that no mere sentimental or nervous sensibility will be ground for a conviction. The "nuisance" must be *reasonably* offensive.[4]

Whether such industry must recede, in other cases, when population approaches, is a question of expediency.

IX. EXPLOSIVE COMPOUNDS.

§ 1441. It is a nuisance at common law to keep or manufacture explosive compounds in such a way as to be productive of terror or peril to the community.[5] Licenses

Explosive compounds

[1] See Ellis *v.* State, 7 Blackf. 534.

[2] See supra, § 1424. Thus, on the ground that a gas manufactory is essential to the comfort and safety of cities, it has been ruled, in a case already cited, that when such a manufactory is chartered for the purpose by the legislature, no indictment lies when the processes adopted for the purpose are the best that can be applied, and when due care and diligence has been shown. People *v.* N. Y. Gas Light Co. 64 Barb. 55. See Com. *v.* Reed, 34 Penn. St. 275. Supra, § 1424.

[3] See Com. *v.* Upton, 6 Gray, 473; Ashbrook *v.* Com. 1 Bush, 139.

[4] Supra, § 1414.

[5] R. *v.* Lister, Dears. & B. 209; Williams *v.* East India Co. 3 East, 192,

must be carefully kept.

for this purpose are to be strictly construed, and their restrictions conformed to closely. Nor will they be stretched to authorize any offence they do not expressly cover.[1] Thus a license from government to manufacture or keep on hand petroleum, under such conditions as will prevent explosion, is no defence to an indictment against the manufacturer of such petroleum in such a way as to diffuse unwholesome and offensive vapors.[2]

X. NUISANCES OF PERSONAL DEPORTMENT.

Common scolds indictable at common law.

§ 1442. When a woman is habitually addicted to scolding at and before persons in general, on the highway, or in a populous neighborhood, so as to disturb passers-by, she may be indicted as a common scold; and it is enough if the indictment simply avers her to be such.[3] Anger or malice is not a necessary constituent of the offence.[4] Ducking, however, which was the old common law punishment, is now obsolete.[5]

And so of common brawlers.

§ 1443. *Common brawlers* are in some States indictable by statute; in others at common law. It is not necessary to constitute this offence, or that of a common scold, that the brawling and scolding should be in the public streets. If it takes place within a house, and yet is so vehement and vituperative as to disturb the public peace outside, it is indictable.[6] A common profane swearer, or user of indecent language, has been said to be in like manner and with like limitations, indictable at common law.[7]

§ 1444. *A common barrator*,[8] *e. g.* a person who habitually fo-

201; Trueman *v.* Casks, Thach. C. C. 14; People *v.* Sands, 1 Johns. 78; Bradley *v.* People, 56 Barb. 72; Cheatham *v.* Shearon, 1 Swan (Tenn.), 213.

[1] See supra, § 1424.

[2] Com. *v.* Kidder, 107 Mass. 188. See Wier's Appeal, 74 Penn. St. 230. Supra, § 1424.

[3] R. *v.* Foxby, 6 Mod. 14; U. S. *v.* Royall, 3 Cranch C. C. 618; Com. *v.* Pray, 13 Pick. 359; Com. *v.* Foley, 99 Mass. 497; Com. *v.* Davis, 11 Pick. 432; Com. *v.* Mohn, 52 Penn. St. 243; James *v.* Com. 12 S. & R. 220. *Contra*, Com. *v.* Hutchinson, 5 Clark (Pa.), 321.

The offence must be to the public, not to an individual alone. State *v.* Schlottman, 52 Mo. 164.

[4] U. S. *v.* Royall, *ut supra*.

[5] James *v.* Com. 12 S. & R. 220.

[6] Com. *v.* Foley, 99 Mass. 497.

[7] Barker *v.* Com. 19 Penn. St. 412; Bell *v.* State, 1 Swan, 42. See supra, § 1432.

[8] As to champerty see infra, § 1853.

ments vexatious and groundless litigation among citizens, irrespective of any private relations he may sustain to them, is indictable as a nuisance at common law.[1] *Common thieves* are indictable in some States by statute, but in such case habitual thieving must be proved.[2]

And so of common barrators. Common thieves.

§ 1445. *Eavesdropping* may, in like manner, be indictable as a nuisance.[3] It should however, to be indictable at common law, be habitual, and combine the lurking about dwelling-houses, and other places where persons meet for private intercourse, secretly listening to what is said; and then tattling it abroad.[4] It is a good defence that the act was authorized by the husband of the prosecutrix.[5] The offence, it is said, may be committed by stealthily lurking around a grand jury, and repeating their secret proceedings.[6]

And so of eavesdroppers.

§ 1446. *Open and gross lewdness* is in some jurisdictions indictable by statute,[7] and is so at common law, with the qualifications above stated.[8] Lewdness, however, is not a designation of character, but a conclusion of law, of which it is necessary to state the premises of fact.[9] And to sustain a charge of haunting houses of ill-fame, there must be a *scienter*.[10] The evidence by which such an indictment may be sustained is necessarily circumstantial.[11]

And so of persons habitually and openly lewd.

§ 1447. *Common drunkenness* may be treated as a nuisance when it is such as habitually to shock, molest, and disturb the community at large.[12]

And so of common drunkards.

[1] Com. *v.* Pray, 13 Pick. 359; Com. *v.* Mohn, 52 Penn. St. 243; State *v.* Chitty, 1 Bailey, 379. A person who maliciously splits suits so as to accumulate costs is indictable at common law. Com. *v.* McCulloch, 15 Mass. 227. See Com. *v.* Davis, 11 Pick. 432. See infra, § 1858.

[2] World *v.* State, Sup. Ct. Md. 6 Reporter, 686.

[3] U. S. *v.* Royall, *ut supra*.

[4] 4 Bl. Com. 168. See Com. *v.* Lovett, 4 Clark (Pa.), 5; 8 Haz. Pa. Reg. 305; Com. *v.* Mergelt, cited Ibid.; State *v.* Williams, 2 Tenn. 108. Supra, § 19.

[5] Com. *v.* Lovett, supra.

[6] State *v.* Pennington, 3 Head, 299.

[7] Grisham *v.* State, 2 Yerger, 589; where it was held that to an indictment against two for lewdness, it is no defence that the parties were married by rites not recognized by the State as legal. And see Peak *v.* State, 10 Humph. 99. Supra, § 1432. See, however, *contra*, State *v.* Brunson, 2 Bailey, 149. For illicit cohabitation see infra, § 1747.

[8] Supra, § 1432.

[9] Dameron *v.* State, 8 Mo. 494.

[10] Brooks *v.* State, 2 Yerger, 482.

[11] Peak *v.* State, 10 Humph. 99.

[12] See Com. *v.* Boon, 2 Gray, 74;

§ 1448. *Publishers of false alarms, or of intelligence calculated to disturb the peace of a community*, on the same principles on which common scolds and common barrators are indictable, are subject, if the offence be continuous and directed at the community generally, to penal discipline.[1]

And so of false newsmongers.

XI. DISORDERLY, BAWDY, AND TIPPLING-HOUSES.

§ 1449. A bawdy-house (or a house of ill-fame as it is sometimes called) is a house kept for the reception of persons who choose to resort to it for the purpose of illicit sexual intercourse, and is indictable at common law.[2] But the house must be resorted to in common by other women than its keeper when a woman.[3] It is immaterial "whether indecent or disorderly conduct is perceptible from the outside."[4]

Bawdy-house and disorderly house indictable at common law.

A disorderly house is a house kept in such a way as to disturb, annoy, or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular high-

Smith *v.* State, 1 Humph. 396; State *v.* Waller, 3 Murph. 229.

[1] 4 Bl. Com. 149. Supra, § 1374; Com. *v.* Cassidy, 6 Phila. 82. "This indictment charges the unlawful circulation of a false report by hand-bills posted on the corners of the public streets, and other public places in the city, calling on the citizens to look out for a child-stealer, describing her as a woman about twenty-four years of age, &c. The hope is suggested that she may be discovered and brought before the public, where she may be observed by both heads of families and their children, &c. That this publication, given to the public in the manner above stated, constitutes, in whatever light it may be viewed, a common nuisance, cannot, we think, be well questioned; that it is injurious to both the comfort and health of a large number of persons in the community in which the report has been put in circulation is self-evident, because its tendency is to fill the mind with anxiety, fear, and alarm, to the absolute destruction of the comfort and happiness of many, and by this means is, to a greater or less extent, injurious to the health of persons brought under such influences." Allison, J., 1865.

[2] 4 Bl. Com. 168; R. *v.* Williams, 10 Mod. 63; R. *v.* Rice, L. R. 1 C. C. 21; U. S. *v.* Stevens, 4 Cranch C. C. 341; Jennings *v.* Com. 17 Pick. 80; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Kimball, 7 Gray, 328; Cadwell *v.* State, 17 Conn. 467; Jacobowsky *v.* People, 6 Hun, 524; Barnesciotta *v.* People, 10 Hun, 137; State *v.* Williams, 1 Vroom, 102; State *v.* Evans, 5 Ired. 603; Smith *v.* Com. 6 B. Monr. 21; State *v.* Bentz, 11 Mo. 27; Birchfield, ex parte, 52 Ala. 377.

[3] State *v.* Garity, 46 N. H. 61; Com. *v.* Lambert, 12 Allen, 177; Cadwell *v.* State, 17 Conn. 467; State *v.* Main, 31 Conn. 572.

[4] Steph. Dig. C. L. art. 180; citing 1 Russ. Cr. 443; R. *v.* Rice, L. R. 1 C. C. 21.

way, and is indictable at common law;[1] and an inn, or building, to which the public have access generally may be "disorderly" when the disorder is only inside, and is not heard outside, if it disturb those who have right of access to the house.[2] So, though a mere tippling-house is not *per se* a nuisance at common law,[3] yet it is otherwise with a house kept for promiscuous and noisy tippling, promoting drunkenness in a community.[4] But to make a house, as a disorderly house, a nuisance at common law, it must offend a class larger than its own private inmates. The disorder must be in a place to which the public at large have access.[5]

Disorderly, tippling, and bawdy-houses are plainly distinguishable. As, however, they are often blended in one count, and as the decisions bearing on them speak generally of the offence thus blended, they will here be considered under one general head. It is to be remembered, however, that to constitute a bawdy-house it is not necessary that there should be any disorder visible from outside;[6] and to constitute a disorderly house it is not necessary that there should be any public prostitution.

§ 1450. The indictment, when the offence is statutory, must contain the statutory terms. When at common law, if it contains averments that the house was unlawful, and disorderly, and a common nuisance, specifying in what respects it was disorderly, this is usually enough.[7]

Enough if facts constituting nuisance be averred.

[1] State *v.* Bailey, 1 Foster, 343; State *v.* Stevens, 40 Me. 559; Com. *v.* Cobb, 120 Mass. 356; Hunter *v.* Com. 2 S. & R. 298; Clementine *v.* State, 14 Mo. 112; Hackney *v.* State, 8 Ind. 494.

[2] State *v.* Mathews, 2 Dev. & Bat. 424.

[3] Com. *v.* McDonough, 13 Allen, 581.

[4] R. *v.* Rice, L. R. 1 C. C. 21; U. S. *v.* Columbus, 5 Cranch C. C. 304; Wilson *v.* Com. 12 B. Monr. 2; State *v.* Bertheol, 6 Blackf. 474. A license to sell liquor does not protect such a house. State *v.* Buckley, 5 Harring. 508; State *v.* Mulliken, 8 Blackf. 260. See Del. Canal Co. *v.* Com. 60 Penn. St. 367; State *v.* Thornton, Busbee, 252. And to permit immoral acts in a house open to the public makes it a disorderly house. State *v.* Williams, 1 Vroom, 102. Supra, § 1424.

[5] Infra, § 1456; Mains *v.* State, 42 Ind. 327.

[6] R. *v.* Rice, L. R. 1 C. C. 21.

[7] U. S. *v.* Columbus, 5 Cranch C. C. 304; State *v.* Homer, 40 Me. 438; State *v.* Collins, 48 Me. 217; State *v.* Bailey, 1 Foster, 343; State *v.* Nixon, 18 Vt. 70; Com. *v.* Ashley, 2 Gray, 356; Wells *v.* Com. 12 Gray, 326; Com. *v.* Wood, 97 Mass. 225; Com. *v.* Stewart, 1 S. & R. 342; Joseph *v.* State, 42 Ind. 370; Vanderworker *v.* State, 8 Eng. (Ark.) 700.

That it is sufficient simply to charge the defendant with keeping a "common disorderly house" has been sometimes argued.[1] But this is a loose mode of pleading, for the question of disorder is a wide one, and there are many kinds of disorder which are not indictable, and of which it would be intolerable tyranny for the law to attempt to take cognizance. The proper course is to specify what the disorder is; *e. g.* assemblages of persons of both sexes of lewd character, tippling, noise, tumult,[2] &c. But several specifications do not constitute duplicity.[3]

It is clearly not necessary to name the persons frequenting the house.[4]

Character of house to be proved inductively.

§ 1451. Particular acts or states of disorder, inside or outside, may be put in evidence to prove a house to be disorderly, although such acts were not specified in the indictment;[5] but common reputation, or complaint among the neighbors, is not for this purpose admissible.[6] But that the house was frequented by noisy and disreputable persons, without identifying them, may be put in evidence.[7]

Bad reputation of visitors admissible.

§ 1452. As has just been seen,[8] *bawdy-houses* admit of a wider range of proof. Whether it be because the term "house of ill-fame" is sometimes, by statute, made convertible with bawdy-house,[9] or whether it be because at com-

[1] See R. *v.* Rogier, 1 B. & C. 272; Com. *v.* Pray, 13 Pick. 359; Clifton *v.* State, 53 Ga. 241. Under Iowa statute see State *v.* Alderman, 40 Iowa, 375.

[2] See Wharton's Prec. *in loco;* Com. *v.* Wise, 110 Mass. 181; People *v.* Jackson, 3 Denio, 101; Frederich *v.* Com. 4 B. Monr. 7; Davis *v.* State, 52 Ind. 488; Hickey *v.* State, 53 Ala. 514. See Whart. Cr. Pl. & Pr. §§ 154, 231.

[3] Com. *v.* Ballou, 124 Mass. 26; Wh. Cr. Pl. & Pr. § 251.

[4] State *v.* Patterson, 7 Ired. 70.

[5] Com. *v.* Davenport, 2 Allen, 299; Com. *v.* O'Brien, 8 Gray, 487; Com. *v.* Cardoze, 119 Mass. 210; Com. *v.* Stewart, 1 S. & R. 342; State *v.* Webb, 25 Iowa, 235; Garrison *v.* State, 14 Ind. 287; State *v.* Patterson, 7 Ired. 70; Mahalovitch *v.* State, 54 Ga. 217.

[6] U. S. *v.* Nailor, 4 Cranch C. C. 372; U. S. *v.* Jourdane, 4 Cranch C. C. 338; State *v.* Foley, 45 N. H. 466; Com. *v.* Stewart, 1 S. & R. 342; Com. *v.* Hopkins, 2 Dana, 418; Smith *v.* Com. 6 B. Monr. 21; Sparks *v.* State, 59 Ala. 82; Toney *v.* State, 60 Ala. 97.

[7] Com. *v.* Kimball, 7 Gray, 328; State *v.* Patterson, 7 Ired. 70; Wooster *v.* State, 55 Ala. 217.

[8] Supra, § 1449.

[9] Cadwell *v.* State, 17 Conn. 467; and see State *v.* Morgan, 40 Conn. 44; aff. State *v.* Blakesley, 38 Conn. 528. Prostitution in the house need not be proved if the house was used

mon law a "house of ill-fame," as a scandal to the community, is *per se* indictable, and because the phrase is included in most indictments of this class, we find decisions to the effect that the "ill-fame" of the house is the subject of admissible proof.[1] And from the necessity of the case, the bad reputation of the persons visiting the house may be put in evidence.[2] It has, how-

as a dance-house to get up assignations. Com. *v.* Cardoze, 119 Mass. 210.

[1] Whart. Crim. Ev. § 255; U. S. *v.* Gray, 2 Cranch C. C. 675; U. S. *v.* Stevens, 4 Cranch C. C. 341; State *v.* McDowell, Dudley (S. C.), 346; Adams *v.* State, 25 Ohio St. 584; State *v.* Brunell, 29 Wis. 435.

[2] State *v.* Boardman, 64 Me. 523; State *v.* McGregor, 41 N. H. 407; Com. *v.* Gannett, 1 Allen, 7; Com. *v.* Lambert, 12 Allen, 177; Com. *v.* Kimball, 7 Gray, 328; Harwood *v.* People, 26 N. Y. 190; Wooster *v.* State, 55 Ala. 217; Toney *v.* State, 60 Ala. 97; Clementine *v.* State, 14 Mo. 112; State *v.* Hand, 7 Iowa, 411; State *v.* Lyon, 39 Iowa, 379; O'Brien *v.* People, 28 Mich. 213; Morris *v.* State, 38 Tex. 603; Sylvester *v.* State, 42 Tex. 496.

In O'Brien *v.* People, 28 Mich. 213, Campbell, J., said:—

"Evidence was given both of ill reputation and of specific acts coming within the statute. In charging the jury, the court instructed them that they must be satisfied from the evidence both that the house was a house of ill-fame, and that it was resorted to for the purpose of prostitution and lewdness, and that 'the former may be proved by showing the reputation of the house, the latter by the testimony of persons having knowledge of the fact that prostitutes and lewd persons resorted there and committed acts of prostitution.' To this was added the further charge, that 'in determining the purpose for which such persons resorted to said house, you may take into account also the character or reputation of said house.' This is excepted to.

"It is claimed that the charge practically allowed the jury to infer both elements of the offence from proof of one. This would not be allowable. It certainly is possible for persons to have occasion to go to such places on honest errands, and it is possible, though not common, for houses to be affected by evil repute without deserving it. But in the present case there was distinct evidence of everything necessary to make out the entire charge, and the jury were not allowed to find a verdict unless they believed that testimony. It is not easy to discover how the additional charge became material under these circumstances. But, guarded as it was, there was no error in it. It did not allow the jury to draw any inferences of criminality from the visits of persons generally, but from those of 'prostitutes and lewd persons,' who 'resorted there.' This language refers to persons of bad character, and the word 'resorted' implies that the house was visited frequently by that class of persons. To hold that when such persons resort to such places no criminal purpose can be inferred, would be absurd. It would be impossible to get, in most cases, as full and direct testimony as seems to have been given here. And to prohibit a jury from drawing natural inferences from such significant facts as those, which show that a house in bad credit

ever, been held error to charge the jury that they are to convict if the house has a bad reputation. They must only convict if they believe the house to be one of ill-fame, or a bawdy-house, as the case may be.[1] At the same time, when the statute makes "house of ill-fame" and "bawdy-house" equivalent, it is admissible to prove the ill-fame of the house.[2]

§ 1453. *Ownership* may be proved by admission, or by acts of authority, or by record.[3] It cannot be shown by reputation,[4] but is to be inferred from the circumstances in proof.[5]

Ownership proved inferentially.

§ 1454. *Tippling-houses*, when conducted noisily and in such a way as to breed disorder and crime, are, as has been seen, indictable at common law; nor will a license to sell liquor shield the defendant on a trial for the nuisance.[6] Nor, in prosecutions for a nuisance, can a tavern-keeper, or the keeper of any building open to the public, defend himself on the ground that the disorder is exclusively inside the house, and is not heard outside.[7] Wherever the public has access, there disorder is a public nuisance. But in a private house, to which the public has not access, the disorder must be such as to annoy passers-by or neighbors.[8] And of a tippling-house, as such, it is an essential condition that there should be a habitual selling, directly or indirectly, of spirituous liquor by retail.[9]

For tippling-houses license no defence.

§ 1455. A married woman may be indicted for keeping a house of ill-fame, either with or without her husband,[10] and a *husband* living in the house, and there exercis-

Married woman indictable for

is a resort of that kind of visitors, would not be consistent with good sense."

[1] State *v.* Brunell, 29 Wis. 435.

[2] Cadwell *v.* State, 17 Conn. 467; State *v.* Morgan, 40 Conn. 44; Sylvester *v.* State, 42 Tex. 496. See Com. *v.* Davis, 11 Gray, 48, and *contra* under Maine statute, State *v.* Boardman, 64 Me. 523.

[3] State *v.* Worth, R. M. Charl. 5.

[4] State *v.* Hand, 7 Iowa, 411.

[5] State *v.* Wells, 46 Iowa, 662; Couch *v.* State, 24 Tex. 557.

[6] Supra, § 1424.

[7] Supra, § 1449.

[8] Supra, § 1411; State *v.* Buckley, 5 Harring. 508.

[9] U. S. *v.* Columbus, 5 Cranch C. C. 304; Com. *v.* McDonough, 13 Allen, 581; State *v.* Burchinal, 4 Harring. 572; Bloomhuff *v.* State, 8 Blackf. 205; State *v.* Thornton, Busbee, 252.

[10] Com. *v.* Lewis, 1 Met. 151; Com. *v.* Cheney, 114 Mass. 281; State *v.* Bentz, 11 Mo. 27. Supra, § 81.

ing acts of control, cannot defend himself on the ground that the house was owned by his wife, under the married woman's acts, who lived there, carried on the premises, and received all the profits.[1] keeping house.

§ 1456. So far as concerns disorderly houses, nuisance to *all* the neighborhood need not be proved,[2] nor, if the house be shown to be disorderly, is proof of outside riot or disorder in the vicinity necessary.[3] On the other hand, a single riot does not create a disorderly house,[4] nor does a single act of lewdness, nor even continuous acts of lewdness by one person, make a bawdy-house.[5] But the offence must be to the public in general.[6] Thus, upon a charge of keeping a disorderly house, where it appeared that the defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons, when drunk, whom he did not encourage (save by getting drunk himself), but would sometimes endeavor to quiet, by which disorder only two families, in a thinly settled neighborhood, were disturbed, this was held not to amount to a common nuisance.[7] Proof of general nuisance is enough.

§ 1457. That the offence need not be *lucri causa* has been mainly determined as a matter of pleading.[8] But on principle the expectation of pay is not essential to the offence.[9] Offence need not be *lucri causa*.

§ 1458. Proof of the use of a single room for purposes of general prostitution will support an indictment for keeping a "house" for such purposes.[10] And a canvas tent A room or a tent

[1] Com. *v.* Wood, 97 Mass. 225.

[2] Com. *v.* Davenport, 2 Allen, 299.

[3] R. *v.* Rice, L. R. 1 C. C. 21; U. S. *v.* Columbus, 5 Cranch C. C. 304; State *v.* Webb, 25 Iowa, 235.

[4] Hunter *v.* Com. 2 S. & R. 298. Supra, § 1449; Mains *v.* State, 42 Ind. 327; Dunnaway *v.* State, 9 Yerg. 350.

[5] State *v.* Evans, 5 Ired. 603.

[6] Hunter *v.* Com. 2 S. & R. 298; Mains *v.* State, 42 Ind. 327.

[7] State *v.* Wright, 6 Jones (N. C.) 25. See State *v.* Mathews, 2 Dev. & B. 424.

[8] See supra, §§ 1449–51.

[9] State *v.* Nixon, 18 Vt. 70; Com. *v.* Wood, 97 Mass. 225; State *v.* Williams, 1 Vroom, 102; State *v.* Webb, 25 Iowa, 235.

[10] Com. *v.* Hill, 14 Gray, 24; Com. *v.* Butman, 118 Mass. 456; State *v.* Garity, 46 N. H. 61; and see Clifton *v.* State, 53 Ga. 241. In People *v.* Bixby, 67 Barb. 221; 4 Hun, 636, an immoral exhibition of women in a room which was not open to the public generally, but only to such as were permitted to enter and paid therefor, was held to be in a "public place" within the statute against indecent exposure. But see State *v.* Barr, 39

may be a "house."

may be a "house" in the same sense;[1] and so may a boat on a river when used as a habitation.[2]

Letting house of ill-fame indictable at common law.

§ 1459. At common law it is an indictable offence not only to keep a house of ill-fame, or to be in any way concerned in the same,[3] but to let a house, knowing it is to be used for the purposes of prostitution;[4] though in New York the last point was once ruled differently, and it was laid down that to rent a house to a woman of ill-fame, with the intent that it should be kept for purposes of public prostitution, is not an offence punishable by indictment, though the house be so kept afterwards.[5] Subsequently, however, the doctrine held in the latter case was qualified, and it was declared that when it appeared that the owner of lands had either created a nuisance, or continued, or in any way sanctioned its creation or continuance, he was indictable.[6] At present, the law, even in New York, is, that such letting or hiring, with a guilty knowledge, makes the landlord indictable as a principal in keeping the house, supposing the house to be so kept.[7] If, however, the landlord has absolutely no control, and when leasing was ignorant of the intended use, he is not responsible.[8] As we will presently see, the indictment should be special, charging him not with keeping, but with knowingly letting, the house.[9]

Cognizance of object sufficient to

§ 1460. To make a party liable for knowingly permitting his house to be used for the purposes of prostitution, it is said in Iowa to be necessary that he be shown to have done some act, or made some declaration, sufficient to

Conn. 40. As sustaining text see State *v.* Main, 31 Conn. 572; State *v.* Mullen, 35 Iowa, 199.

[1] Killman *v.* State, 2 Tex. App. 222; though see Callahan *v.* State, 41 Tex. 43.

[2] State *v.* Mullen, 35 Iowa, 199.

[3] Supra, § 1449; Harlow *v.* Com. 11 Bush, 610.

[4] U. S. *v.* Gray, 2 Cranch C. C. 675; Com. *v.* Harrington, 3 Pick. 26; Smith *v.* State, 6 Gill, 425; State *v.* Potter, 30 Iowa, 587.

[5] People *v.* Brockway, 2 Hill (N. Y.), 558.

[6] People *v.* Townsend, 3 Hill, 479. See also, to same effect, Ross *v.* Com. 2 B. Monr. 417.

[7] People *v.* Erwin, 4 Denio, 129; but see *contra*, R. *v.* Barrett, L. & C. 263, — a case, I think, erroneously decided. In Ohio the offence is indictable by statute. Act of April 11, 1856.

[8] State *v.* Williams, 1 Vroom, 102. See Ross *v.* Com. 2 B. Monr. 417.

[9] State *v.* Pearsall, 43 Iowa, 630.

show his assent to such use after he had knowledge of it.[1] Mere inactivity, it is said in the same case, or failure to take steps to prosecute, does not make him liable. But, however this may be under the Iowa statute, such acquiescence involves a party in the common law offence, where the lease is renewed (as in cases of leases week by week, or month by month) after knowledge by the lessor of the use made by the lessee. Here the lessor supplies the machinery for the maintenance of the nuisance; and according to the views hereinbefore unfolded is as principal (the offence being a misdemeanor) responsible for such nuisance; it appearing that he was virtually coöperating in its maintenance.[2] The same rule applies to all persons mixing in the management.[3] Thus, it is no defence to an indictment of this class that the defendant, who is proved to have control of the building, is not the owner, but merely collects the rents as agent for the owner;[4] nor is it a defence that the defendant's husband, she being a married woman, resided in the house, and was the lessee.[5]

Impute indictability.

§ 1460 *a*. The indictment, though it need not describe the premises with greater accuracy than in burglary,[6] when it rests on a lease ought accurately to specify the date and terms of the lease, and the name of the lessee, or to give an excuse for non-specification.[7] An omission of the *scienter* is fatal.[8] And if the leasing is the *gravamen* of the offence, and there is no proof of coöperation in keeping the nuisance, the indictment must be special.[9]

Indictment must be special.

[1] State *v.* Abrahams, 6 Iowa, 117. See Com. *v.* Adams, 109 Mass. 344.

[2] See supra, § 1442; R. *v.* Stannard, L. & C. 349, so far as it conflicts with the principles just stated, cannot be accepted as law. So far as it lays down the rule that a landlord's failure to give notice to quit does not involve the landlord in liability as a "letter" of the house, the rule is consistent with what has been stated as to "omissions." See supra, §§ 125 *et seq.*

[3] Harlow *v.* Com. 11 Bush, 610.

[4] Lowenstein *v.* People, 54 Barb. 299.

[5] Com. *v.* Cheney, 114 Mass. 281. See supra, § 1455.

[6] People *v.* Saunders, 29 Mich. 269.

[7] Com. *v.* Moore, 11 Cush. 600. Otherwise when no lease is set forth. Smith *v.* State, 6 Gill, 425.

[8] State *v.* Leach, 50 Mo. 535.

[9] Com. *v.* Johnson, 4 Clark (Pa.), 398. State *v.* Pearsall, 43 Iowa, 630.

XII. GAMES.

§ 1461. Here we touch a point that has heretofore [1] been incidentally discussed. Are public games to be discouraged and depressed? Much depends on this point on the policy of the community in respect to the physical and martial culture of young men; but much also, when the question of nuisance presents itself, depends on the moral bias of the community. If public sentiment is scandalized by the public exhibition of a particular game, then the public exhibition of such game may be nuisance. But the sentiment thus to be protected must be that of a community, and not that of a few persons, no matter what their prominence and excellence.[2] Applying this criterion, we can understand why decisions as to what public games are nuisances should vary in different communities.

Scandalous or disorderly games indictable.

§ 1462. Bowling-alleys, when attended by noise, and drawing to them crowds of idlers, may be nuisances in thickly inhabited and quiet communities;[3] though when charged as a common law nuisance proof of great habitual disorder should be given.[4]

So of bowling-alleys when disorderly.

§ 1463. Unless conducted in such a way as to attract offensive crowds, billiard rooms are not nuisances.[5] But when disorderly they may become indictable.

So of billiard rooms.

§ 1464. Public spectacles are to be governed by the considerations just named, with this addition, that whatever tends to needlessly collect a crowd of idlers, and block up streets, becomes a nuisance.[6] That the exhibition of obscene pictures may be a nuisance at common law is elsewhere seen.[7]

So of public spectacles.

[1] Supra, § 371.

[2] See supra, §§ 1411, 1414.

[3] Tanner *v.* Trustees, 5 Hill (N. Y.), 121. See State *v.* Records, 4 Harring. 554.

[4] State *v.* Hall, 3 Vroom (N. J.), 158.

In Massachusetts, bowling has been held to be an "unlawful game" under Rev. Sts. c. 50, § 17. Com. *v.* Goding, 3 Met. 130; Com. *v.* Stowell, 9 Met. 572; Com. *v.* Drew, 3 Cush. 279. Infra, § 1465.

It is otherwise in North Carolina, it being held there to be a game more of skill than chance. State *v.* Gupton, 8 Ired. 27.

[5] Com. *v.* McDonough, 13 Allen, 581; People *v.* Sergeant, 8 Cow. 139; though see State *v.* Layman, 5 Harring. 510.

[6] See R. *v.* Carlile, 6 C. & P. 636; Walker *v.* Brewster, 5 L. R. Eq. 25; R. *v.* Grey, 4 F. & F. 73.

[7] Infra, §§ 1606–8; supra, § 1432.

§ 1465. What has just been said applies to the generic term "gaming-house." It is not an indictable offence for a person to permit single acts of gaming in his house.[1] But when gaming is there publicly known to be carried on, however secluded the house may be, and when unwary and inexperienced persons are there enticed and fleeced, then the house becomes a nuisance, and indictable as such, irrespective of any particular statutes.[2] And a public faro table when so operating is, *per se*, a nuisance.[3] Nor is it necessary that the house should be one exposed to all passers-by. It is enough if persons ordinarily applying are to be received.[4]

Gaming, when public, may be indictable.

[1] Estes *v.* State, 2 Humph. 496.

[2] R. *v.* Medlor, 2 Show. 36; State *v.* Haines, 30 Me. 65; Lord *v.* State, 16 N. H. 325; Com. *v.* Tilton, 8 Met. 232; Com. *v.* Stahl, 7 Allen, 304; People *v.* Jackson, 3 Denio, 101; State *v.* Layman, 5 Harring. 510; Bloomhuff *v.* State, 8 Blackf. 205; State *v.* Crummey, 17 Minn. 72; Barada *v.* State, 13 Mo. 94; Vanderworker *v.* State, 8 Eng. (Ark.) 700. See Wheeler *v.* State, 42 Md. 563.

[3] State *v.* Doon, R. M. Charl. 1. The following cases are under local statutes: —

Under the Rev. Sts. of Mass. c. 50, § 17, it is sufficient to allege that the defendant did for hire, gain, and reward permit persons to resort, &c., for the purpose of playing at a certain unlawful game mentioned, without alleging that persons actually did resort there for the purpose of playing, or did there play, at any unlawful game. Com. *v.* Stowell, 9 Met. 572.

An indictment under the South Carolina Act of Assembly of 1816, to prevent gaming, against a person for permitting persons to play cards at his house, being a public-house, is not good, unless it states that the persons were playing at such games as were not excepted in the act; and where a conviction had taken place on such an indictment, the judgment was arrested. Reynolds *v.* State, 2 N. & McC. 365. See Bell *v.* State, 5 Sneed, 507.

A conviction which states that a keeper of a public-house, licensed under the 9 Geo. 4, c. 61, has been "guilty of an offence against the tenor of his license, that is to say, that he knowingly suffered a certain unlawful game, to wit, the game of dominoes, to be played in his house," is bad; as the game of dominoes is not itself unlawful, and playing at dominoes does not necessarily amount to "gaming," within the meaning of the license. R. *v.* Ashton, 22 Law J. Rep. (N. S.) M. C. 1; 17 Jur. 501; 1 El. & Bl. 286. As to dominoes see Bryan *v.* State, 26 Ala. 65; Harris *v.* State, 33 Ala. 373.

[4] Rice *v.* State, 10 Tex. 545.

Persons playing at the game commonly known as "*keno*" are guilty of gambling, and the person who sets up, keeps, or exhibits this apparatus, contrivance, or machine, is guilty of setting up, keeping, or exhibiting a gambling device, and is liable to the penalties of the statute. Trimble *v.* State, 22 Ark. 355; Portis *v.* State, 27 Ark. 360. See U. S. *v.* Hornibrook, 2 Dillon, 229; Miller *v.* State, 48 Ala. 122. As to what is a public place

The English Commissioners, in their Draft Code of 1879, give us the following definitions: —

"A common gaming-house is, —

"(*a*.) A house, room, or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance; or,

"(*b*.) A house, room, or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which

"A bank is kept by one or more of the players, exclusively of the others; or,

"In which any game is played, the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet."

Gaming is staking on chance.

§ 1465 *a*. Some of the cases defining "gaming," where the term is used in a statute, are given in notes; though so numerous are the adjudications on this topic that it may be enough, without further specification, to state the conclusion to be drawn from them. It cannot be said that a mere contest of skill or strength, no matter how great may be the prize, is indictable at common law, since in England such

see State *v*. Book, 41 Iowa, 550; Smith *v*. State, 52 Ala. 384; Lowrie *v*. State, 43 Tex. 602; Sheppard *v*. State, 1 Tex. App. 304.

That under statutes declaring that persons playing faro and other games for money shall be deemed common gamblers, single acts may constitute the offence, see State *v*. Melville, 11 R. I. 417; Cameron *v*. State, 15 Ala. 383; Torney *v*. State, 13 Mo. 455.

Giving a prohibited game a new name does not take the game out of the statute. See State *v*. Maurer, 7 Iowa, 65.

As to bowling-alleys in Massachusetts see supra, § 1462; Com. *v*. Goding, 3 Met. 130; Com. *v*. Stowell, 9 Met. 572; Com. *v*. Drew, 3 Cush. 279. See State *v*. Records, 4 Harring. 554.

Cock-fighting is an unlawful "game" or sport; Com. *v*. Tilton, 8 Met. 232; although game-cocks are not *implements* of gaming, within the meaning of a statute against "gaming apparatus, or implements used in unlawful gaming." Coolidge *v*. Choate, 11 Met. 79.

That form of lottery called a "gift enterprise," by which a merchant or tradesman sells his wares for their market value, but, by way of inducement, gives to each purchaser a ticket which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery, has been held to be common gaming under the Tennessee laws, so as to make all persons aiding or abetting such transaction indictable. Bell *v*. State, 5 Sneed, 507. See infra, § 1491.

contests have at all times been sanctioned by public policy and protected by the courts. On the other hand, not only in the United States, but in England, statutes have been repeatedly passed to prohibit "gaming" as an illegal act, to be distinguished from the playing of games. Keeping this distinction in view, the meaning of "gaming," as a criminal offence, is plain. To play chess for a prize is not "gaming," nor is it gaming to play foot-ball or cricket, or to engage in contests of strength in a country fair, though a prize is to be awarded to the winner. On the other hand, it is "gaming" for parties to stake money on chance. The chance must be the controlling factor in the game. It is not enough to say that wherever chance enters in any appreciable degree into a contest, then there is gaming. There is no contest — forensic, literary, artistic — in which chance does not so enter. A lawyer may accidentally lose his brief before beginning his speech; or an author may be misled by a wrong reference on which he casually strikes; or an artist may find that colors he took due care in selecting turn out not to stand. This, however, does not make a contest, in which lawyer, author, or artist may be concerned, "gaming." All competitive examinations are affected in some degree by chance, yet no competitive examination is "gaming." So as to games of skill. In such games chance may have very little part. If so, playing these games, even for reward, is not gaming. It is otherwise when the game depends more largely on chance than on skill. Hence gaming as a penal offence, under the statutes making it such, may be defined as a staking on chance.

Dog-racing, dependent upon training, is not a game of chance;[1] nor is horse-racing, when also dependent on training, and for the improvement of stock;[2] though if chance be made the preponderating element, it is otherwise.[3] "Cock-fighting," as is already

[1] Hirst *v.* Molesburg, L. R. 6 Q. B. 130.

[2] Oliphant on Horses, 412; Coombs *v.* Dibble, L. R. 1 Exch. 248; Bentwick *v.* Connop, 5 Q. B. 693; Chalband *v.* Bray, 1 Dowl. Pr. (N. S.) 783; Evans *v.* Pratt, 4 Scott, N. R. 376; Holmes *v.* Sixsmith, 7 Exch. 802. See Stephen on Search of a Horse, 2d ed. 1836; Harless *v.* U. S. 1 Morris, 169; State *v.* Hayden, 31 Mo. 35; but see State *v.* Ness, 2 Ind. 499.

[3] Tollet *v.* Thomas, L. R. 6 Q. B. 515. See Beeston *v.* Beeston, L. R. 1 Ex. D. 13; Higginson *v.* Simpson, L. R. 2 C. P. D. 76. Compare Morgan *v.* Beaumont, 121 Mass. 7, and cases in subsequent notes.

observed, being cruel and wanton, and mainly dependent on chance, is gaming.[1]

Whether the game of ninepins is a game of chance depends upon whether it is a game in which chance or skill predominates. When fairly conducted, it is to be regarded as an athletic sport, not indictable at common law.[2]

The following games have been held lawful in England even when played for a stake: —

Foot-ball;[3] wrestling matches, provided they do not take the shape of public prize-fights;[4] rowing matches;[5] coursing matches;[6] quoits;[7] cricket;[8] bowls;[9] foot-racing;[10] billiards;[11] dominoes.[12]

Facts must be averred.

§ 1466. It is not enough, in an indictment under a statute prohibiting "gaming-houses," to use the term "common gaming-house." The special facts making such a house a nuisance must be averred.[13] But under a statute making gaming indictable the particular game need not be proven.[14] At all events, the names of frequenters need not be specified.[15] And

[1] Com. v. Tilton, 8 Met. 232. But see Martin v. Hewson, 10 Exch. 737.

[2] See supra, § 1462.

[3] Manby v. Scott, 1 Mod. 136.

[4] Supra, §§ 372, 373; Manby v. Scott, *ut supra;* Kennedy v. Gad, 3 C. & P. 376.

[5] Bostock v. R. R. 3 M. Dig. 274.

[6] Daintree v. Hutchinson, 16 M. & W. 87.

[7] Manby v. Scott, *ut supra.*

[8] Jeffreys v. Walter, 1 Wils. 220; Walpole v. Sanders, 7 D. & R. 130; Hodson v. Terrill. 1 C. & M. 797.

[9] Sigel v. Jebb, 3 Stark. 2.

[10] Batty v. Marriott, 5 C. B. 818; Emery v. Richards, 14 M. & W. 728; Coombs v. Dibble, L. R. 1 Exch. 248.

[11] Parsons v. Alexander, 1 Jur. N. S. 660.

[12] R. v. Ashton, 1 E. & B. 286. See note to § 1465.

[13] Wh. Cr. Pl. & Pr. §§ 154, 230, 231; U. S. v. Ringgold, 5 Cranch C. C. 378; Com. v. Pray, 13 Pick. 359; People v. Jackson, 3 Denio, 101; Frederick v. Com. 4 B. Monr. 7. See Vanderworker v. State, 8 Eng. (Ark.) 700; State v. Ames, 1 Mo. 372.

[14] State v. Dole, 3 Blackf. 294. As to whether a bargain for an option to call is gambling see Kirkpatrick v. Bonsall, 72 Penn. St. 155. As to joinder of defendant see supra, § 302.

[15] See supra, §§ 1453, 1460. As to indictment see Com. v. Parker, 117 Mass. 112; Wheeler v. State, 42 Md. 563; Carr v. State, 50 Ind. 178; State v. Thomas, 50 Ind. 292; Donniger v. State, 52 Ind. 326; Zook v. State, 47 Ind. 463; Blemer v. People, 76 Ill. 265; Conyers v. State, 50 Ga. 103; Napier v. State, 50 Ala. 168; Carper v. State, 27 Oh. St. 572; State v. Crowder, 39 Tex. 47; State v. Bristow, 41 Tex. 146; State v. Bullion, 42 Tex. 77.

Under the English statute it must be proved not only that the defendant

deficiency of specification as to other matters can be cured by an averment that the details were unknown to the grand jury.[1]

§ 1467. The proof is necessarily to a greater or less degree inferential, such as possession and use of implements for gambling,[2] or the testimony of participants in games of whose character the jury is to judge. The *scienter* may be inferred from the illicit use of these implements elsewhere.[3] How the defendant's control is to be proved is elsewhere shown.[4]

Evidence is inferential.

XIII. EXPOSURE OF PERSON.[5]

§ 1468. An intentional indecent exposure of the person to public view is a nuisance at common law,[6] and the

Indecent exposure a nuisance.

won the money, but that he won it by some "fraud or unlawful device or ill practice." R. *v.* Rogier, 1 B. & C. 272. That it would not be necessary to state in the indictment the name of the person from whom the money was won see R. *v.* Moss, 1 Dears. & B. 205; Roscoe's Cr. Ev. 580.

That defendants cannot be joined for playing separate games see Wh. Cr. Pl. & Pr. § 302.

[1] Com. *v.* Ashton, 125 Mass. 384; Wh. Cr. Pl. & Pr. § 156.

[2] State *v.* Andrews, 43 Mo. 470; Yepperson *v.* State, 39 Tex. 48.

[3] Com. *v.* Hopkins, 2 Dana, 418.

[4] See supra, § 1453. Renting a house weekly, with a billiard table in it for gambling, makes the lessor liable. Com. *v.* Adams, 109 Mass. 344.

[5] For forms, see Wh. Prec., as follows: —

(765.) Exhibiting scandalous and libellous effigies, and thereby collecting a crowd, &c. First count.

(766.) Keeping a house in which men and women exhibit themselves naked, &c., as "model artists."

(767.) Bathing publicly near public ways and habitations.

(768.) Public exposure of naked person.

(769.) Exposing the private parts in an indecent posture.

(770.) Same, under § 8, c. 444, Vermont Rev. Stats. First count. Exposure to divers persons, &c.

(771.) Second count. Exposure in the presence of one Polly P.

(772.) Third count. Exposure in the presence of Polly P., and divers other persons to the jurors unknown.

(773.) Another form for the same in North Carolina, there being no allegation of the presence of lookerson.

(774.) Lewdness and lascivious cohabitation in Massachusetts. First count. Lascivious behavior by lying in bed only with a woman.

(775.) Second count. Lascivious behavior, by putting the arms openly about a woman, &c.

(776.) Lascivious cohabitation at common law.

(777.) Lewdness, &c., by a man and woman unlawfully cohabiting and living together.

(779.) Notorious drunkenness.

[6] R. *v.* Sedley, 10 St. Trials, Ap. 93; 1 Sid. 168; 1 Keb. 620; and see R. *v.* Gallard, 1 Sess. Cas. 231; R. *v.* Crunden, 2 Camp. 89; 1 B. & Ad. 933.

same reasoning applies to such negligent exposures as it is proper to put under police control.[1]

The private parts of the person must be exposed; or at least as much as is usually hidden, and the exposure of which tends to generally scandalize or to excite lascivious desires.[2]

Publicity must be averred.

§ 1469. That the exposure is in a public place, where it can be seen by persons having a right of access to such place, is of the essence of the offence.[3] Whether, however, it is necessary to aver the exposure to be "in the sight of" divers persons has been doubted. In North Carolina, in a case which has the high authority of Judge Gaston, it was held enough to allege the exposure to be "to public view in a public place;"[4] but this decision has been subsequently (1873) practically overruled in the same State, it being declared that it should appear that the exposure was in the sight of others.[5] But it is clearly sufficient to aver an exposure "to the view of" divers persons. Thus in Massachusetts, an indictment for indecent exposure, which alleges that the defendant, devising and intending the morals of the people to debauch and corrupt, at a time and place named, in a certain public building there situate, in the presence of divers citizens, &c., unlawfully, scandalously, and wantonly did expose to the view of said persons present, &c., his body, &c., sufficiently sets forth the offence.[6] Nor in Massachusetts need the indictment conclude "to the common nuisance of all the citizens,"[7] &c.

An indictment charging the offence to have been committed on a highway is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it.[8]

Place must be open to public.

§ 1470. A urinal, fixed in a market-place, open to the public for the purpose of making urine, and on a public foot-path, is "an open and public place," so as to sus-

[1] Ibid.

[2] See Ardery v. State, 56 Ind. 328.

[3] See Moffit v. State, 43 Tex. 346; State v. Griffin, 43 Tex. 538.

[4] State v. Roper, 1 Dev. & Bat. 208.

[5] State v. Pepper, 68 N. C. 259. See, under Arkansas statute, State v. Hazle, 20 Ark. 156.

[6] Com. v. Haynes, 2 Gray, 72. See State v. Gardner, 28 Mo. 90; State v. Rose, 32 Mo. 560.

[7] Com. v. Haynes, 2 Gray, 72.

[8] R. v. Farrell, 9 Cox C. C. 446.

tain an indictment for this offence;[1] and so of the inside of an omnibus;[2] and of the sea-beach, when visible from inhabited houses,[3] or from a public path frequented by females;[4] and of the roof of a house, visible from other houses,[5] and, as we have seen, of a room or booth where all persons desiring are admitted for pay to witness an indecent exhibition.[6]

Bathing near a public footway, frequented by females, is unlawful, and renders the party so bathing liable to be indicted for exposure. Nor is it any defence that the place has been always used as a resort for bathers; or that the exposure has not been beyond what is necessarily incident to such bathing.[7]

§ 1471. The intent with which the act was done may be a material ingredient in the offence, and is a question of fact for the consideration of the jury, under all the circumstances of the case; and it has been held that a charge which withdraws that question from the consideration of the jury as a question of fact is erroneous.[8] But intent is to be inferred from recklessness; nor can it be questioned that a negligent exposure in a thoroughfare may be indictable.[9]

Intent to be inferred.

§ 1472. It has been properly held that if a man indecently expose his person to *one person* only, this is not an indictable misdemeanor.[10] It is otherwise if there are other persons in such a situation that they may be witnesses of the exposure.[11] It is by dwelling on this point

To be a nuisance offence must be in public place.

[1] R. *v.* Harris, 11 Cox C. C. 659, overruling R. *v.* Orchard, 3 Cox C. C. 248; 20 Eng. L. & Eq. 598.

[2] R. *v.* Holmes, 20 Eng. L. & Eq. 597; Dears. C. C. 207; 6 Cox C. C. 216.

[3] R. *v.* Crunden, 2 Camp. 89.

[4] R. *v.* Reed, 12 Cox C. C. 1.

[5] R. *v.* Thallman, L. & C. 326; 9 Cox C. C. 388.

[6] R. *v.* Saunders, 13 Cox C. C. 116; L. R. 1 Q. B. D. 15. Supra, § 1432; People *v.* Bixby, 67 Barb. 221; 4 Hun, 636.

[7] R. *v.* Reed, 12 Cox C. C. 1.

[8] Miller *v.* People, 5 Barb. 203.

[9] Supra, § 1468.

[10] R. *v.* Webb, 1 Den. C. C. 338; 2 Cox C. C. 376; 20 Eng. L. & Eq. 599. See R. *v.* Elliott, L. & C. 103. Whether an indictment which charges A. with having "in a certain public place, within a certain victualling alehouse," indecently exposed his person *in the presence* of M. A., the wife of B., and other of the liege subjects there, is good — *quære*. But if it appear that the exposure was to M. A., the wife of B., *only*, the defendant ought not to be convicted. R. *v.* Webb, 2 C. & K. 933; S. C., 1 Den. C. C. 338.

[11] R. *v.* Farrell, 9 Cox C. C. 446. See R. *v.* Elliott, L. & C. 103, where fornication was committed on an open road.

that we may reach a solution of an apparent conflict. An intentional and indecent exposure of the person to one individual in private may be indictable as an assault,[1] but not as a nuisance.[2] When the exposure is to two or more persons, it is indictable as an offence against decency. When it is in a public place, and in such a way that it is in the view of bystanders, passers, or neighbors, then it is a nuisance, though it is not averred in the indictment that it was actually seen by others beside the testifying witness, and though there is only collateral proof that it was so seen.

XIV. OBSTRUCTING HIGHWAYS AND NAVIGABLE STREAMS.

Obstructing road over which public has right of way is indictable.

§ 1473. To sustain an indictment for nuisance in obstructing a road, the road must first be shown to be public and not private;[3] since, as has been seen, no indictment lies for a nuisance unless the offence be to the public generally, as distinguished from a special and limited class of persons.[4] A public road, however, to be thus protected, need not have been formally accepted by the municipal authorities. It is enough if over it the public have a right to pass and repass, whether freely or on payment of a fixed toll.[5] Any public square, any space of ground, dedicated and accessible to the public use, fall within the same general category.[6] Nor

[1] See supra, § 612.

[2] State *v.* Millard, 18 Vt. 574; though see Fowler *v.* State, 5 Day, 81.

[3] Com. *v.* Tucker, 2 Pick. 44; State *v.* Randall, 1 Strobh. 110; and see Whart. on Neg. §§ 815, 956. For indictments against municipal authorities for neglect see infra, § 1584 *a*.

[4] See supra, §§ 1410 *et seq.*; and State *v.* Rye, 35 N. H. 368; People *v.* Jackson, 7 Mich. 432.

[5] Co. Litt. 56 *a*; 1 Hawk. P. C. c. 76; Cleaves *v.* Jordan, 34 Me. 9; Com. *v.* Gowen, 7 Mass. 378; Com. *v.* Wilkinson, 16 Pick. 175; Kelly *v.* Com. 11 S. & R. 345; Freeman *v.* State, 6 Port. 372; Mills *v.* State, 20 Ala. 86; Gregory *v.* Com. 2 Dana, 417; Parkinson *v.* State, 2 W. Va. 589. As to turnpike roads see Whart. on Neg. §§ 956 *et seq.*; infra, § 1476; R. *v.* Preston, 2 Lew. 193; State *v.* Day, 3 Vt. 138; Com. *v.* Fleming, Lewis Cr. Law, 533; Craig *v.* People, 47 Ill. 487. As to ferries see State *v.* Wilson, 42 Me. 9; People *v.* Babcock, 11 Wend. 586; State *v.* Hudson County, 3 Zab. 206; 4 Zab. 718; Carter *v.* Com. 2 Va. Cas. 354. For indictments against municipalities for neglect see infra, § 1554 *a*.

[6] State *v.* Atkinson, 24 Vt. 448; Com. *v.* Bowman, 3 Barr, 202; Rung *v.* Shoneberger, 2 Watts, 23; Com. *v.* Rush, 14 Penn. St. 186; State *v.* Commis. 3 Hill (S. C.), 149. As to toll see North. Cent. R. R *v.* Com., infra, § 1476.

does it matter that the road is owned by a private corporation. Supposing that the public has a right, on payment of a fixed toll, to travel on it, an indictment for nuisance lies for its obstruction.[1] The same protection is thrown over bridges,[2] navigable rivers, and harbors in the open sea and great lakes.[3]

Whatever interferes with travel is an obstruction.

§ 1474. It is a common nuisance to prevent the public from having free use of a highway by unreasonably blocking it or otherwise temporarily excluding them from it, or by putting on it any permanent structures; or by placing in its vicinity instruments which make its public use insecure or uncomfortable.[4] Hence, constables obstructing the streets by their sales are indictable for a nuisance;[5] and it is unlawful, in a large city, for an auctioneer to place goods, intended for sale, in the public streets.[6] Where a wagoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his wagons, for several hours at a time, both day and night, and having one wagon, at least, usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot-passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was held a public nuisance, although it appeared that there was left room for two carriages to pass on the opposite side of the street.[7] So it is a nuisance to collect in a

[1] R. *v.* Preston, 2 Lew. 193; Com. *v.* Wilkinson, 16 Pick. 175. Infra, § 1476.

[2] Whart. on Neg. § 977; R. *v.* Middlesex, 3 B. & Ad. 201; State *v.* Canterbury, 8 Foster, 195.

[3] Infra, § 1477.

[4] Sir J. Stephen gives the following illustrations of nuisances of this class:—

"Each of the following acts is a nuisance to a highway:—

"(1.) Digging a ditch, or making a hedge across it, or ploughing it up. 1 Russ. Cr. 485.

"(2.) Allowing wagons to stand before a warehouse for an unreasonable time, so as to occupy great part of the street for several hours by day and night. R. *v.* Russell, 6 East, 427.

"(3.) Keeping up a hoarding in front of a house in the street, for the purpose of repairs, for an unreasonable time. R. *v.* Jones, 3 Camp. 230.

"(4.) Excavating an area close to a foot-path, and leaving it unfenced. Barnes *v.* Ward, 9 C. B. 392.

"(5.) Blasting stone in a quarry so as to throw stones upon the houses and road. R. *v.* Mullins, L. & C. 489.

[5] Com. *v.* Milman, 18 S. & R. 403.

[6] Passmore's case, 1 S. & R. 217.

[7] R. *v.* Russell, 6 East, 427; and see R. *v.* Cross, 3 Camp. 227. Where the defendants, proprietors of a distillery in the city of Brooklyn, were in the habit of delivering grains remain-

highway, by the use of violent, indecent, and excited language,[1] or by any public show or game,[2] a crowd by which the street is choked;[3] and to set spring-guns pointed to the highway, by which life is endangered.[4]

The same rule applies to a stall placed on the sidewalk of a public street for the sale of fruit and confectionery, although the defendant pays rent to the owner of the adjoining premises for the use of so much of the pavement as he occupies;[5] and to front steps of a dwelling placed in such a way that they protrude into the highway,[6] and to things overhanging a highway so as to endanger passage.[7] But the obstruction must be material and unlicensed.[8] Hence telegraph posts, erected by the municipal authorities, are not indictable as nuisances.[9]

Prescription no defence.

§ 1475. A grant from lapse of time will not be presumed of a part of a public square or street so as to bar an indictment for a nuisance.[10] Thus, where the travelling public had for ten years ceased to use a portion of a road established by public authority, and had by use acquired a right to a portion of the land of the trustees of a church for highway purposes, instead of the said portion of old road; it was held,

ing after distillation, called slops, by passing them through pipes to the public streets opposite their distillery, where they were received into casks standing in carts and wagons; and the teams and carriages of the purchasers were accustomed to collect there in great numbers to receive and take away the article; and in consequence of their remaining there waiting their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon; it was held that the defendants were guilty of nuisance. People *v.* Cunningham, 1 Denio, 524.

[1] Com. *v.* Oaks, 113 Mass. 8; People *v.* Cunningham, 1 Denio, 524; Barker *v.* Com. 19 Penn. St. 412; Bell *v.* State, 1 Swan, 42. So as to collecting a crowd by an exhibition of a "stuffed Paddy." Com. *v.* Haines, 4 Clark (Pa.), 17.

[2] Supra, § 1458.

[3] See State *v.* Hughes, 72 N. C. 25.

[4] State *v.* Moore, 31 Conn. 479. See cases cited in Whart. on Neg. § 348. Supra, §§ 464, 507.

[5] Com. *v.* Wentworth, Brightly, 318; S. C., 4 Clark, 324; Smith *v.* State, 6 Gill, 425. See Com. *v.* Blaisdell, 107 Mass. 234; Kelly *v.* Com. 11 S. & R. 345.

[6] Com. *v.* Blaisdell, 107 Mass. 234.

[7] See Whart. on Neg. § 982; R. *v.* Watts, 1 Salk. 357; Com. *v.* Goodnow, 117 Mass. 114; Norristown *v.* Moyer, 67 Penn. St. 355. Supra, § 1412.

[8] State *v.* Merrit, 35 Conn. 314.

[9] Com. *v.* Boston, 97 Mass. 555.

[10] Com. *v.* Tucker, 2 Pick. 44; Com. *v.* Alburger, 1 Whart. 469. Supra, § 1415.

that the acquisition of a right of way over the land of the trustees did not estop the State from asserting its claim to the old road, nor shield the individual obstructing it from punishment.[1] When license is a defence has been already discussed.[2]

Unlicensed or excessive obstruction by railroad may be indictable.

§ 1476. A railway train, crossing an ordinary highway, being productive of anxiety, if not of danger, to those passing such highway, is indictable as a nuisance, unless chartered by the State. Such charter is to be strictly construed; and is not to be regarded as authorizing the railway to cross any highways except in the line specifically prescribed.[3] Even when authorized to cross a particular highway, the corporation may be indictable for a nuisance if its right is negligently or oppressively exercised.[4] But evidence that daily twenty trains on a railroad, and about as many ve-

[1] Elkins *v.* State, 2 Humph. 543.

[2] Supra, § 1424.

[3] Com. *v.* Erie & N. E. R. R. 27 Penn. St. 339. See other cases supra, § 1424.

[4] In North. Cent. R. R. *v.* Com., Sup. Ct. Penn. 1879, 21 Alb. L. J. 36, it was held that a turnpike was a highway in the sense of the text. It was held no answer to the indictment that the obstruction could not be remedied without an expenditure of from $5,000 to $8,000. It is well-recognized law, it was said, that an indictment will lie against a corporation, not municipal, for the creation and maintenance of a public nuisance. R. *v.* Great North of England Railway, 9 Q. B. 315; Dater *v.* Troy R. R. Co. 2 Hill, 629; Chestnut Hill Turnpike *v.* Rutter, 4 S. & R. 6; Delaware Div. Canal Co. *v.* Commonwealth, 60 Penn. St. 367. The mere construction of a railroad track across a public highway, in pursuance of law, is no nuisance. Danville R. R. Co. *v.* Commonwealth, 73 Penn. St. 29. But it must be constructed in such a manner as "not to impede the passage or transportation of persons or property along the same. Act of February, 1849, Pur. Dig. 1220. A turnpike is a public highway; it is for the use of every person desiring to pass over it, on payment of the toll established by law. It differs from a common highway, in the fact that it is not constructed in the first instance at the public expense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. The same public annoyance and injury arises from its obstruction as if it was a common highway. Hence, in Lancaster Turnpike Co. *v.* Rogers, 2 Barr, 114, it was said, that when the turnpike company ceased to use a building, erected, in part on the turnpike, as a toll-house, it ceased to be there for a lawful purpose, and became a public nuisance. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway in so far that an indictment will lie against one obstructing it as for a public nuisance. It was so held in Com. *v.* Wilkinson, 16 Pick. 175." As to toll see supra, § 1473.

hicles on a highway, passed over a place where the railroad crossed the highway at grade, which was in full view from the highway at any point within a hundred and fifty feet; and where the public authorities never required the establishment of a gate, station agent, or flagman, although the crossing had existed for many years, is insufficient to warrant a finding that the railroad corporation was guilty of negligence in omitting to provide there any such safeguard.[1] And if the trains are kept closely within the range of the charter, no indictment can be maintained against the corporation for a nuisance because of alarm to horses and passengers produced by the locomotives.[2]

Nuisance to obstruct navigable river or lake.

§ 1477. It is a nuisance, on the same principle, to obstruct the passage of a navigable river, or of a navigable lake, by bridges or otherwise, so as to diminish appreciably its capacities for navigation,[3] or to divert a part of such stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burden as it would before.[4] But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable for a nuisance in not removing it.[5] And it is also to be kept in mind, that the owner of the soil between high and low water-mark may use it for his own private purposes, provided he do not interfere with the navigation of the river.[6]

The obstruction must be proved by the prosecution.[7]

Obstructions to navigable streams may be abated by individuals.[8]

[1] Com. v. Boston & Worcester R. R. 101 Mass. 201. See Com. v. Temple, 14 Gray, 69. Supra, § 1424.

[2] R. v. Pease, 4 B. & Ad. 30. Supra, § 1424.

[3] R. v. Watts, 2 Esp. 675; R. v. Ward, 4 Ad. & El. 384; R. v. Tindall, 6 Ad. & E. 143; R. v. Betts, 16 Q. B. 1022; State v. Freeport, 43 Me. 198; Penns. v. Wheeling, 13 How. 518; Com. v. Church, 1 Barr, 105; State v. Dibble, 4 Jones (N. C.), 107; State v. Graham, 15 Rich. (S. C.) 310; People v. St. Louis, 5 Gilman, 351; Moore v. Sanborn, 2 Mich. 519. Sir J. Stephen inserts the qualification "wilfully" (Dig. art. 191), but I think erroneously, as a negligent obstruction is indictable.

[4] 1 Hawk. c. 75, s. 11; R. v. Stanton, 2 Show. 30.

[5] R. v. Watts, 2 Esp. 675; White v. Crisp, 10 Exch. 318; Brown v. Mallett, 5 C. B. 599. See R. v. Russell, 9 D. & R. 566; 6 B. & C. 566; R. v. Ward, 4 Ad. & El. 384; R. v. Tindall, 6 Ad. & E. 143; R. v. Morris, 1 B. & Ad. 441.

[6] Zug v. Com. 70 Penn. St. 138.

[7] Ibid.

[8] Supra, § 1426.

§ 1478. It was once thought that a collateral benefit to the community could be set up as a defence. Thus, upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage, occasioned by these staiths, was for a public purpose, and occasioned a public benefit, and if the erection were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was held that this direction was right.[1] This, however, was overruled afterwards in England,[2] and the later position, that no countervailing benefit can be a defence, has been followed in this country.[3] But the obstruction must be material.[4] Hence it has been held that a wire or rope stretched across a stream for ferry purposes is not a nuisance if necessary for the transfer of travellers, and if not materially obstructing navigation.[5]

Collateral benefit no defence.

§ 1479. Rivers in North America (in this respect being distinguished from those in England) do not cease to be navigable from the fact that they are at certain points broken by rapids or cataracts, which have to be avoided by portages. Hence the English rule as to ebb and flow of tides does not apply to the unimpeded parts of such rivers.[6] But a creek which cannot even with spring freshets float timber cannot claim to be navigable.[7] The test is, possibility of use for practical transport.[8]

Not necessary that tide should flow.

§ 1480. The provincial statute of 8 Anne, chap. 3, for preventing obstructions to fish in rivers, is still in force in Massachusetts; and as it declares all obstructions therein mentioned common nuisances, an indictment will lie; the special remedy provided by that statute being merely cumu-

Indictment may lie for obstructing fish.

[1] R. *v.* Russell, 9 D. & R. 566; 6 B. & C. 566, Tenterden, C. J., *dissentiente*.
[2] R. *v.* Ward, 4 Ad. & El. 384.
[3] Caldwell's case, 1 Dallas, 150; Rowe *v.* Titus, 1 Allen (New Brunswick), 326. See supra, § 1416.
[4] Supra, § 1474.
[5] The Vancouver, 2 Sawyer, 381.
[6] R. *v.* Meyers, 3 Up. Can. (C. P.) 347.
[7] Whelan *v.* McLachlan, 16 Up. Can. (C. P.) 102.
[8] Bell *v.* Quebec, 41 L. T. (N. S.) 451.

lative.[1] A seine or net, not placed permanently, is not within the act.[2]

An indictment at common law does not lie for obstructing the passage of fish by a dam across an unnavigable river.[3] But such a dam becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country, and stagnates, whereby the air along the highways and around the dwellings is infected with noxious and unwholesome vapors, and the health of the surrounding country is sensibly impaired.[4]

Wharf may be a nuisance.

§ 1481. Where a wharf is extended below low water-mark, and into the channel of the tide-waters of the Commonwealth, it does not necessarily follow that it is a common nuisance, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public.[5] If the effect of such a wharf is to fill up the channel or divert the current, it is a nuisance.[6]

And so may docks.

§ 1482. Public docks are protected in the same way, and it has been held a nuisance to monopolize such a dock by forcing into it a larger vessel than those for which it was constructed.[7]

And so may oyster beds.

§ 1483. Planting oysters in public waters is not such a special appropriation of such waters as will justify their removal as a nuisance, unless they interfere with the rights of the public; and even then a private person has no right to take them away and convert them to his own use.[8]

[1] Com. v. Ruggles, 10 Mass. 391.

[2] The following statute was passed in Massachusetts in 1857:—

"Every person who shall wilfully or wantonly, without color of right, obstruct the water of any mill-pond, reservoir, canal, or trench, from flowing out of the same, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years." May 15, 1857. Supplement to Revised Statutes, 1857, chapter clx. p. 410.

[3] Com. v. Chapin, 5 Pick. 199.

[4] Com. v. Webb, 6 Rand. (Va.) 726; Douglas v. State, 4 Wis. 387; State v. Close, 35 Iowa, 670.

[5] R. v. Grosvenor, 2 Stark, 511. See Com. v. Wright, Thach. C. C. 211.

[6] Ibid.

[7] R. v. Leech, 6 Mod. 145.

[8] State v. Taylor, 3 Dutch. 117.

§ 1484. The supreme authority of the State may, as has been seen, authorize an obstruction of the highways of the State; but this license or charter must be strictly construed, and any negligence or excess in the exercise of the conveyed powers will expose the parties, if a nuisance result, to an indictment.[1]

License no defence to negligent obstruction.

§ 1485. Neglect, as well as positive commission, may become the basis of an indictment for nuisance. Thus a person or corporation who undertakes the cleansing or repairing of a road or channel specially is indictable for a nuisance created by neglect.[2]

Neglect in repairing roads may be indictable.

§ 1486. The indictment, when the basis of the charge is neglect, must set forth the nature of the duty specially imposed on the defendant; for this is matter of substance.[3] But it has been said not to be necessary to aver that the defendants had the means to repair.[4] In such indictments, two defendants, having duties distinct, both in source and limit, cannot be joined;[5] nor can offences having distinct characters and penalties be coupled in one count.[6] The termini of the road must be correctly laid,[7] and the road must be averred to be public.[8] Whether a *date* is to be averred is elsewhere discussed.[9]

Indictment must aver duty.

§ 1487. When the indictment is for neglect in not repairing a road, the usual practice is to impose a fine, to be remitted (if there be no contempt or wilful violation of the law) on the road's being repaired.[10]

Court may compel repair by fine.

[1] See supra, §§ 1424, 1476.

[2] See Whart. on Neg. § 956; supra, § 93; infra, § 1584 *a*. People *v.* Corporation of Albany, 11 Wend. 539; State *v.* King, 3 Ired. 411; State *v.* Commissioners, Walker, 368. For indictment see infra, §§ 1486, 1573.

[3] State *v.* King, 3 Ired. 411; State *v.* Commissioners, Walker, 368. See supra, §§ 1423, 1573; Wharton's Prec. 781, note.

[4] State *v.* Harsh, 6 Blackf. 346.

[5] 2 Hawk. c. 25, s. 89.

[6] Greenlow *v.* State, 4 Humph. 25.

[7] State *v.* Northumberland, 46 N. H. 156; State *v.* Graham, 15 Rich. (S. C.) 310; though see *contra*, State *v.* Harsh, 6 Blackf. 346.

[8] Parkinson *v.* State, 2 W. Va. 589.

[9] Whart. Cr. Pl. & Pr. §§ 120–9.

[10] See R. *v.* Incledon, 13 East, 164. Supra, § 1426.

CHAPTER XXIII.

LOTTERIES.

I. Offences included in Statutes.
Lotteries and sales of lottery tickets indictable by statute, § 1490.
"Lottery" does not include private drawings by chance, § 1491.
"Ticket" includes fractions, § 1492.
II. Indictment.
Indictment must show ticket to be prohibited, § 1493.
Not duplicity to couple stages of offence, § 1494.
Enough to follow statute, § 1495.
Variance in ticket fatal, § 1496.
III. Evidence.
Intent inferentially proved, § 1497.

I. OFFENCES INCLUDED IN STATUTES.

§ 1490. The term lottery has a double meaning. It includes not only a scheme for the distribution of prizes by chance, but the distribution itself.[1] At common law neither of these is indictable unless they are nuisances.[2] By statute, however, not merely lottery schemes themselves, but sales of lottery tickets, are made indictable in many jurisdictions. The statutes in question being too numerous and too various for analysis, we must content ourselves with noticing some of the more general considerations they involve.

Lotteries and sales of lottery tickets indictable by statute.

§ 1491. Supposing the term "lottery" as a *nomen generalissimum* is introduced in a statute, what is included in the term? In the United States there is a popular usage attaching the term to schemes for the distribution of prizes by chance among persons purchasing tickets; the drawing purporting to be from a wheel, on a particular day, which day, with the amount of the intended prizes, is previously announced. But this is but a single form of lottery; the term,

"Lottery" does not include private drawings by chance.

[1] See U. S. *v.* Olney, 1 Abb. (U. S.) 275; Dunn *v.* People, 40 Ill. 465.

[2] See, as ruling that a public lottery is a common law nuisance, Blanchard, ex parte, 9 Nev. 101.

in its full sense, embracing all schemes for the distribution of prizes by chance, and including faro tables, and various forms of gambling. At the same time there is a wide distinction between a private and a public offering of prizes by chance. A., B., C., and D. may meet together, and in good faith agree that a certain article to which they have a common claim shall be given to the person who draws a particular number. This is a matter of contract which, if the terms are known to the parties beforehand, has nothing in it repugnant to sound morals, and nothing which can operate on the community as a fraud. When, however, the community at large is invited to come in, a new and very serious objection springs up. Independently of the opportunity for fraud by the managers of such enterprises, their publication imparts an excited spirit of gambling to the public generally. On the one side often ensue gross cases of deception as to the scheme itself; on the other, the sacrifice of savings by the ignorant and credulous, and excitement, destructive of regular industry, often inducing insanity. It is to suppress this species of lottery, we should remember, that the lottery statutes are aimed. The test, therefore, as to any scheme for the distribution of property by chance, is, is it private or public. If a private arrangement be made, by which A., B., C., and D. agree upon the lot as the mode of settling the title to a particular piece of property, this is not a lottery in the penal sense. If they adopt a plan by which all who choose may buy tickets in a prearranged scheme, this is a lottery in the penal sense.[1] Hence a "gift enterprise," or a "raffle," in which the public is invited to take shares for the distribution of prizes by chance, is a lottery, no matter how artfully the object may be disguised.[2] Nor does it affect the question

[1] See 2 Holzendorff's Rechts-Lexicon, Leipzig, 1872, p. 74.

[2] U. S. *v.* Olney, 1 Abbott (U. S.), 275; State *v.* Clarke, 33 N. H. 329; Com. *v.* Thacher, 97 Mass. 583; Hull *v.* Ruggles, 56 N. Y. 424; State *v.* Shorts, 3 Vroom, 398; Wooden *v.* Shotwell, 3 Zab. 465; Bell *v.* State, 5 Sneed, 507; Com. *v.* Chubb, 5 Rand. (Va.) 715; Dunn *v.* People, 40 Ill. 465; Eubanks *v.* State, 3 Heisk. 488. In Thomas *v.* People, *ut supra*, it was said by Thornton, J.:—

"The ticket alone does not constitute a lottery, for we are not informed by it that there would be any distribution of prizes. When, however, we consider it in connection with the advertisement, we ascertain that there will be a distribution at the close of the concerts, and after the sale, of the engravings. The ad-

that in the scheme there are no blanks.[1] Such, for instance, it has been ruled to be the case with a gift sale of books, by which the books were offered for sale at prices above their real value, and by which each purchaser was declared to be entitled in addition to a prize, to be ascertained, after the purchase, by a correspondence, unknown to the purchaser, between certain numbers indorsed in the books offered for sale, and the different prizes proposed.[2] The same ruling was made as to the American Art Union;[3] and as to a sale of envelopes, some of which were alleged to contain tickets enabling the holder to purchase valuable property at a nominal price.[4] But we cannot extend this principle to cases where, by private and limited contract, certain

vertisement contains this language: 'There will be distributed, as presents, to the purchasers of engravings, in a just and legal manner, $200,000 in presents.' The term 'present,' though literally it means a gift, yet, in the relation, and in the sense in which it was used, evidently meant a prize. It was offered, as the reward of contest, to the purchasers. It was something to be won. One ticket and engraving were sold for $5, 100 engravings and tickets for $425, and 1,000 for $4,250. Inducements were thus offered to struggle for the prizes. Here, then, was a scheme for the distribution of prizes. Was the distribution certain and fixed, or was it to be by chance? It is urged, in defence of this scheme, that no plan of distribution had been determined upon; that the purchasers were to receive certain articles in a just and legal manner; and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals.

"The distribution was to be in a just and legal manner. It should, then, be in an honest, upright, and equitable mode. There should be perfect fairness and equality. This plan would be utterly violated if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a 'just and legal manner,' unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of money paid.

"It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs, we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjecture. We have no right to harbor wild imaginings, to change a reasonable and probable result."

[1] Wooden *v.* Shotwell, 3 Zab. 465.

[2] State *v.* Clarke, *ut supra;* and see S. P., Hull *v.* Ruggles, 56 N. Y. 424; Eubanks *v.* State, 3 Heisk. 488; Thomas *v.* People, 59 Ill. 160; Randle *v.* State, 42 Tex. 580. See State *v.* Bryant, 74 N. C. 207. Supra, § 1465.

[3] People *v.* Art Union, 7 N. Y. 240; Governors, &c. *v.* Art Union, 7 N. Y. 228. See Morris *v.* Blackman, 2 Hurl. & Colt. 912.

[4] Dunn *v.* People, 40 Ill. 465.

parties unite, according to a plan known to all of them before the drawing, to dispose of designated articles by chance.[1]

[1] Com. *v.* Manderfield, 8 Phila. 457.

In U. S. *v.* Olney, 1 Deady U. S. 461, we have the following from Deady, J.: —

"The word 'lottery' is defined and used as follows by lexicographers and writers:

"'A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles.' Worcester's Dict.

"'A distribution of prizes by lot or chance.' Webster's Dict.

"'A scheme for the distribution of prizes by chance.' Bouvier's Dict.

"'A kind of game of hazard wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate.' Rees's Cyclopædia.

"'A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks.' American Cyclopædia.

"'That the chance of gain is naturally overvalued, we may learn from the universal success of lotteries.' Smith's Wealth of Nations, b. i. c. 10.

"All these authorities agree that when there is a distribution of prizes — something valuable — by chance or lot — that this constitutes a lottery. But the definitions from Worcester and the American Cyclopædia are the most complete. From each of these it expressly appears that a valuable consideration must be given for *the chance* to draw the prize.

"Tried by this standard it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True the purchasers of tickets or shares were in any event to get something, — at the least, a lot, for the purposes of this scheme *estimated* to be worth $50. But it is not probable that any one would have purchased a ticket, if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots. If the first three hundred lots could have been sold for fifty dollars each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from $100 to $5,000 each. This is neither reasonable nor probable."

In a case in the N. Y. Ct. of Appeals, in 1876, the action was brought to recover for goods sold and delivered. Defendants claimed that the goods were intended to be used in a lottery. It appeared that the goods sold consisted of a quantity of candies and silverware. The candies were put up by plaintiff in packages, known as prize candy packages, in some of which were tickets, each with the name of a piece of silverware upon it. Defendants intended to sell the packages for more than their value, the purchaser taking the chance of getting a package containing a ticket, in which case he was entitled to the article of silverware named, in addition to the package. It was ruled that this was a lottery within the meaning of the statute, and the sale, having been for the purpose of aiding in a lottery, was void (1 R. S. 668, § 38); the contract of sale was also void and plaintiff could not recover. Hall *v.* Ruggles, 56 N. Y. 424.

As to meaning of "promoting a lot-

Ticket includes fractions.

§ 1492. A ticket, under the statute, includes a quarter of a ticket.[1]

II. INDICTMENT.

Indictment must show ticket to be prohibited.

§ 1493. Where only certain kinds of lottery are prohibited, then the indictment must set forth enough of the scheme of lottery, or of the ticket sold, as the case may be, to individuate the lottery or ticket, and show that the particular scheme or lottery is of the prohibited class.[2]

It would seem that it is not necessary to set out the full ticket, if enough be given to show it to be illegal.[3] But, as will be seen, if the ticket be set forth, a variance is fatal.[4]

Where all lotteries are prohibited by law, it has been ruled not to be necessary to set forth the letter of the ticket, or even its purport.[5] But, in view of the fact that the term "lottery" has such a wide general signification, and that it embraces processes all of which none of the statutes have undertaken to declare penal, to charge simply the organizing of a "lottery," or the sale of a "lottery ticket," is very loose pleading. At all events, the name of the vendee, in case of a sale, should be averred, so as to in some way notify the defendant of the offence with which he is charged.[6] An allegation that the particulars of the "lottery policies" are unknown to the grand jury, and that the vendees are unknown, may supply the want of specification.[7]

It is said, however, that to aver that the lottery was prohibited by law is not necessary in a State where all lotteries are prohibited.[8]

Not duplicity to

§ 1494. To couple in one count the allegations "offer for sale," and "sell," is not duplicity, and so with "set up and promise."[9] And it has been held that to sell sev-

tery," in the Kentucky statute, see Miller *v.* Com. 13 Bush, 731.

[1] Freleigh *v.* State, 8 Mo. 606.

[2] People *v.* Taylor, 3 Denio, 99; Com. *v.* Manderfield, 8 Phila. 457; State *v.* Scribner, State *v.* Barker, 2 Gill & J. 246. As to construction of charter, see Boyd *v.* State, 53 Ala. 601.

[3] Com. *v.* Gillespie, 7 S. & R. 469.

[4] Ibid. Infra, § 1496.

[5] State *v.* Follet, 6 N. H. 53; France *v.* State, 6 Bax. 478. See Com. *v.* Gillespie, 7 S. & R. 469.

[6] Wh. Prec. 486; but see infra, § 1510.

[7] Pickett *v.* People, 8 Hun, 83.

[8] People *v.* Sturdevant, 23 Wend. 418.

[9] Com. *v.* Eaton, 15 Pick. 273;

eral tickets, attached to each other, forms but one offence.[1] couple stages of offence.

Com. *v.* Harris, 13 Allen, 534; Wh. Prec. 828, n. Infra, § 1515; Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

In Miller *v.* Com. 13 Bush, 731, it was ruled that the promotion of a lottery, and the aiding in such promotion, are but different modes of committing, or participating in the commission of the same offence. The latter is but a degree of the former, and under an indictment for the major offence a conviction may be had for the minor. It was further ruled that specific acts of inducement, although each is a separate offence with a separate punishment denounced against it, are provable under the general charge of promoting a lottery.

The following rulings may be noticed in addition: —

A count in an indictment, charging the defendant with keeping a common gaming-house, and selling lottery tickets therein, was held insufficient; and also a count charging the keeping an ill-governed and disorderly room for the sale of lottery tickets. People *v.* Jackson, 3 Denio, 101.

Under the 27th section of 1 Rev. Sts. of New York, 665, a lottery which is not for the purpose of disposing of property is not illegal; and an indictment for selling lottery tickets, not describing the lottery as being for such purpose, cannot be supported. People *v.* Payne, 3 Denio, 88. The indictment should contain either a particular description of the lottery, or assign as a reason that a more particular description of the lottery was unknown to the grand jury; and an averment merely that the name of the lottery was unknown to the grand jury is insufficient; but it is not necessary that the indictment should set forth the amount of the lottery. People *v.* Taylor, 3 Denio, 99. It is not necessary to set out the tickets sold, or the names of the purchasers, it being alleged that the names were unknown to the jurors. People *v.* Taylor, 3 Denio, 99.

The publication in New York of an advertisement of a lottery to be drawn in a place where such lottery is not unlawful is an indictable offence; and if the indictment set forth the advertisement *in hæc verba*, showing that the lottery was for the purpose of disposing of money or property, it is sufficient, although the purpose of the lottery is not otherwise alleged in the indictment. People *v.* Charles, 3 Denio, 212.

The act to prevent raffling and lotteries was intended to prevent the sale of lottery tickets in the State, whether the lottery was established here or elsewhere. And an indictment for vending lottery tickets need not allege that the lottery was established in this State. An indictment for vending a lottery ticket need not expressly aver that the ticket was of a lottery established or set on foot for the purpose of disposing of real estate, goods, money, or things in action. The character and description of the lottery need not form the subject of an express averment. It is sufficient if these appear argumentatively in the indictment, especially after verdict. People *v.* Warner, 4 Barb. 314.

Under the Revised Statutes (1 R. S. 665, § 28) it is a misdemeanor to publish in this State an account of a lottery to be drawn in another State or Territory, although such lottery be

[1] Fontaine *v.* State, 6 Bax. 514. Supra, § 257.

Enough to follow statute.

§ 1495. It is sufficient, ordinarily, when the indictment is for setting up a lottery, or for having tickets in possession with intent to sell, to follow the words of the statute.[1]

Variance in ticket fatal.

§ 1496. A variance as to the ticket when it is set forth, or as to the terms it offers when only given in substance, is at common law fatal.[2]

III. EVIDENCE.

Intent proved inferentially.

§ 1497. The sale of other tickets, or acts promotive of such sale, may be put in evidence in order to prove the intention, when part of the same system.[3]

authorized by the laws of the State where it is to be drawn.

It was accordingly held, that a demurrer to an indictment, which charged the defendant with publishing in the city of New York an account of a lottery to be drawn in the District of Columbia, was not well taken.

An indictment charging the defendant with publishing an account of an illegal lottery, and setting forth *in hæc verba* the lottery scheme, which showed that the prizes consisted of sums of money, was held good, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, lands, &c. Charles *v.* People, 1 Comst. 181.

[1] Com. *v.* Dana, 2 Met. 329; Com. *v.* Horton, 2 Gray, 69.

[2] Com. *v.* Gillespie, 7 S. & R. 469; Whitney *v.* State, 10 Ind. 404.

[3] Whart. Cr. Ev. § 32; Thomas *v.* People, 59 Ill. 160; Miller *v.* Com. 13 Bush, 731.

In Thomas *v.* People, supra, it was ruled admissible to put in evidence, on behalf of the prosecution, not only the ticket sold, but the bill or advertisement delivered to the purchaser, which explained the purposes and character of the scheme, and also other tickets and bills or advertisements of similar kind, sold and delivered by the accused to other parties, as tending to prove the intent with which the ticket was sold.

It has also been held (Dunn *v.* People, 40 Ill. 465), that it is proper for the prosecution to read to the jury the contents of other envelopes, beside the one sold, for the purpose of showing the true character of the transaction.

In Miller *v.* Com., supra, it was said by Lindsay, C. J.: "There is much plausibility in the argument that, because printing, vending, or having in possession, with intent to vend, lottery tickets, or knowingly permitting, in any house, shop, or other building, the setting up, managing, or drawing of a lottery, or the sale or exchange of lottery tickets, and the advertising of lotteries or tickets, are each made separate offences by statute, and a specific punishment denounced against each, that none of these acts go to make up, or are provable under the more general charge of promoting a lottery. But if, this conclusion be correct, then it will be difficult, if not impossible, to imagine in what manner a lottery can be promoted."

CHAPTER XXIV.

ILLICIT SALE OF INTOXICATING LIQUORS.

Tippling-house when disorderly is a nuisance, § 1498.

I. License.
- License should be negatived in indictment, § 1499.
- How it is to be proved, § 1500.
- Construction of license, § 1500 *a*.
- Licenses not assignable, § 1501.

II. Common Seller: Tippling-house.
- Act of common selling to be proved inferentially, § 1502.

III. Agency.
- Principal liable for agent's acts, § 1503.
- Agent is personally responsible, § 1504.

IV. "Intoxicating" or "Spirituous."
- Intoxicating qualities when notorious need not be proved, § 1505.

V. Medical Use.
- To be a defence drink must be sold in good faith as medicine, § 1506.

VI. Ignorance.
- Honest mistake of fact is not ordinarily a defence, § 1507.

VII. Autrefois Acquit.
- Offence must be identical to bar, § 1508.

VIII. Husband and Wife.
- Feme covert may be responsible for sales, and husband for wife's sales, § 1509.

IX. Averment and Proof of Vendee.
- Prevalent opinion is that vendee need not be named, § 1510.
- Vendee may be averred as unknown, § 1511.
- When named must be proved, § 1512.

X. Averment and Proof of Sale.
- Statutory description of liquor sufficient, § 1513.
- And so as to measure, § 1514.
- "Sell and offer" not double, § 1515.
- Price need not be averred, § 1516.
- Sufficient to charge "common seller," but sale must be properly averred, § 1517.
- Sales on credit are within statute, § 1518.
- And so are drinks on trade, § 1519.
- Sales to be inferred from circumstances, § 1520.
- Time is immaterial, § 1521.
- Measure is immaterial, § 1522.
- To be inferentially shown, § 1523.
- Sales may be joint, § 1524.
- Only offences charged to be proved, § 1525.
- Bill of particulars to be required, § 1526.
- Partial license no defence, § 1527.
- Statutory presumption as to sale, § 1528.

XI. Penal Responsibility of Vendee.
- Vendee may be called as witness, § 1529.

XII. Constitutionality of Laws respecting.
- License laws to be strictly construed, § 1530.

XIII. U. S. Revenue License.
- This is no defence, § 1531.

§ 1498. The statutes of the several States regulating or prohibiting the sale of intoxicating liquors are so numerous, so various, and so constantly the subject of repeal or amendment, that it is not proposed to analyze them under this head. All that can be here attempted is to

Tippling-house when disorderly is a nuisance.

classify such of the decisions under them as may be of general application.

It may at first be noticed that a tippling-house, or house for the sale of intoxicating liquors, when noisily and offensively conducted, is a nuisance at common law, and as such indictable. The case, however, to support a conviction, must show a nuisance to the community.[1]

I. LICENSE: ITS AVERMENT, PROOF, AND EFFECTS.

§ 1499. As a general rule, the indictment should negative the license.[2] If the negation of the license to sell is as to quantity coextensive with the quantity charged to be sold, it is sufficient. The general negation, "not having a license to sell liquors as aforesaid," relates to the

License should be negatived in indictment.

[1] See supra, § 1449.

For forms of indictment see Wh. Prec., as follows:—

(792.) Presuming to be a common seller of wine, under Maine statute.
(793.) Selling liquors by retail in New Hampshire.
(794.) Retailing in liquor, &c., without license, under § 1, c. 83, Verm. Rev. St.
(795.) Selling liquor by the small, under the same.
(796.) Selling liquor, &c., under Mass. Rev. St. c. 47, § 1.
(797.) Another form under same section.
(798.) Under Rev. St. c. 47, § 2.
(799.) Another form under same.
(800.) Under Rev. St. c. 47, § 2.
(801.) Another form under same.
(802.) Another form under same.
(803.) Another form under Rev. Sts. c. 47, § 2, where defendant is licensed to sell wine.
(804.) Another form under same.
(805.) Another form under same.
(806.) Another form under same.
(807.) Selling liquor without license, under Mass. Rev. Sts. c. 47, § 3.
(808.) Another form under same.
(809.) Another form under same.
(810.) Violation of license laws in Rhode Island.
(811.) Same in New York.
(812.) Same in New Jersey.
(813.) Same in Pennsylvania.
(814.) Another form for same, being that used in Philadelphia.
(815.) Same in Virginia.
(816.) Same in North Carolina.
(817.) Same in Alabama.
(818.) Same in Kentucky.
(819.) Same in Tennessee.
(820.) Same in Mississippi.

[2] Wh. Cr. Pl. & Pr. §§ 239 *et seq.*; State *v.* Munger, 15 Vt. 290; Com. *v.* Thurlow, 24 Pick. 374; State *v.* Webster, 5 Halst. 293; Com. *v.* Hampton, 3 Grat. 590; State *v.* Horan, 25 Tex. (Supp.) 271; Com. *v.* Smith, 6 Bush, 303. See Burke *v.* State, 52 Ind. 461. Indictment need not aver defendant not to be a "druggist," &c.; Surratt *v.* State, 45 Miss. 601; Riley *v.* State, 43 Miss. 397. See also State *v.* Fuller, 33 N. H. 259; State *v.* Blaisdell, 33 Ibid. 388; State *v.* Buford, 10 Mo. 703. As the cases show, the whole question depends on the principle underlying the statute.

time of sale, and not to the time of finding of the bill, and will suffice.[1] "Without being duly authorized and appointed thereto according to law" is a sufficient negation.[2]

How provisos and exceptions in statutes are to be treated is elsewhere discussed.[3]

How license is to be proved.

§ 1500. It has been ruled in some courts, though on questionable reasoning, that it is for the defendant to prove he is licensed, the prosecution not being bound to prove a negative.[4] But wherever the negative is capable of proof, it is one as to which the prosecution should at least make out a *primâ facie* case.[5]

Construction of license.

§ 1500 *a*. A license is not to be strained beyond its proper and formal import;[6] but at the same time is to be construed according to its spirit. Thus, in a case in Massachusetts where a certificate of license for the sale of intoxicating liquors, granted by the mayor and aldermen of a city, recited that it was granted and accepted upon the express condition that the licensee should in all respects fulfil and conform to all the conditions or requirements of the St. of 1875, c. 99; and that, for breach of any of its conditions or requirements, the license should become forfeited, null, and void, and it

[1] State *v.* Munger, 15 Vt. 290.

[2] Com. *v.* Keefe, 7 Gray, 332; Com. *v.* Conant, 6 Gray, 482; State *v.* Fanning, 38 Mo. 359; Com. *v.* Hoyer, 125 Mass. 209; Roberson *v.* Lambertville, 38 N. J. L. 69. See State *v.* Hornbreak, 15 Mo. 478; State *v.* Andrews, 28 Mo. 17. As to mode of negativing see Eagan *v.* State, 53 Ind. 162.

[3] Whart. Cr. Pl. & Pr. §§ 238, 239; and see State *v.* Stamey, 71 N. C. 202.

[4] Whart. Cr. Ev. § 342; R. *v.* Turner, 5 M. & S. 205; R. *v.* Hanson, Paley on Conv. 45, n.; 1 C. & P. 538; U. S. *v.* Hayward, 2 Gall. 485; State *v.* Crowell, 25 Me. 174; State *v.* Whittier, 21 Me. 341; State *v.* Woodward, 34 Me. 293; State *v.* McGlynn, 34 N. H. 422; State *v.* Morrison, 3 Dev. 299; Gening *v.* State, 1 McCord, 573; Wheat *v.* State, 6 Mo. 455; State *v.* Lipscomb, 52 Mo. 32; State *v.* Edwards, 60 Mo. 490; Shearer *v.* State, 7 Blackf. 99. But see Kidder *v.* Norris, 18 N. H. 532; State *v.* Evans, 5 Jones (N. C.), 250; Mehan *v.* State, 7 Wis. 670; Com. *v.* Thurlow, 24 Pick. 374; which case is confined to its particular point in Com. *v.* Boyer, 7 Allen, 306.

[5] See Wh. Cr. Ev. § 341.

In Massachusetts, the Stat. 1854, c. 102, imposing upon the defendant the duty of proving a license in all prosecutions for selling "spirituous" liquors, applies to the Stat. 1850, c. 232, against selling "intoxicating" drinks. Com. *v.* Kelly, 10 Cush. 69. And under Stat. of 1864 the defendant is required to prove license from town. Com. *v.* Leo, 110 Mass. 414. See Whart. Crim. Ev. § 342.

[6] Spake *v.* People, 89 Ill. 617.

was signed by the mayor and city clerk, and below their signatures followed an "extract from chapter 99 of Acts of 1875," section six being quoted in full; it was held that the license was substantially in the form required by the statute; and that the licensee, having fully complied with the conditions of the license, and having displayed it on his premises according to law, was legally licensed.[1]

Licenses not assignable.

§ 1501. A license having been granted to one man to keep a tavern in a particular house, from which he afterwards removed; another being indicted for retailing spirituous liquors in that house may show that he did it as the agent or partner, and under the charge of him to whom it was granted; and may, on that ground, be acquitted by the jury.[2] But a license is no protection to a partner whom A. subsequently takes, when the license is, not to keep a tavern, but to sell liquor.[3] And, generally, a license to one cannot be assigned to another.[4]

II. WHAT IS EVIDENCE OF A "COMMON SELLER," OR OF A TIPPLING-HOUSE.

Act of common selling to be

§ 1502. Proof of retail sales of liquor drunk on the premises is sufficient proof of the party's being a common seller or of his keeping a tippling-house.[5] A pedler, carrying intoxicating liquors on his person and selling the same,

[1] Murphy *v.* Nolan, 126 Mass. 542.

[2] Barnes *v.* Com. 2 Dana, 388. See Gray *v.* Com. 9 Dana, 300; Com. *v.* Hoyer, 125 Mass. 209.

[3] Long *v.* State, 27 Ala. 32.

A license to sell liquor, granted to two persons as partners, will, during the period mentioned in the license, protect one of the partners against the penalty for selling without a license, although the other has retired from the firm. State *v.* Gerhardt, 3 Jones N. C. 178.

The grant of a license to retail spirituous liquors from a day past is a release of the penalties for retailing without license subsequent to that day, although prior to the taking out of the license. City *v.* Corlies, 2 Bailey, 186.

A license to sell spirituous liquors has no relation back to the date of the order of the county court granting permission to obtain it, and will only protect one who sells from and after the date of its issue. State *v.* Hughes, 24 Mo. 147. Nor will a license "to keep a dram-shop, block No. 15, in the city of St. Louis," justify a sale in any other place in St. Louis. Ibid.

[4] Lewis *v.* U. S. 1 Morris, 199; Com. *v.* Bryan, 9 Dana, 310.

[5] Brock *v.* Com. 6 Leigh, 634. See Com. *v.* Wood, 4 Gray, 11; Cochran *v.* State, 26 Texas, 678; and so when his wife is his agent. State *v.* Colby,

is liable for single sales, or may be indicted as a common seller.[1] To sustain the allegation that the defendant was a common seller, records of his conviction for single sales are admissible.[2] proved inferentially.

The mode of proving sales is discussed in another section.[3]

III. AGENCY.

§ 1503. A shopkeeper is indictable for an unlawful sale of spirituous liquors by a servant employed in his business,[4] as all concerned are principals.[5] Where, however, the sale is not in the immediate line and direction of the principal's business, the fact of agency is only *primâ facie* evidence of the principal's guilt.[6] If there be no authority, express or implied, the principal must be acquitted.[7] *Primâ facie* agency may be rebutted by showing that the agent was explicitly and *bonâ fide* ordered to make no such sale, and that the sale was without the defendant's cognizance and against his direction, and outside of the range of the agent's duties.[8] Principal liable for agent's act.

One partner is liable for another partner's sale, when such sale was in pursuance of an agreement between the two that liquor should be sold.[9]

While, in order to convict an employer for specific sales of intoxicating liquor by his clerk, the jury must be satisfied of his

55 N. H. 72; State *v.* Roberts, 55 N. H. 483; Com. *v.* Reynolds, 114 Mass. 306; Com. *v.* Kennedy, 119 Mass. 211. Infra, § 1509.

[1] State *v.* Grames, 68 Me. 418.

[2] State *v.* Gorham, 67 Me. 247.

[3] Infra, § 1520.

[4] Supra, §§ 135, 247, 341; State *v.* Stewart, 31 Me. 515; State *v.* Wentworth, 65 Me. 234; State *v.* Dow, 21 Vt. 484; Com. *v.* Park, 1 Gray, 553; Com. *v.* Nichols, 10 Met. 259; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Major, 6 Dana, 293; State *v.* Matthis, 1 Hill (S. C.), 37; Britain *v.* State, 8 Humph. 203; Molihan *v.* State, 30 Ind. 266; Schmidt *v.* State, 14 Mo. 137.

[5] Supra, §§ 223, 247; Johnson *v.* People, 83 Ill. 431.

[6] Com. *v.* Nichols, 10 Met. 259. See Thompson *v.* State, 45 Ind. 495. Supra, §§ 135, 247, 341, 1422.

[7] Barnes *v.* State, 19 Conn. 398; Hipp *v.* State, 5 Blackf. 149; Wreidt *v.* State, 48 Ind. 579; Lathrope *v.* State, 51 Ind. 192; State *v.* Dawson, 2 Bay, 360; Goods *v.* State, 3 Greene (Iowa), 565. See supra, §§ 246, 1422.

[8] Com. *v.* Nichols, 10 Met. 259; Barnes *v.* State, 19 Conn. 398; Anderson *v.* State, 22 Ohio St. 305; Hanson *v.* State, 43 Ind. 550; O'Leary *v.* State, 44 Ind. 91. The question of *bona fides* is for the jury. State *v.* Wentworth, 65 Me. 234.

[9] State *v.* Neal, 7 Foster, 131.

assent to and not merely of his knowledge of the sales;[1] yet when the charge is for a nuisance, then the employer is generally liable for all the agent's acts within the range of his employment.[2]

Evidence that liquor charged to have been sold by the father was sold by the son in the father's presence at his bar supports an information against the father. But the mere fact that the son sold liquor at his father's bar in the father's absence is said not to be evidence that he sold it at his request or by his authority.[3]

Agent is personally responsible.

§ 1504. It is no defence that the defendant was acting as agent for another. He is criminally responsible as principal himself, notwithstanding such agency.[4] Nor is it any defence that he sold the liquor without authority.[5]

A clerk or servant of the real householder may be convicted on an indictment for a liquor nuisance, if such clerk or servant is at any time in control of the house, no matter for how short a period.[6]

IV. WHAT MAY BE CONSIDERED "SPIRITUOUS" OR "INTOXICATING" LIQUORS UNDER THE STATUTES.

Intoxicating qualities when notorious need not be proved.

§ 1505. Without specific proof of quality, verdicts have been sustained holding the following articles to be intoxicating:—

1. Common cordial.[7]
2. Brandy or gin, mixed with sugar and water.[8]
3. Unadulterated gin, brandy, or rum,[9] and port wine.[10]

"Strong beer" has been ruled to be "intoxicating;"[11] and

[1] Com. v. Putnam, 4 Gray, 16.

[2] Supra, § 1422.

[3] Parker v. State, 4 Ohio St. 563.

[4] Supra, § 94; State v. Bugbee, 22 Vt. 32; State v. Dow, 21 Vt. 484; State v. Wiggin, 20 N. H. 449; Com. v. Hadley, 11 Met. 66; Com. v. Drew, 3 Cush. 279; Com. v. Hoyer, 125 Mass. 209; Com. of Excise v. Dougherty, 55 Barb. 332; Com. v. Gillespie, 7 S. & R. 469; Britain v. State, 3 Humph. 203; Com. v. Major, 6 Dana, 293; Hays v. State, 13 Mo. 246; Schmidt v. State, 14 Mo. 137; State v. Matthis, 1 Hill (S. C.), 37; Winter v. State, 30 Ala. 22.

[5] State v. Wadsworth, 30 Conn. 55; Whitton v. State, 37 Miss. 379; State v. Finan, 10 Iowa, 19.

[6] Com. v. Kimball, 105 Mass. 465.

[7] State v. Bennet, 3 Harring. 565.

[8] Com. v. Odlin, 23 Pick. 275.

[9] Com. v. Peckham, 2 Gray, 514.

[10] State v. Packer, 80 N. C. 439.

[11] People v. Hawley, 3 Mich. 330. But the fact that beer contains a cer-

to be "strong liquor,"[1] though it is otherwise with "small beer."[2] Whether "lager beer" is "intoxicating" is said to be a question for the jury;[3] to whom, indeed, such questions properly belong.[4] And of that which is notorious no evidence need be produced.[5]

The defendant's *belief*, that the drink is not intoxicating, is no defence.[6]

What wines are "spirituous" depends on their kind.[7]

An averment that the respondent sold rum, brandy, and gin is sufficient without an averment that they are intoxicating liquors.[8] It is otherwise when the statute simply prohibits "intoxicating liquors."[9] In such case it is not necessary to designate what was the particular kind of spirituous liquors sold,[10] though proof must be given to this effect.[11]

V. HOW FAR MEDICAL USE IS A DEFENCE.

§ 1506. Unless there be an express exception in the statute, the fact that the liquor is sold by a retailer for medicine is no defence.[12] It is otherwise, however, when

To be a defence drink must

tain percentage of alcohol is not in itself conclusive. Com. *v.* Blos, 116 Mass. 56.

[1] Tompkins *v.* Taylor, 21 N. Y. 173.

[2] Ibid. But see Klare *v.* State, 43 Ind. 483.

[3] People *v.* Zeiger, 6 Parker C. R. 355; Rau *v.* People, 63 N. Y. 277. See State *v.* Goyette, 11 R. I. 592, to the effect that whether lager beer is malt liquor on the face of an indictment depends upon statutory construction.

[4] State *v.* Laffer, 38 Iowa, 422. But the court will take notice that lager beer is "malt liquor." State *v.* Goyette, 11 R. I. 592.

[5] Whart. on Ev. § 330; Eagan *v.* State, 53 Ind. 162; but see, as to common brewers' beer, Klare *v.* State, 43 Ind. 483.

[6] Supra, § 88; infra, § 1507.

[7] State *v.* Moore, 5 Blackf. 118; Caswell *v.* State, 2 Humph. 402. But see State *v.* Lowry, 74 N. C. 121, where it was said that whether "blackberry wine" is a spirituous liquor is for the jury.

[8] State *v.* Munger, 15 Vt. 290.

[9] Ward *v.* State, 48 Ind. 293; Lathrope *v.* State, 50 Ind. 555. Infra, § 1513.

[10] Com. *v.* Odlin, 23 Pick. 275; State *v.* Fox, 1 Harr. (N. J.) 152; Connell *v.* State, 46 Ind. 446. See State *v.* Peterson, 41 Vt. 504; though see Gunter *v.* Leckey, 30 Ala. 591.

[11] State *v.* Reynolds, 47 Vt. 297; Deverny *v.* State, 47 Ind. 208. When the statute prohibits "intoxicating liquor" without further specification, it is enough, under statute, to aver sale of "intoxicating liquor." State *v.* Blaisdell, 33 N. H. 388; Com. *v.* Conant, 6 Gray, 482; State *v.* Packer, 80 N. C. 439, and cases infra, § 1513.

[12] State *v.* Whitney, 15 Vt. 298; State *v.* Brown, 31 Me. 522; Com. *v.* Kimball, 24 Pick. 366; Com. *v.* Sloan, 4 Cush. 52; Phillips *v.* State, 2 Yerg.

be sold in good faith as medicine.

the liquor is given by a physician to a sick man as medicine, though charged in the physician's bill.[1] To constitute the defendant an apothecary, under the exception in the statute, he must have some skill in the preparation of medicine. Merely keeping drugs will not be enough.[2]

Where there was evidence tending to show that the liquor was *purchased* for medicinal purposes, but none that it was *sold* for that purpose, a conviction was held right.[3]

In Ohio, any person may lawfully, *in good faith*, give away intoxicating liquors, for medicinal or other purposes, or may lawfully sell them in any quantity for such purposes, to be drank elsewhere than where sold; but he cannot lawfully *sell* them (except such as are specially excepted by the statute) *to be drank where sold*, for any purpose.[4]

VI. IGNORANCE.

§ 1507. Cases may readily be conceived in which ignorance on the part of a vendor as to the character, either of the liquor or of the vendee, may be set up as a defence. The vendor may say that it is his conscientious belief that though alcohol may stimulate it does not inebriate; or that the person to whom he sells is one entitled by law to purchase; *e. g.* one seeking to use the liquors for medical purposes, or one of full age as distinguished from a minor, when to the latter sales are prohibited. But to such defence the answer has been already given,[5] that when a specific act is made by the law indictable, irrespective of the defendant's motive or intent, his belief that he was right in what he did, based on a mistake of fact, is no defence. Eminently is this the case with regard to intoxicating drinks. Legislatures in many States, on high grounds of public morality, have either partially or totally prohibited the sale of such drinks. To evade such laws

Honest mistake of fact is not ordinarily a defence.

458. But see Ball *v.* State, 50 Ind. 595. Whether the indictment must negative the medical use depends on the statute, see State *v.* McBride, 64 Mo. 364.

[1] State *v.* Larrimore, 19 Mo. 391; Thomasson *v.* State, 15 Ind. 449. See Russell *v.* Sloan, 33 Vt. 656. And see *contra*, State *v.* Hall, 39 Me. 107; Jakes *v.* State, 42 Ind. 473.

[2] State *v.* Whitney, 15 Vt. 298.

[3] Leppert *v.* State, 7 Ind. 300. See Donnell *v.* State, 2 Ind. 658.

[4] Schaffner *v.* State, 8 Oh. St. 642.

[5] Supra, § 88.

various devices have been adopted. Intoxicating liquors have been advertised with innocent names: "Bitters," "Tonics," "Alteratives," "Cordials." Certificates are given that they contain no alcohol, and nothing to inebriate. Selling is disguised as trading, or showing sights.[1] Persons to whom sales are prohibited, *e. g.* minors, become at once to the vendors adults. If pretexts such as these are sustained, the worst vendors of the worst liquors would be the best protected by the law. They have only to be brutishly ignorant as to the character of the liquor, the purpose of the purchase, and (when sales to minors are prohibited) the age of the vendee, to go free. But the law declares that such "ignorance" is no defence.[2]

VII. AUTREFOIS ACQUIT.[3]

§ 1508. A conviction for retailing to one person is no bar to an indictment for retailing to another, though the act of selling charged in the second indictment was anterior to the finding of the bill on which the conviction was had.[4] So, where two bills for retailing were found against the defendant at the same time, and the first charged a retailing to A. B., and to divers other persons; the second, a retailing to C. D., and to divers other persons, and a conviction was had on the first indictment, and it was pleaded in bar of the second; it

Offence must be identical to bar.

[1] See infra, § 1509. Where, however, the character of the liquor is so changed that it cannot be used as a beverage, and it becomes solely a medicine, then the doctrine of the text ceases to apply. See State *v.* Laffer, 38 Iowa, 422; Russell *v.* Sloan, 33 Vt. 656.

[2] See supra, § 88, where the cases on this question, on both sides, are given; infra, § 1509. S. P., U. S. *v.* Dodge, 1 Deady, 186; Barnes *v.* State, 19 Conn. 398; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Emmons, 98 Mass. 6; Com. *v.* Lattinville, 120 Mass. 385; Com. *v.* Finnegan, 124 Mass. 324; State *v.* Hause, 71 N. C. 518; McCutcheon *v.* People, 69 Ill. 601; Farmer *v.* People, 77 Ill. 322; State *v.* Cain, 9 W. Va. 559; Ulrich *v.* Com. 6 Bush, 400; State *v.* Heck, 23 Minn. 549; State *v.* Hartfiel, 24 Wis. 60. As dissenting see Crabtree *v.* State, 30 Oh. St. 382; Brown *v.* State, 24 Ind. 113; Fahrbach *v.* State, 24 Ind. 77; State *v.* Kalb, 14 Ind. 403, where it was held that, *due care having been shown*, honest belief is a defence. In Alabama, where the offence is selling to a "known" drunkard, *scienter* must be proved. Smith *v.* State, 55 Ala. 1.

[3] See, generally, Whart. Cr. Pl. & Pr. § 472.

[4] State *v.* Ainsworth, 11 Vt. 91; State *v.* Cassety, 1 Rich. 90. See *per contra*, State *v.* McBride, 4 McCord, 332, overruled by State *v.* Cassety, as above; and see Com. *v.* Mead, 10 Allen, 396.

was held, that the words "and to divers other persons," in both indictments, must be rejected as surplusage, and the plea in bar was overruled.[1]

An indictment for specific sales, under one statute, is not barred by a conviction, under another statute, of being at the same period of time a common seller.[2] Clearly is a conviction or acquittal of a disorderly or tippling-house, as a nuisance, no bar to an indictment for specific sales, or for being a common seller.[3]

An acquittal for a sale to a "person unknown" is no bar to a prosecution for a sale to A. B., unless the prosecution's case in both instances is the same.[4]

When there are a series of sales distinctly separated as to time, they may be separately prosecuted; though it is otherwise when the first indictment avers a continuous offence, in which case a conviction or acquittal bars a subsequent prosecution for any ingredient of such offence.[5]

A conviction of the husband for maintaining a liquor nuisance may be no bar to a conviction on the same evidence of the wife.[6]

VIII. HUSBAND AND WIFE.

Feme covert may be responsible for sales, and husband for wife's sales.

§ 1509. A *feme covert* may be jointly indicted with her husband for an illegal sale made with his approval, though he was at the time absent.[7] If made by her in his absence, and not under his immediate command, though in the house in which they live and trade together, she may be indicted singly.[8] She is exclusively responsi-

[1] State v. Cassety, 1 Rich. 90.

[2] Wh. Cr. Pl. & Pr. § 472; State v. Coombs, 32 Me. 527; State v. Maher, 35 Me. 225; State v. Inness, 53 Me. 536; State v. Johnson, 3 R. I. 94; Com. v. Kennedy, 97 Mass. 224; Heikes v. Com. 26 Penn. St. 513; though see *contra*, under statutes, State v. Nutt, 28 Vt. 598; Miller v. State, 3 Oh. St. 475.

[3] State v. Inness, 53 Me. 536; Com. v. McCauley, 105 Mass. 69; State v. Williams, 1 Vroom, 102; Martin v. State, 59 Ala. 34.

[4] State v. Birmingham, Busbee, 120. See Whart. Cr. Pl. & Pr. § 456.

[5] Com. v. Robinson, 126 Mass. 259; citing Com. v. Armstrong, 7 Gray, 49; Wh. Cr. Pl. & Pr. § 472.

[6] Com. v. Welsh, 97 Mass. 593. See supra, §§ 79–81; infra, § 1509.

[7] See supra, §§ 79–81; Com. v. Tryon, 99 Mass. 442; Com. v. Hamor, 8 Grat. 698.

[8] Com. v. Murphy, 2 Gray, 510. See R. v. Crofts, 7 Mod. 397; State v. Haines, 35 N. H. 207; Com. v. Welsh, 97 Mass. 593; Gening v. State, 1 McCord, 573. Supra, §§ 79–81.

ble for such a sale when she is living separate and apart from her husband, and the sale is without his approval.[1] But the husband may be liable if he has a guilty knowledge of his wife's acts, and the business is done in the common domicil, though she does business on her own account, and has taken out a United States license as retail dealer.[2] And in 1879 it was ruled in Massachusetts that even under the married women's acts, if a married woman keeps intoxicating liquors for sale in violation of law in a hotel hired by her, and her husband aids her in such keeping, or if, without actually and actively aiding her, he is present, and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping.[3]

IX. AVERMENT AND PROOF OF VENDEE.

§ 1510. The prevalent opinion is that in an indictment against a person for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons.[4] But in some States, and on principle with greater apparent reason, it is determined that in the indictment the name of the person to whom the sale was made must be specified, if known.[5] But in view of the fact that the offence is

Prevalent opinion is that vendee need not be named.

[1] Ibid.; Pennybaker *v.* State, 2 Blackf. 484; State *v.* Collins, 1 McCord, 355. Supra, §§ 79–81.

[2] Com. *v.* Wood, 97 Mass. 225; Com. *v.* Barry, 115 Mass. 146; Com. *v.* Kennedy, 119 Mass. 211; Com. *v.* Carroll, 124 Mass. 30. See Hensly *v.* State, 52 Ala. 10, and see supra, § 81.

[3] Com. *v.* Pratt, 126 Mass. 462.

[4] State *v.* Munger, 15 Vt. 290; People *v.* Adams, 17 Wend. 475; Osgood *v.* People, 39 N. Y. 449; State *v.* Webster, 5 Halst. 293; Com. *v.* Dove, 2 Va. Cas. 26; Com. *v.* Smith, 1 Grat. 553; Morrison *v.* Com. 7 Dana, 219; Cochran *v.* State, 26 Tex. 678; State *v.* Heldt, 41 Tex. 220; State *v.* Rogers, 39 Mo. 431; State *v.* Jaques, 68 Mo. 260; Cannady *v.* People, 17 Ill. 158; Rice *v.* People, 38 Ill. 435; Green *v.* People, 21 Ill. 125; State *v.* Gummer, 22 Wis. 441; State *v.* Kuhn, 24 La. Ann. 474; State *v.* Parnell, 16 Ark. 506; State *v.* Muse, 4 Dev. & B. 319. Whart. Cr. Pl. & Pr. §§ 111; Whart. Crim. Ev. § 97.

In Rough *v.* Com. 78 Penn. St. 495, the name of the vendee was left blank. It was held that it was within the discretion of the court below to amend it by inserting the vendee.

[5] Com. *v.* Thurlow, 24 Pick. 374; State *v.* Doyle, 11 R. I. 574; State *v.* Steedman, 8 Rich. 312; State *v.* Jackson, 4 Blackf. 49; McLaughlin *v.* State, 45 Ind. 338; Wreidt *v.* State, 48 Ind. 579; Wilson *v.* Com. 14 Bush,

not, like assault, directed against an individual, but, like nuisance, directed against the community, we may reconcile ourselves to the more convenient practice of omitting the name of the vendee in all cases where the statutes forbid sales irrespective of persons.

Vendee may be averred as unknown.

§ 1511. Where the vendee must be named, and his name was at the finding unknown, it is enough so to aver it, and it will be no variance, though it appear that subsequently to the finding the name became known.[1] If, however, the name was known to the grand jury, or could have been if they asked, the variance may be fatal.[2]

Vendee when named must be proved.

§ 1512. An allegation in an indictment that the defendant, without being licensed according to law, sold spirituous liquors to A., is proved by evidence that A. bought the liquors of the defendant for B., at B.'s request and with his money, without disclosing that fact to the defendant.[3] Where, however, the agency is disclosed, the sale must be averred to have been to the principal in States where the law requires the vendee to be named.[4]

An information under the second section of the Ohio act to provide against the evils resulting from the sale of intoxicating liquors must aver that the seller knew that the buyer was a minor.[5]

X. AVERMENT AND PROOF OF SALE.

1. *How Sale is to be averred.*

Statutory description of liquor sufficient.

§ 1513. When a statute makes the sale of "intoxicating liquor" indictable, it is enough to describe the thing sold as "intoxicating liquor," without specification of kind.[6] But when only specific kinds of such drinks are pro-

159; Dorman *v.* State, 34 Ala. 216; Capritz *v.* State, 1 Md. 569; State *v.* Walker, 3 Harring. 547; Neales *v.* State, 10 Mo. 499; overruled by State *v.* Rogers, 39 Mo. 431. See supra, § 1493; Whart. Crim. Ev. § 97; Whart. Cr. Pl. & Pr. § 111.

[1] Whart. Crim. Ev. § 97; Roberson *v.* Lambertville, 38 N. J. L. 69; State *v.* Bryant, 14 Mo. 340; Blodget *v.* State, 3 Ind. 403; State *v.* Carter, 7 Humph. 158.

[2] Blodget *v.* State, 3 Ind. 403; Whart. Crim. Ev. § 97.

[3] Com. *v.* Perley, 2 Cush. 559.

[4] Com. *v.* Remby, 2 Gray, 508.

[5] Aultfather *v.* State, 4 Ohio St. 467. But see supra, § 1507.

[6] State *v.* Blaisdell, 33 N. H. 388; Com. *v.* Conant, 6 Gray, 482; Com. *v.* Dean, 14 Gray, 99; Com. *v.* Ryan, 9 Gray, 137; Downey *v.* State, 20 Ind. 82; State *v.* Carpenter, Ibid. 219, and other cases cited supra, § 1505.

hibited, then the indictment must designate the kind, assigning to it one of the statutory terms.[1]

§ 1514. When the statute prohibits sales of less than a particular measure, the indictment must aver the quantity sold to be less than such measure, in the statutory words. It will not be enough to aver simply a sale by a smaller measure. Thus it is not enough to aver selling a "pint," when the statute makes illegal the selling of "a less measure than a quart." The indictment must aver the selling of "a less measure than a quart."[2] But when every mode of sale is illegal, any kind of measure known to law may be averred.[3]

And so as to measure.

§ 1515. In cases in which the statute makes it penal to "sell or offer to sell" liquor, "sell and offer to sell" in the indictment is not duplicity.[4]

"Sell and offer" not double.

§ 1516. The *price* of a sale need not be averred.[5]

Price need not be averred.

§ 1517. An indictment which avers generally that the defendant, at a time and place named, was a common seller of intoxicating liquors, is sufficient, without setting forth any particular sales, or any number of sales.[6] And so as to charging a "tippling-house."[7]

Sufficient to charge as "common seller."

How license is to be negatived is already shown.[8]

License.

An indictment on the Massachusetts statute of 1875, c. 99, charging the defendant in one count with "keeping an

[1] State *v.* Munger, 15 Vt. 290; State *v.* Fox, 1 Harrison, 152.

[2] Com. *v.* Odlin, 23 Pick. 275; State *v.* Shaw, 2 Dev. 198; though see Reams *v.* State, 23 Ind. 111.

[3] State *v.* Reed, 35 Me. 489; Com. *v.* Brown, 12 Met. 522; Cool *v.* State, 16 Ind. 355. Infra, § 1523.

[4] Barnes *v.* State, 20 Conn. 232. See Com. *v.* Eaton, 15 Pick. 273; Com. *v.* Harris, 13 Allen, 534. Whart. Cr. Pl. & Pr. § 251.

[5] Ibid.; Com. *v.* Roberts, 1 Cush. 505; Com. *v.* Odlin, 23 Pick. 275; State *v.* Miller, 24 Mo. 532; O'Conner *v.* State, 45 Ind. 347; Farrell *v.* State, 45 Ind. 371; State *v.* Clare, 5 Iowa, 509; but see Divine *v.* State, 4 Ind. 240; Hubbard *v.* State, 11 Ind. 554, *contra*.

[6] Com. *v.* Edwards, 4 Gray, 1; Com. *v.* Wood, 4 Gray, 11. See State *v.* Collins, 48 Me. 217.

An information under the fourth section of the Ohio statute must aver that the place of sale was one of public resort. Aultfather *v.* State, 4 Oh. St. 467. Under the same statute it is a sufficient averment if the place of sale is described as a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, which *ex vi termini* import a place of public resort; but it is otherwise with "room," which has no such import. Ibid.

[7] Com. *v.* Riley, 14 Bush, 44.

[8] Supra, § 1499.

open bar," and in another count with "keeping a public bar for the sale of spirituous and intoxicating liquors," but not alleging that the defendant unlawfully sold intoxicating liquors or kept or exposed them for sale, does not sufficiently set forth the offence intended to be charged.[1]

Under the statute prescribing that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act," a complaint, which merely alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," is insufficient.[2]

2. *What are Sales.*

Sales on credit are within statute.

§ 1518. *Sales on credit are sales*;[3] but, unless there be a delivery, a mere agreement to sell is not indictable.[4]

And so are drinks on "trade."

§ 1519. No trick, by which a sale is covered up as a trade, or as a free drink when money is paid for admission, or as a prior contribution, will be a defence. If the liquor is directly or indirectly given for a valuable consideration, it is a sale.[5] But a *bonâ fide* gift is not a sale.[6]

Keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors is sustained by proof that the defendant furnished intoxicating liquors with meals supplied to customers, the payment for which included payment for the liquors.[7]

3. *Proof of Sales.*

Sales to be inferred

§ 1520. Sales may be inferred from extraneous facts, as well from the testimony of vendees.[8] And *a fortiori* is in-

[1] Com. *v.* Hickey, 126 Mass. 250.

[2] Com. *v.* Byrnes, 126 Mass. 248.

[3] Com. *v.* Burns, 8 Gray, 482.

[4] Pulse *v.* State, 5 Humph. 108; Archer *v.* State, 45 Md. 33.

[5] Com. *v.* Clark, 14 Gray, 367; State *v.* Redden, 5 Harring. 505; Rickart *v.* People, 79 Ill. 85; State *v.* Bell, 2 Jones (N. C.), 337, affirming State *v.* Kirkham, 1 Ired. 384.

[6] Allen *v.* State, 14 Tex. 633; Schaffner *v.* State, 8 Oh. St. 642.

[7] Com. *v.* Worcester, 126 Mass. 256.

[8] U. S. *v.* Dodge, 1 Deady, 186; Com. *v.* Kennedy, 97 Mass. 224; Com. *v.* Cotter, Ibid. 336; Com. *v.* Van Stone, Ibid. 548; Com. *v.* Stoehr, 109 Mass. 365; Com. *v.* Dearborn, 109 Mass. 368; Com. *v.* Berry, 109 Mass. 366; Com. *v.* Carr, 111 Mass. 423; Com. *v.* Shaw, 116 Mass. 8; Com. *v.*

ferential evidence sufficient to establish the charge of keeping intoxicating liquors.[1] from circumstances.

In New York, it is admissible to prove that the defendant, being a tavern-keeper, kept a bar with bottles in it.[2]

In Rhode Island, a sign-board put up in a bar-room, with the words, "Boarding by J. B. Wilson," the defendant, painted thereon, is presumptive proof, unexplained, that the defendant is the keeper of the bar-room.[3]

In Massachusetts, on the trial of an indictment for being a common seller of intoxicating liquors, evidence that the defendant, during part of the time covered by the indictment, kept a public house, and had upon it an innkeeper's sign, is irrelevant and inadmissible.[4]

Where the respondent, one of a firm, had made out in his own handwriting a bill of the sale of goods at sundry times, upon which was entered the sale of spirituous liquors by the small measure at different times, and which had been receipted by him, such bill of sale was held competent evidence to go to the jury to prove a sale, and it was determined that the person to whom the sale was made need not be produced.[5]

Where, on a charge of keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant lived in the building and occupied the second and third stories, the first floor being used as a bar-room; that the bar-room had one entrance from the street, and the upper part of the building another, there being an inside door at the foot of the stairs leading into the bar-room, so that it was possible to go from the rooms occupied by the defendant to the bar-room without going into the street; that on Sundays a curtain was lowered at one of the bar-room win-

Mason, 116 Mass. 66; Com. v. Gafley, 122 Mass. 334; Com. v. Wallace, 123 Mass. 401; Com. v. Kahlmeyer, 124 Mass. 322; Com. v. Levy, 126 Mass. 240; State v. Long, 7 Jones (N. C.), 24; Huey v. State, 31 Ala. 349. Supra, §§ 1–23.

[1] Com. v. Gallagher, 124 Mass. 29.

[2] People v. Hulbut, 4 Denio, 133.

[3] State v. Wilson, 5 R. I. 291.

[4] Com. v. Madden, 1 Gray, 486. See, under Mass. statute for keeping liquor nuisance, Com. v. Dunn, 111 Mass. 425; Com. v. Haber, 113 Mass. 207; Com. v. Hayes, 114 Mass. 282; Com. v. Shea, 115 Mass. 102, and other cases in same volume; Com. v. McIvor, 117 Mass. 118; Com. v. Cronin, 117 Mass. 140.

[5] State v. Munger, 15 Vt. 290.

dows exhibiting the inscription "dining-rooms," preceded by the surname of the defendant; that the bar-room was not fitted up as a dining-room; it was ruled, in the absence of evidence that any other person bearing the same surname as the defendant had anything to do with the premises, that the evidence was sufficient to justify the jury in finding that the defendant was the proprietor of the place in question.[1]

On a similar charge, a conviction was sustained where there was evidence that the defendant occupied a building, using part of it for a dwelling and the rest for other purposes; that, during part of the time covered by the indictment, he used one room for the sale of liquors, and during the rest of the time another room adjoining the first; on which the judge declined to rule that the government must elect as to which tenement or room it would rely upon, and instructed the jury that a tenement might consist of two rooms used together and immediately connected together, and that, if the two were thus used alternately and interchangeably for the illegal sale or the illegal keeping of intoxicating liquors, they might be considered as parts of one and the same tenement, and the illegal use of either, while thus connected and used, would be an illegal use of the tenement. In the same case there was evidence tending to show that there were two seizures of intoxicating liquors made during the time covered by the indictment; and that these liquors, at the time of seizure, were in places where they were not likely to be seen by persons visiting the premises. The judge declined to rule that if the liquors seized were not offered by exposing them to those who might become purchasers, and that if the liquors were deposited where their presence could not be known to the public, the jury could not find upon such state of facts alone an illegal keeping, although the defendant did keep and intend to sell them; and ruled that, if the liquors were kept in the tenement, and at the time to which the evidence related, for the purpose of being sold when occasion or opportunity offered, the defendant might be convicted. The conviction on this state of facts was sustained.[2]

On a trial for the illegal keeping of intoxicating liquors, with intent to sell, a conviction was sustained on evidence that in the

[1] Com. v. Sisson, 126 Mass. 48.

[2] Com. v. Fraher, 126 Mass. 56.

defendant's dwelling-house, where he kept boarders, were a barrel of ale on tap, several bottles containing liquor, an ale-pump, tumblers, a strainer, bowls and dishes; and that in a shed adjoining the house there was an empty ale-barrel.[1]

§ 1521. The day averred in the indictment is immaterial. Proof of any other day, prior to the finding of the bill, is enough.[2] Time is immaterial.

One who is tried on several complaints, charging him with unlawful sales of intoxicating liquors to the same person on different days, and convicted upon evidence sufficient to prove only one such sale, may be sentenced on any of the complaints, and have a new trial on the others.[3] A single act of sale constitutes the offence.[4]

§ 1522. If the proof shows the sale of an illegal amount, it is no variance if such amount does not correspond with that laid in the indictment.[5] Measure is immaterial.

§ 1523. The measure or amount of liquor sold may be inferentially shown.[6] Whether a sale is consummated is to be inferred from facts.[7] To be inferentially shown.

§ 1524. Two persons may be jointly guilty, and if so jointly convicted of the offence of retailing spirits.[8] Sales may be joined.

§ 1525. It is erroneous to admit evidence of a greater number of offences than there are counts in the indictment,[9] unless to prove *scienter* or *quo animo*.[10] Only offences charged to be proved.

[1] Com. *v.* Levy, 126 Mass. 240.

[2] U. S. *v.* Riley, 5 Blatch. C. C. 204; Com. *v.* Carroll, 15 Gray, 409. See Com. *v.* Wood, 4 Gray, 11. See, generally, Whart. Crim. Pl. & Pr. § 120. But "on or about" a day is insufficient. See Whart. Crim. Pl. & Pr. § 125.

[3] Com. *v.* Remby, 2 Gray, 508. See Com. *v.* Walton, 11 Allen, 238; Koch *v.* State, 32 Oh. St. 353.

[4] Elam *v.* State, 26 Ala. 48; McPherson *v.* State, 54 Ala. 221.

[5] State *v.* Moore, 14 N. H. 451 (citing Stark. on Ev. 1539); Windsor *v.* Com. 4 Leigh, 680; Brock *v.* Com. 6 Leigh, 634. See supra, § 1514.

[6] Scott *v.* People, 25 Tex. (Suppl.) 168.

[7] R. *v.* Denham, 35 Up. Can. (Q. B.) 508; Gorsuth *v.* Butterfield, 2 Wis. 237. Supra, § 1520.

[8] Com. *v.* Griffin, 3 Cush. 523. See Com. *v.* Cook, 12 Allen, 542. Only one need be convicted. State *v.* Simmons, 66 N. C. 622; State *v.* Caswell, 2 Humph. 399.

In Maine two persons may be jointly indicted, one for maintaining a liquor nuisance under R. S. c. 17, § 2, and the other for aiding in its maintenance, under § 5 of the same chapter. State *v.* Ruby, 68 Me. 543.

[9] Hodgman *v.* People, 4 Denio, 235; Stockwell *v.* State, 27 Oh. St. 563.

[10] Com. *v.* White, 15 Gray, 407; Pearce *v.* State, 40 Ala. 720. Whart. Crim. Ev. § 31.

§ 1526. The requiring of a bill of particulars, on the trial of an indictment for being a common seller of intoxicating liquors, is within the discretion of the presiding judge; but his refusal to require one is not subject to exception.[1]

Bill of particulars may be required.

§ 1527. Proof that the defendant during part of the time embraced in an indictment for being a common seller of intoxicating liquors, was authorized to sell, or that on certain occasions he refused to sell, is not an answer to the whole indictment.[2]

Partial license no defence.

§ 1528. The provision of the Massachusetts Stat. 1835, c. 215, s. 34, that in prosecutions for the sale of spirituous and intoxicating liquors, delivery in or from any building or place, other than a dwelling-house, "shall be deemed *primâ facie* evidence of a sale, and be punishable as such sale," is constitutional, and applies to all cases of such prosecutions; but the presumption is liable to be rebutted by attendant circumstances, or other facts.[3]

Statutory presumption as to sale.

XI. PENAL RESPONSIBILITY OF VENDEE.

§ 1529. Is the vendee of spirituous liquors, illegally sold, penally responsible? Remembering that all accessaries to misdemeanors, and all persons participating in the commission of misdemeanors, are principals, our first impression would be in the affirmative. Closer study, however, greatly qualifies this conclusion. The sale of spirituous liquor, it must be remembered, is not a misdemeanor *per se*, any more than is the sale of meat. When, however, the sale of liquor is unlicensed, then it is indictable, just in the same way as the sale of meat, when unwholesome, is indictable. To make, therefore, a purchaser in either case a principal, his intention in purchasing must have been to have promoted the selling of unwholesome meat, or of illicit liquor. But an ordinary purchaser, without special proof of *scienter* and intent, cannot be charged with this. Consequently an ordinary purchaser cannot be charged as a principal in the offence. Hence an ordinary pur-

Vendee may be called as witness.

[1] Com. v. Wood, 4 Gray, 11; State v. Bacon, 41 Vt. 526; Whart. Cr. Pl. & Pr. § 702.

[2] Com. v. Putnam, 4 Gray, 16.

[3] Com. v. Wallace, 7 Gray, 222.

chaser may be compelled to answer under oath as to whether he made the purchase.[1]

XII. CONSTITUTIONALITY OF LAWS RESPECTING.

License laws to be strictly construed.

§ 1530. Legislative zeal has led to provisions in this relation which have not infrequently provoked grave constitutional issues. Of these it is at present possible only to notice a few results. It will be generally conceded that an act directing the forfeiture of intoxicating liquors without process of law is unconstitutional, on account of its summary and arbitrary disregard of the ordinary safeguards of trial.[2] In Texas it has been ruled that an act is unconstitutional which provides that the indictment need not negative license.[3] A similar decision was made in Maine, as to a statute which provided that a form of complaint for keeping with intent to sell should be good, without averring to whom the sale was to be made.[4] In Vermont a contrary decision has been pronounced as to a statute providing that it shall be sufficient to allege "that the respondent became a dealer in intoxicating liquors without having license therefor."[5] In Massachusetts, as has just been seen, a statute declaring that delivery is *primâ facie* evidence of sale has been declared constitutional.[6]

So far as concerns the general question, laws which "assume to regulate only, and to prohibit sales by other persons than those who should be licensed by the public authorities, ... are but the ordinary police regulations such as the State may make in respect to all classes of trade or employment."[7] But statutes which undertake altogether to prohibit the manufacture and sale of intoxicating drinks as a beverage have been held, by a majority of the judges of the Supreme Court of the United States,

[1] Supra, § 179; Hill *v.* Spear, 50 N. H. 254; State *v.* Rand, 51 N. H. 361; Com. *v.* Downing, 4 Gray, 29; Com. *v.* Willard, 22 Pick. 476. Doran's case, 2 Parsons, 467; and State *v.* Bonner, 2 Head, 135, were under statutes making vendee specially responsible, in which case he cannot be compelled to answer criminating questions. See Whart. Crim. Ev. § 468.

[2] Fisher *v.* McGirr, 1 Gray, 1. See Greene *v.* Briggs, 1 Curtis C. C. 311. Compare Life of Curtis, ii. 191.

[3] Hewitt *v.* State, 25 Tex. 722; State *v.* Horan, 25 Tex. (Suppl.) 271.

[4] State *v.* Learned, 47 Me. 426.

[5] State *v.* Comstock, 27 Vt. 553.

[6] Com. *v.* Wallace, 7 Gray, 222.

[7] Cooley's Const. Limit. 581.

to prohibit the sale of imported liquors in their original packages, and hence to conflict with the Constitution of the United States.[1] It is otherwise when the original package is broken for use or retail. It was also held that a law of New Hampshire was not void which punished the sale in that State of gin bought in Boston, notwithstanding the gin was in the cask in which it was imported.[2]

[1] License Cases, 5 How. 512, 574, 631.

[2] Ibid.

"It would seem, from the views expressed by the several members of the court in these cases, that the state laws known as Prohibitory Liquor Laws, the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the power of Congress to regulate commerce, and to levy imposts and duties. And it has been held that they are not void, because tending to prevent the fulfilment of contracts previously made, and thereby violating the obligation of contracts. People *v.* Hawley, 3 Mich. 330; Reynolds *v.* Geary, 26 Conn. 179.

"The same laws have also been sustained, when the question of conflict with state constitutions, or with general fundamental principles, has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. Com. *v.* Kendall, 12 Cush. 414; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Howe, 13 Gray, 26; Santo *v.* State, 2 Iowa, 202; One House *v.* State, 4 Greene (Iowa), 172; Zumhoff *v.* State, Ibid. 526; State *v.* Donehey, 8 Iowa, 396; State *v.* Wheeler, 25 Conn. 290; Reynolds *v.* Geary, 26 Conn. 179; Oviatt *v.* Pond, 29 Conn. 479; People *v.* Hawley, 3 Mich. 330; People *v.* Gallagher, 4 Mich. 244; Jones *v.* People, 14 Ill. 196; State *v.* Prescott, 27 Vt. 194; Lincoln *v.* Smith, Ibid. 328; Gill *v.* Parker, 31 Vt. 610. Compare Beebe *v.* State, 6 Ind. 501; Meshmeier *v.* State, 11 Ind. 484; Wynehamer *v.* People, 13 N. Y. 378." See also State *v.* Allmond, 2 Houst. 612; 1 Green's C. R. 304. "In Reynolds *v.* Geary, 26 Conn. 179, it was held that the state law forbidding suits for the price of liquors sold was to be applied to contracts made out of the State, and lawful where made.

"It has also been held competent to declare the liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram shop on the same ground. One House *v.* State, 4 Greene (Iowa), 172. See also Lincoln *v.* Smith, 27 Vt. 328; Oviatt *v.* Pond, 29 Conn. 479; State *v.* Robinson, 33 Me. 568; License Cases, 5 How. 589. But see Wynehamer *v.* People, 13 N. Y. 378; Welch *v.* Stowell, 2 Doug. (Mich.) 332.

"And it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare

XIII. UNITED STATES REVENUE LICENSE.

§ 1531. A license to retail liquors under the United States revenue laws, sustained by proof of payment of the revenue tax, is no defence to a prosecution under the state law for the illegal sale of intoxicating liquor.[1]

that it exceeded the proper province of police regulation. Hibbard *v.* People, 4 Mich. 125; Fisher *v.* McGirr, 1 Gray, 1. But see Meshmeier *v.* State, 11 Ind. 484; Wynehamer *v.* People, 13 N. Y. 378.

"Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offence; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day; and the very building in which he lives and conducts the business, which to that moment was lawful, becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, they address themselves exclusively to the legislative wisdom." Cooley's Const. Lim. 582 *et seq.*

See, generally, State *v.* Lovell, 47 Vt. 493; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Fredericks, 119 Mass. 199; State *v.* Wheeler, 25 Conn. 290; State *v.* Wilcox, 42 Conn. 364; Metrop. Board *v.* Barrie, 34 N. Y. 657; People *v.* Commis. 59 N. Y. 92; Fell *v.* State, 42 Md. 71; Jones *v.* People, 14 Ill. 196; Streeter *v.* People, 69 Ill. 595; State *v.* King, 37 Iowa, 462; Rohrbacker *v.* Mayor, 51 Miss. 735; Hurl, ex parte, 49 Cal. 557.

As to "local option" see Com. *v.* Weller, 14 Bush, 218; State *v.* Cooke, 24 Minn. 247.

[1] Com. *v.* McNamee, 113 Mass. 12; Com. *v.* Sanborn, 116 Mass. 61.

CHAPTER XXV.

RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

I. Unlawful Assembly.
Unlawful assembly is an assembly threatening a tumultuous disturbance of the public peace, § 1535.
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Rout is attempt at riot, § 1536.
III. Riot.
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Otherwise as to wearing dangerous weapons with violent language, § 1553.
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V. Power of Magistrate in dispersing.
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VI. Disturbance of Meetings.
Such disturbance indictable, § 1556.
VII. Wearing Concealed Weapons.
Indictable by statute, § 1557.
VIII. Military Drilling, § 1558.

I. UNLAWFUL ASSEMBLY.

§ 1535. An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

Unlawful assembly is an assembly threatening a tumultuous disturbance of public peace.

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.[1] In determining the question of terror, it has been said that the jury are to consider whether rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done.[2] An unlawful assembly does not in itself involve any overt act. If overt acts of violence are attempted, the offence is a rout; if such acts of violence are executed, the offence is a riot.

II. ROUT.

§ 1536. A rout is an attempt at riot made by an unlawful assembly. Such preparatory steps must have been taken as would lead, if carried out, to a riot. At least three persons are essential to constitute the offence.[3]

Rout is attempt at riot.

[1] The definition in the text is taken from the Draft Report of the English Commissioners of 1879. See article on "Riot," &c., Am. Law Mag. for July, 1844; 2 West. L. J. 49; R. *v.* Hunt, 1 Russ. on Cr. 388; R. *v.* Hunt, 3 B. & A. 566; R. *v.* Hughes, 4 C. & P. 373; R. *v.* Birt, 5 C. & P. 154; R. *v.* Neale, 9 C. & P. 431; 4 Penn. L. J. 31. For an exposition of the difference between unlawful assembly and riot see R. *v.* Kelly, 6 Up. Can. (C. P.) 372, where a conviction of riot was set aside on proof that there was no overt act of public disorder.

Sir J. Stephen thus illustrates the topic in the text:—

"Sixteen persons meet for the purpose of going out to commit the offence of being by night, unlawfully, upon land, armed in pursuit of game. This is an unlawful assembly. R. *v.* Brodribb, 6 C. & P. 571. The meeting in this case was in a private house.

"A., B., and C. meet for the purpose of concerting an indictable fraud. This, though a conspiracy, is not an unlawful assembly. (Submitted.) Compare 1 Hawk. P. C. 515.

"A., B., and C., having met for a lawful purpose, quarrel and fight. This, though an affray, is not an unlawful assembly. 1 Hawk. P. C. 514.

"A large number of persons hold a meeting to consider a petition to parliament, lawful in itself; but they assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary firmness and courage in the neighborhood to apprehend a breach of the peace. This is an unlawful assembly. Redford *v.* Birley, 3 Starkie (N. P.), 79; R. *v.* Vincent, 9 C. & P. 91." Steph. Dig. art. 71.

[2] R. *v.* Vincent, 9 C. & P. 91.

[3] 1 Hawk. P. C. c. 65, § 1.

III. RIOT.

§ 1537. A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object.[1] If the object be to overthrow the government, then the offence, if there be adequate overt acts, is treason.[2] If it be to resist a statute, but not to overthrow government, then, in the United States (however it may be in England), the offence is not treason, though it may be riot or a high misdemeanor.[3]

Riot is an executed tumultuous disturbance of public peace.

§ 1538. An unlawful assembly is an essential prerequisite;[4] but an assembly meeting lawfully can be converted into one that is unlawful, by the concerted determination, however sudden, to effect an unlawful purpose.[5]

Must be a mutual unlawful purpose.

§ 1539. It must be also shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror,[6] such as being armed, making threatening speeches, turbulent gestures, or the like.[7] If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit.[8] But by proof of concert to do an unlawful act, followed by the doing such act so tumultuously as to strike terror into third parties, the charge of riot may be sustained.[9]

Must be likely to inspire terror.

The indictment at common law must aver "to the terror of the people."[10]

§ 1540. Even a lawful act may be done in such a violent and tumultuous manner as to be a riot.[11] No body of men is justified

[1] 1 Hawk. P. C. c. 65, s. 1; 1 Russ. on Cr. 265; State *v.* Connolly, 3 Rich. 337; State *v.* Sumner, 2 Spear, 599. Under Indiana statute see Kiphart *v.* State, 42 Ind. 273. Under Georgia statute see Rachels *v.* State, 51 Ga. 374.

[2] See infra, § 1795.

[3] See infra, § 1796.

[4] State *v.* Stalcup, 1 Ired. 30.

[5] 1 Hawk. c. 65, s. 3; State *v.* Snow, 18 Me. 346; State *v.* Cole, 2 McCord, 117. Supra, § 1535.

[6] R. *v.* Hughes, 4 C. & P. 373.

[7] 1 Hawk. c. 65, s. 5.

[8] Ibid.; Dalt. c. 137; State *v.* Straw, 33 Me. 554.

[9] State *v.* Brazil, Rice R. 258; Penns. *v.* Cribs, Addis. 277; Douglass *v.* State, 6 Yerg. 525.

[10] Infra, § 1546.

[11] Kiphart *v.* State, 42 Ind. 273.

in asserting legal rights by violence; and a lawful assembly becomes unlawful whenever the members agree to resort to violent and tumultuous measures to achieve even a lawful end.[1] If the object, however, of the assembly be lawful, it in general requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty than if the object were unlawful; and it has even been held that if, for the purpose of abating a public nuisance, a number of persons assemble with spades, iron crows, and the proper tools for that purpose, and abate it accordingly, without doing more, it is no riot,[2] unless there be threatening language or other misbehavior, in apparent disturbance of the peace.[3]

Riotous to tumultuously assert legal rights.

§ 1541. It is not necessary, under the English statute, that the Riot Act should be read to constitute a riot. Before the proclamation can be read, a riot must exist; and the effect of the proclamation will not change the character of the meeting, but makes those guilty of a felony who do not disperse within one hour after the proclamation is read.[4]

Riot Act need not be read.

§ 1542. In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may *primâ facie* be inferred to be participants;[5] and the obligation is cast upon a person so circumstanced, in his defence, to prove his actual non-interference.[6] Eminently is this the case when the sheriff of a county, the mayor of a city, or any other known public conservator of the peace, has repaired, in the discharge of his duty, to the scene of tumult, and there commanded the dispersion of the unlawful riotous assembly, and demanded the assistance of those present

All present and not suppressing are participants.

Darst *v.* People, 51 Ill. 286; State *v.* York, 70 N. C. 66.

[1] 1 Hawk. c. 65, s. 7; State *v.* Snow, 18 Me. 346; State *v.* Brook, 1 Hill (S. C.), 362; Douglass *v.* State, 6 Yerg. 525. See also the charge of Judge King, in 4 Penn. L. J. 33. For distinctive Missouri law on this point see Smith *v.* State, 14 Mo. 147.

[2] Dalt. c. 137. Supra, §§ 97 *a*, 1410.

[3] Ibid. See State *v.* Hughes, 72 N. C. 25; State *v.* Blair, 13 Rich. 93. Supra, §§ 97 *a*, 1426.

[4] R. *v.* Fursey, 6 C. & P. 81; State *v.* Russell, 45 N. H. 83.

[5] R. *v.* Howell, 9 C. & P. 437; Roberts *v.* O'Conner, 33 Me. 496; State *v.* Bugbee, 22 Vt. 32; Com. *v.* Hadley, 11 Met. 66; Williams *v.* State, 9 Mo. 268. See supra, §§ 205 *et seq.*; Whart. Cr. Pl. & Pr. §§ 16, 17.

[6] R. *v.* Howell, 9 C. & P. 437. See *contra*, State *v.* McBride, 19 Mo. 239. See fully Whart. Cr. Pl. & Pr. § 16.

to aid in its suppression. After such proclamation there can be no neutrals. The line is then drawn between those for and those against the maintenance of order, and with the forces of the one or the other, all who see fit to remain must promptly arrange themselves. "Those who continue looking on while the active rioters are resisting the public authorities, and daringly moving on to the consummation of their designs of destruction; who refuse to join with the authorities, and witness their defeat without striking one blow in aid of outraged law, are just as much rioters as those most active in the work of violence; and, in such circumstances, it will avail them nothing that they appear only passive lookers on, instead of active rioters and incendiaries." Thus, in the Philadelphia riots of May, 1844, after the rioters had completed their work of mischief in Kensington, they proceeded to the city and collected in front of St. Augustine's Church, threatening its destruction. "The mayor of the city, placing himself at the head of a police force, repaired to the scene of violence. The keys of the church were delivered to him by that part of the congregation who previously had them in charge, and the church was left in the immediate custody of the law, no attempt or effort being made to otherwise defend it. The mayor seeing no disposition in the multitude to retire, addressed them, urging and commanding them to depart in peace, and soliciting all good citizens to unite with him in accomplishing this much to be desired object. He was received with insults and imprecations, and actually assaulted, his officers were forcibly driven off, and the church, which had been given up to his protection, and that of the law, was set fire to and consumed." It was held, that under such circumstances all who composed the assembly, whether active participants or apparent spectators, if not assisting the officers of the law, were equally rioters.[1] And this applies even to those who leave the scene before the riot is consummated, if they countenanced any preliminary movements inciting to the subsequent riotous acts.[2]

§ 1543. While, however, it would be unwise for the court, in

[1] Per King, J., 4 Penn. L. J. 33; Penn. v. Cribs, Addis. 277; Williams v. State, 9 Mo. 268; Whart. Cr. Pl. & Pr. §§ 16, 17.

[2] R. v. Sharpe, 3 Cox C. C. 288; State v. Blair, 13 Rich. 93.

laying down the law to the jury, to relax the principle that presence implies participancy, it is not improper, should a conviction take place upon evidence of presence alone, for the court, in grading its sentence, to recollect — to use the pertinent language of Judge Daly, on the trial of the Astor Place riots — "so strong is human curiosity, that even well-disposed citizens are attracted by the excitement. To courageous minds there is a fascination in the very presence of danger, and a distinction must be carefully drawn between those who were mere lookers-on and those who were stimulating and encouraging the riot."[1] And the inference of consent, to be drawn from presence, may be rebutted by showing that the defendant was in the assembly with no purpose common to the rioters.

Defendant's purpose may be material.

§ 1544. To constitute a riot it is not necessary that there should be actual fright to the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened.[2]

Enough if individuals only are terrified.

§ 1545. Three or more persons must be concerned to constitute the offence of riot;[3] but it is not necessary to prove any previous concert; it is sufficient if they are together, and appear to act with the same view of disturbing the public peace.[4] If several are indicted for a riot, and there is proof only against one, and the offence is not laid and proved to have been committed with persons unknown, all must be acquitted.[5] But if after conviction of four for riot

Three or more persons necessary to offence.

[1] 2 West. L. J. (N. S.) 75.

[2] State v. Alexander, 7 Rich. 5; State v. Jackson, 1 Speers, 13.

[3] R. v. Ellis, Holt, 636; Com. v. Edwards, 1 Ashm. 46, and cases cited; State v. Thackam, 1 Bay, 358; State v. Calder, 2 McCord, 462, and cases hereafter cited to this section.

In some States by statute two are enough to constitute the offence. See Rachels v. State, 51 Ga. 374.

[4] State v. Straw, 33 Me. 554; State v. Calder, 2 McCord, 462. See Whart. Cr. Pl. & Pr. §§ 305, 755; and see supra, § 1388.

[5] 2 Hawk. c. 47, s. 8; R. v. Scott, 3 Burr. 1262; 1 W. Bl. 291, 350; R. v. Sudbury, 1 Ld. Raym. 484; 2 Salk. 593; Penn. v. Huston, Addis. 334; State v. Alison, 3 Yerg. 428; Turpin v. State, 4 Blackf. 72; State v. Bailey, 3 Blackf. 209; Brazil v. State, Rice R. 257; State v. Pugh, 2 Hayw. 55; State v. O'Donald, 1 McCord, 532; Maxwell v. Carlile, 1 McCord, 534. Whart. Cr. Pl. & Pr. § 305.

two die, judgment will not be arrested as to the two.[1] And there may be a conviction of a single person of the offence if the indictment aver and the proof show other persons engaged.[2]

Indictment must contain proper technical terms.

§ 1546. The indictment must aver an unlawful assembly as the preliminary to the riot;[3] and unlawful acts (*e. g.* breach of the peace, terror, &c.), as its consequent.[4]

It is not necessary to allege any other unlawful purpose than that of disturbing the peace;[5] nor, if a breach of the peace accompanied with violence and terror produced thereby be alleged, are any particular technical words necessary.[6] And where there is no specification of the particular breaches of the peace committed, it is enough to aver that the defendants unlawfully, riotously, and routously assembled together, to disturb the peace of the State; and being so assembled did make great noise, riot, tumult, and disturbance, &c., to the great terror and disturbance of the people.[7]

"*Terror*," however, *in terrorem populi*, is essential to an indictment for riot; though without it there may be a conviction of an unlawful assembly.[8]

[1] R. *v.* Scott, 3 Burr. 1262; 1 W. Bl. 350.

[2] Com. *v.* Berry, 5 Gray, 93.

[3] State *v.* Stalcup, 1 Ired. 30.

[4] R. *v.* Gulston, 2 Ld. Raym. 1210.

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and, at the ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except in the words "*po. se*," and "guilty," written on the indictment, over the names of the convicted defendants. It was held that this was no proof of an assault as against the present defendants, and that they could not be convicted at common law of the riot only, as the indictment did not conclude *in terrorem populi*. R. *v.* Hughes, 4 C. & P. 373.

And it is held that if persons are charged with a riot, and cutting down fences, and the indictment does not conclude *in terrorem populi*, they cannot on that indictment be convicted at common law of a riot, but may be convicted of an unlawful assembly. R. *v.* Cox, 4 C. & P. 538.

[5] State *v.* Renton, 15 N. H. 169.

[6] State *v.* Russell, 45 N. H. 83; State *v.* Langford, 3 Hawks, 381; State *v.* Voshall, 4 Ind. 589; McWaters *v.* State, 10 Mo. 167; though see Whiteside *v.* People, Breese, 3; State *v.* York, 70 N. C. 66.

[7] State *v.* Brazil, Rice R. 257.

[8] R. *v.* Hughes, 4 C. & P. 373; R. *v.* Woolcock, 5 C. & P. 516; R. *v.* Cox, 4 C. & P. 538; *contra*, to effect that terror may be dispensed with, when riotous facts are alleged, Com. *v.* Runnels, 10 Mass. 518; State *v.* Whitesides, 1 Swan, 88.

"Force and arms" need not be used in immediate relation to the acts of violence committed, especially when the term is applied to the rioters assembling.[1]

A bald allegation of only two defendants is fatal.[2] But three persons need not be mentioned by name as rioters. It is enough if there be two persons named, who are alleged to have acted as co-defendants and co-rioters with certain other persons whose names are to the jury unknown.[3] When there are such unknown persons, the fact should be averred.[4]

Each defendant may be severally tried.[5]

§ 1547. Riotous assemblages at independent periods, though connected with the defendants, cannot be put in evidence for the purpose of proving disorderly and illegal purposes on the part of the defendants, unless there be proof laid of system.[6]

System must be proved in order to introduce other riots.

§ 1548. To connect a riot with a particular defendant the defendant's presence must be first put in evidence;[7] though this rule may be departed from when from its size, and the number engaged, it is more convenient that the general character of the riot should be first proved.[8]

Order of evidence is at discretion of court.

§ 1549. "An assembly of three or more persons, for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house, in order to commit any indictable offence therein, is not unlawful."[9] A man is justified in collecting his friends to protect his house when attacked, and they may even for this purpose use necessary force;[10] but it is said he cannot in this way defend his "close," or property other than his house.[11]

Force excusable in defence of home.

[1] Com. v. Runnels, 10 Mass. 518. See Whart. Cr. Pl. & Pr. § 271.

[2] Whart. Cr. Pl. & Pr. §§ 305–6.

[3] Thayer v. State, 11 Ind. 287; State v. Egan, 10 La. An. 698; State v. Brazil, Rice R. 257. Supra, § 1545; Whart. Cr. Pl. & Pr. §§ 104, 111.

[4] State v. O'Donald, 1 McCord, 532.

[5] Whart. Cr. Pl. & Pr. § 309; Com. v. Berry, 5 Gray, 93.

[6] State v. Renton, 15 N. H. 169. See Whart. Crim. Ev. § 32.

[7] Nicholson's case, 1 Lew. C. C. 300.

[8] See R. v. Cooper, 1 Russ. on Cr. 405.

[9] Draft Report Eng. Commis. 1879.

[10] See supra, § 502; infra, § 1556. State v. Huntley, 3 Ired. 418.

[11] R. v. Bangor (Bishop), 1 Russ. on Cr. 388. See supra, §§ 95, 502.

§ 1550. On the ordinary indictment for riot the defendant may be convicted of an unlawful assembly;[1] and, when the indictment contains the proper averments, of an assault and battery,[2] or of any unlawful malicious disturbance of another's rights.[3]

On indictment for riot may be conviction of lesser offence.

IV. AFFRAY.

§ 1551. Any affray is the fighting of two or more persons in some public place, to the terror of the citizens.[4] There is a difference between a sudden affray and a sudden attack. An affray is a mutual contest, suddenly excited, in which all parties take apparently equal part, without any apparent intention to do any great bodily harm.[5]

Affray is a sudden "free fight."

§ 1552. It is said that no quarrelsome or threatening words whatsoever amount to an affray;[6] and that no one can justify laying his hands on those who shall quarrel merely with angry words without coming to blows.[7] To an affray more or less publicity is essential; and it has been held that a quarrel, however animated, out of the hearing or seeing of any except the parties concerned, cannot be said to be to the terror of the people, and hence is not an affray.[8] So a casual quarrel by three strangers in a private field will not amount to an affray, as the place of the fight must be in public view;[9] though it is otherwise as to an enclosure visible from a

Quarrelsome words no affray.

[1] R. v. Hughes, 4 C. & P. 373; R. v. Cox, 4 C. & P. 538; State v. Brazil, Rice R. 258; Com. v. Kinney, 2 Va. Cas. 139. See Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

[2] Shouse v. Com. 5 Barr, 83. See Whart. Cr. Pl. & Pr. § 384.

[3] Campbell v. Com. 59 Penn. St. 266; and see U. S. v. Hart, 1 Peters C. C. 390; Com. v. Hoxey, 16 Mass. 385; Penn. v. Morrison, Addis. 274; Com. v. Taylor, 5 Binney, 281; State v. Townsend, 2 Harring. 543; State v. Jasper, 4 Dev. 323, and cases cited supra, § 17.

[4] 4 Black. Com. 144; 3 Inst. 158; Com. v. Runnels, 10 Mass. 518; Duncan v. Com. 6 Dana, 295; Simmons v. Com. 6 J. J. Mar. 615; State v. Simpson, 5 Yerg. 356; but see Childs v. State, 15 Ark. 204.

[5] State v. Toohey, 2 Rice's Dig. 104.

[6] O'Neill v. State, 16 Ala. 65.

[7] 1 Hawk. c. 63, s. 2. Supra, § 619.

[8] Ibid. s. 2.

[9] Skains v. State, 21 Ala. 218; Taylor v. State, 22 Ala. 15; Hawkins v. State, 13 Ga. 322; Wilson v. State, 3 Heisk. 278. See State v. Perry, 5 Jones (N. C.), 9, where it was held that if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty of an affray, though he may be unable to return the blow; and see State v. Sumner, 5 Strobh. 53.

thronged thoroughfare.[1] Nor is a party who uses insulting language to an assailant, but offers no resistance to an attack made upon him by the latter, guilty of an affray.[2]

But wearing dangerous weapons may, with violent language, suffice.

§ 1553. But although no bare words, in the judgment of law, carry therein so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where words naturally provoking violence are used as part of a mêlée;[3] and where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is generally prohibited by statute. For by statute 2 Edw. 3, c. 3, in force in several of the United States, it is enacted, "that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in an affair of peace, nor go nor ride armed by night or day in fairs or markets, or in the presence of the king's justices or ministers, or elsewhere, upon pain to forfeit their armor to the king, and their bodies to prison, at the king's pleasure."[4] A man cannot excuse wearing such armor in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that no one incurs the penalty of the statute for assembling his neighbors and friends in his own house, to resist those who threaten to do him any violence therein, because a man's house is his castle.[5]

As will presently be seen, the wearing concealed weapons is in many States indictable by statute.[6]

[1] Carwile *v.* State, 35 Ala. 392.

[2] O'Neill *v.* State, 16 Ala. 65; State *v.* Simpson, 5 Yerg. 356.

[3] State *v.* Perry, 5 Jones (N. C.), 9. See State *v.* Lanier, 71 N. C. 288.

[4] "Every one commits a misdemeanor who goes armed in public, without lawful occasion, in such a manner as to alarm the public." Steph. Dig. C. L. art. 68, citing 2 Edw. 3, c. 3.

[5] Supra, § 1549; 1 Hawk. c. 63, s. 8; State *v.* Huntley, 3 Ired. 418; but see State *v.* Simpson, 5 Yerg. 356; and see a note on this topic in 1 Green's C. R. 481. See infra, § 1157.

[6] Infra, § 1557.

§ 1554. In the indictment, "to the terror of the people" must be averred. An indictment charging that two persons with force and arms, &c., "did make an affray, by fighting," has been held to be sufficiently certain and definite.[1] In such an indictment an assault and battery may be averred and proved.[2]

Indictment must contain technical averments.

V. POWER OF MAGISTRATES IN DISPERSING.[3]

§ 1555. An unlawful assembly may be dispersed by a magistrate whenever he finds such an interference necessary to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders, and bind them to their good behavior, or imprison them if they do not offer adequate bail, but he may authorize others to arrest them by a bare verbal command without any other warrant; and all citizens present whom he may invoke to his aid are bound to respond promptly to his requisition, and support him in maintaining the peace.[4] A justice of the peace

Magistrate may disperse unlawful assembly.

[1] State *v.* Benthal, 5 Humph. 519.

[2] Childs *v.* State, 15 Ark. 204.

[3] See Whart. Cr. Pl. & Pr. §§ 1–17.

[4] 1 Hawk. P. C. c. 63, s. 16; Lamb. 272; Dalt. Co.; 4 Penn. Law J. 31; R. *v.* Pinney, 3 B. & Ad. 947; 5 C. & P. 254; R. *v.* Neale, 9 C. & P. 431. Infra, § 1584; Whart. Cr. Pl. & Pr. §§ 10 *et seq.*

In R. *v.* Pinney, supra, it was held that a magistrate, in such cases, is bound to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence if he fails in his duty.

It is not a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law.

It is true, he is not bound to head the special constables, or to arrange and marshal them, as this is the duty of the chief constables.

But magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 Will. 4, c. 41, unless it is proved that information was laid, before them, on oath, of a riot having occurred or being expected.

Nor is a magistrate chargeable with neglect of duty for not having called

either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assembly, subjects himself to indictment and conviction for a criminal misdemeanor.[1] Where, however, as was laid down in the Lord George Gordon riots by Lord Loughborough, and as has been held in this country in riots of similar type,[2] an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the rioters, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves; and whatever is honestly done by them in the execution of that object will be supported and justified by the common law. It is the duty of every citizen to make such endeavor, and when the rioters are engaged in the commission of high crimes, the law protects other persons in repelling them by force.[3]

out the *posse comitatus* in case of a riot, if he has given the people generally reasonable and timely warning to come to his assistance.

When he calls upon soldiers to attack a mob and suppress a riot he is not bound to go with them; it is enough if he gives them his authority.

He may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. R. *v.* Kennet, 5 C. & P. 282, n.

He may, at the time of a riot, repel force by force, before the reading of the proclamation from the Riot Act.

To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove — first, that the constable saw a breach of the peace committed; secondly, that there was a reasonable necessity for calling on the defendant for his assistance; and, thirdly, that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of rioters the single aid of the defendant would not have been of any use. R. *v.* Brown, C. & M. 314.

[1] State *v.* Littlejohn, 1 Bay, 316. Infra, § 1584.

[2] Annual Register, 1780, 277; 3 Penn. Law Jour. 345; 4 Ibid. 31.

[3] Resp. *v.* Montgomery, 1 Yeates, 419. Wh. Cr. Pl. & Pr. §§ 10 *et seq.*

For forms of indictment, see Wh. Precedents, as follows:—

(849.) General frame of indictment for riot.
(850.) Affray at common law.
(851.) Unlawful assembly and assault.
(852.) Riot and hauling away a wagon.
(853.) Riot, in breaking the windows of a man's house.
(854.) Riot, and disturbing a literary society, under Ohio statute.
(855.) Riot, and pulling down a dwelling-house in the possession of prosecutor.
(856.) Riot, and false imprisonment.
(857.) Disturbing the peace, &c., on

VI. DISTURBANCE OF MEETINGS.

§ 1556. For three or more persons to attempt to break up a meeting, religious or secular, is indictable either as a riot, or as an attempt at riot. There may be cases, however, in which the number joining in the disturb-

Such disturbance indictable.

land occupied by the United States for an arsenal.

(858.) Disturbance of election in Massachusetts.

(859.) Another form for same.

(860.) Interrupting a judge of the election in Pennsylvania.

(861.) Disturbing a religious meeting, under the Virginia statute.

(862.) Same, under Rev. Sts. Mass. c. 130, § 171.

(863.) Disturbing a congregation worshipping in a church, at common law.

(864.) Disturbing same in a dwelling-house.

(865.) Dressing in woman's clothes, and disturbing a congregation at worship.

(866.) Going armed, &c., to the terror of the people, at common law.

(867.) Carrying a dangerous weapon, under Indiana Rev. Stat.

(868.) Maliciously firing guns into the house of an aged woman, and killing a dog belonging to the house.

(869.) Breach of peace, in Vermont.

(870.) Refusing to aid a constable in quelling a riot.

In the Edinburgh Review for October, 1879 (p. 535), in an article on the Draft Code of 1879, we have the following: —

"The supposed uncertainty of the present law has worked great injustice upon those whose duty required them to use force in order to maintain the queen's peace. A soldier, it has been thought, had the disagreeable alternative of being punished for disobedience of orders if he refused to fire when ordered by his commanding officer, or of being tried before a judge and jury for murder if he did fire and killed somebody. The unwillingness of the guardians of peace to take upon themselves responsibility in such circumstances, however natural, has often been injurious to the State. In the Lord George Gordon riots, the military were at first supposed to be useless, as they dared not fire till an hour after the Riot Act had been read; and George III. and the Attorney General Wedderburn have been praised, the latter for boldly refuting this erroneous doctrine, and the former for his determination, as chief magistrate of the kingdom, to see that other magistrates acted in accordance with Wedderburn's exposition of the law. In the Bristol riots of 1832 the country was more excited by the trials of the mayor and of Colonel Brereton for neglect of duty than by the riots themselves. Yet the law as expounded was clear enough. The Chief Justice, Tindal, in charging the grand jury in the Bristol case, declared that —

"'By the common law, every private individual may lawfully endeavor, of his own authority and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power; he may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and pre-

ance is not large enough to constitute a riot, or there may be cases in which it is desirable, for statutory or other reasons, to

vent those whom he may see coming up from joining the rest; and not only has he authority, but it *is his bounden duty*, as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace. Such was the opinion of all the judges in the reign of Queen Elizabeth in a case called the "Case of Arms," although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices and sheriffs or other ministers of the king in doing this.'

"Chief Justice Tindal, approving this, adds: —

"'But if the occasion demands immediate action, and no opportunity is given for obtaining the advice or sanction of the magistrate, *it is the duty of every subject* to act for himself and on his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured whatever is honestly done by him in the execution of that object will be supported and justified by the common law.'

"The Code, section 49, enacts that '*every one* is justified in using force necessary to suppress a riot, provided the force used is not disproportioned to the danger to be apprehended from the continuance of the riot.' The four following sections will henceforth regulate the law under which magistrates and soldiers in difficult circumstances have to act. Thus, by section 50, every sheriff, mayor, magistrate, justice of the peace, and peace officer is justified in using such force as he honestly and reasonably believes to be necessary 'to suppress a riot, and as is not disproportioned to the danger' which he reasonably 'believes to be apprehended from the continuance of the riot.' By section 57, every one acting in obedience to such orders is justified in obeying them 'unless such orders are manifestly unlawful. . . . . *It shall be a question of law whether any particular order is manifestly unlawful or not.*' That is to say, this all-important question is one which in each case must be decided by the judge or judges, not by the jury.

"Section 52 provides that —

"'Everybody, whether subject to military law or not, who, in good faith and on reasonable and probable grounds, believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is justified in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.'

"Section 53 –

"'Every one who is bound by military law to obey the lawful command of his superior officer is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful. It shall *be a question of law* whether any particular order is manifestly unlawful or not.'

"But *the law* has just been declared; its applicability in each case depends upon what are *the facts of that case.* Is it the intention that the judge, not the jury, should decide these? A soldier ordered to fire does so, and is

prosecute for the distinctive offence of improperly interfering with the right belonging to all citizens to meet together for religious or secular conference. There can be no question that the violent interference with this right is indictable at common law, and that any conduct which wantonly disturbs persons so meeting is in like manner indictable.[1] But obstreperous singing by a member of a congregation, so as to disturb the worship of others, is not an indictable offence, if conscientious.[2] There must be an intent lawlessly and recklessly to disturb the meeting; unintentional absurdity provoking laughter in others is not such a disturbance.[3] A variance between the disturbance alleged and that proved may be fatal.[4] It was held an indictable

put on his trial for the murder of the man shot. The prosecution must show that the order to fire was 'manifestly unlawful.' This will apparently depend upon whether the facts proved bring the case within section 52. Surely in such a case the facts only, and not the law, would be in doubt; and hence, in accordance with constitutional usage, a jury should decide. Section 88 provides for the due reading of the Riot Act, requiring rioters to disperse, and making non-dispersal an offence punishable with penal servitude for life."

[1] Supra, §§ 17, 1535. State v. Yeaton, 53 Me. 125; Com. v. Jeandell, 2 Grant (Pa.), 506; Lindenmuller v. People, 33 Barb. 548; Com. v. Dupuy, Brightly, 44; Kidder v. State, 58 Ind. 68; State v. Cole, 2 M'Cord, 117; Hunt v. State, 3 Tex. Ap. 116. As to disturbing theatres see 2 West. Law J. (N. S.) 75; R. v. Forbes, 1 Cr. & D. 157. As to schools, see State v. Gager, 28 Conn. 232.

For rulings affirming constitutionality of statutes, and interpreting the same, see State v. Leighton, 35 Me. 195; Com. v. Porter, 1 Gray, 476; Wright v. Com. 77 Penn. St. 470; State v. Ringer, 6 Blackf. 109; Williams v. State, 3 Sneed, 313; State v. Hinson, 31 Ark. 638; Com. v. Daniels, 2 Va. Cas. 402; State v. Stubblefield, 32 Mo. 563. See 20 Alb. L. J. 124, 125.

[2] State v. Linkhaw, 69 N. C. 214. See 21 Alb. L. J. 42, for similar case. In State v. Ramsay, 78 N. C. 448, it was held indictable for an expelled member of a congregation to persist in addressing it in a disorderly manner when duly forbidden so to do. In Holt v. State, 57 Tenn. 192, dancing in a noisy way outside of the door, so as to disturb the congregation, was held indictable. Compare Wollingsworth v. State, 3 Sneed, 313; Brown v. State, 46 Ala. 175.

See State v. Doty, 5 Cold. 33, as to requisites of indictment for disturbing meeting-house; overruled in Warren v. State, 3 Heisk. 269.

Whether noise at a camp-meeting, after the religious services for the day are over, is indictable, see Jenning's case, 3 Grat. 624; State v. Edwards, 32 Mo. 548; and see 20 Alb. L. J. 124.

[3] State v. Linkhaw, 69 N. C. 214; Brown v. State, 46 Ala. 175.

[4] State v. Sherrill, 1 Jones (N. C.), 508.

offence to interfere with negroes, even when in a state of slavery, when engaged in legitimate public worship.[1]

VII. WEARING CONCEALED WEAPONS.

§ 1557. In many States, statutes prohibiting the wearing of concealed weapons have been pronounced to be constitutional.[2] In such cases, to sustain a conviction, the weapon must be concealed,[3] and must be carried as "arms."[4] In several jurisdictions travellers are excepted from the operation of the statute.[5] There must be reasonable ground for expecting an attack, to constitute a defence;[6] though mere casual transportation, not for aggressive use, is not within the statute.[7] The indictment must conform to the statute.[8] The burden of establishing the exceptions within the statutes is on the defence.[9]

Indictable by statute.

VIII. MILITARY DRILLING.

§ 1558. While the right to organize and drill military companies is secured to the people of the States under the Constitution of the United States, the mode of organizing and exercising such companies may be preserved by State legislation.[10]

Right to organize military companies secured under Constitution.

[1] Bell *v.* Graham, 1 N. & McC. 278.

[2] Wright *v.* Com. 77 Penn. St. 470; Andrews *v.* State, 3 Heisk. 165; overruling Aymette *v.* State, 3 Humph. 154; State *v.* Buzzard, 4 Pike (Ark.), 18; Fife *v.* State, 31 Ark. 455; Cockburn *v.* State, 24 Tex. 394; State *v.* Clayton, 41 Tex. 410; Nunn *v.* State, 1 Kelly, 243; State *v.* Mitchell, 3 Blackf. 229; Walls *v.* State, 7 Blackf. 572; Owen *v.* State, 31 Ala. 387. See Hill *v.* State, 53 Ga. 472. See *contra*, Bliss *v.* Com. 2 Litt. 90. For common law, see supra, § 1553.

[3] Jones *v.* State, 51 Ala. 16; Waddell *v.* State, 37 Tex. 355.

[4] Page *v.* State, 3 Heisk. 198.

[5] Lockett *v.* State, 47 Ala. 42.

[6] Bailey *v.* Com. 11 Bush, 688; Chatteaux *v.* State, 52 Ala. 388; Carroll *v.* State, 28 Ark. 99.

[7] Waddell *v.* State, 37 Tex. 355; Maxwell *v.* State, 38 Tex. 112.

[8] Hill *v.* State, 53 Ga. 472; State *v.* Carter, 36 Tex. 89; State *v.* Clayton, 41 Tex. 410.

[9] Wiley *v.* State, 52 Ind. 516; Whart. Crim. Ev. § 128. As to who is a "traveller," under the statute, see Gholson *v.* State, 53 Ala. 519.

[10] In People *v.* Affeldt, Circ. Ct. Ill. 1879, 1 Crim. Law Mag. 97, it was held that the act of Congress entitled "An act more effectually to provide for the national defence, by establishing a uniform militia throughout the United States," is a full exercise of the constitutional power of Congress to regulate, organize, arm, and discipline the militia, covering this entire field of legislation, and excludes all conflicting state legislation upon the same subject matter. It was conse-

quently ruled that the provisions of section 5 of the Military Code of Illinois, that "It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms, in any city or town of this State, without the license of the governor thereof," are in conflict with said act of Congress, and void.

In Dunn *v.* People, the same question was brought before the Supreme Court of Illinois, and the constitutionality of the militia law was sustained by a majority of the court. From the opinion of the court by Scott, J., the following extracts are taken: —

"The first proposition submitted against the validity of the act known as the 'Military Code' is, that the power of organizing, arming, and disciplining the militia, being confided by the Constitution of the United States to Congress, when Congress has acted upon the subject, and passed a law to carry into effect the constitutional provision, such action excludes the power of legislation by the State on the same subject. This is not, in our judgment, an accurate — certainly not a full — expression of the law. Two things must be assumed to maintain this proposition: 1. That the constitutional provision in respect to the militia is of that character it can only be exercised by Congress, and that any state legislation would of necessity be inconsistent with federal legislation under that article of the Constitution. 2. That the Constitution itself places a restriction, either directly or by implication, upon all state legislation in respect to the militia. Neither assumption is warranted by any fair construction of the Constitution of the United States, nor by contemporaneous explanations by writers whose authority is to be respected, nor by any subsequent judicial determinations with which we are familiar.

"Article 1, section 8, division 15, confers power on Congress 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.' Neither this clause nor any other of the Constitution inhibits, in express terms, state legislation in regard to the militia. Our understanding is, it is a matter upon which there may be concurrent legislation by the States and Congress. No doubt it is true that some powers granted to Congress are exclusive, and exclude by implication all state legislation in regard to the subject of such powers. It is not true, however, that all powers granted to Congress are exclusive unless when concurrent authority is reserved to the States. Examples of concurrent authority readily suggest themselves. Congress has power under the Constitution 'to levy and collect taxes, duties, imposts, and excises;' but it has never been supposed that grant of power was a restriction upon the States 'to levy and collect taxes' for state purposes. Such a construction would destroy all state governments, by taking from them the means of maintaining order or protecting life or property within their jurisdiction. Other examples might be mentioned, but this is sufficient for our present purpose.

"It might be well in this connection to call to mind, that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States,

respectively, or to the people.' The power of state governments to legislate concerning the militia existed, and was exercised, before the adoption of the Constitution of the United States, and, as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress, enacted in pursuance of the Constitution of the United States. The section of the Constitution cited does not confer on Congress unlimited power over the militia of the States; it is restricted to specific objects enumerated, and for all other purposes the militia remain, as before the formation of the Constitution, subject to state authorities. Nor is there any warrant for the proposition that the authority a State may exercise over its own militia is derived from the Constitution of the United States. The States always assumed to control their militia, and, except so far as they have conferred upon the national government exclusive or concurrent authority, the States retain the residue of authority over the militia they previously had and exercised, and no reason exists why a State may not control its own militia within constitutional limitations. Its exercise by the States is simply a means of self-protection.

"'The States are forbidden to keep 'troops' in time of peace, and of what avail is the militia to maintain order and to enforce the laws in the States unless it is organized? 'A well-regulated militia' is declared to be 'necessary to the security of a free State.' The militia is the dormant force upon which both the national and state governments rely 'to execute the laws, ... suppress insurrections and repel invasions.' It would seem to be indispensable there should be concurrent control over the militia in both governments, within the limitations imposed by the Constitution. Accordingly, it is laid down by text-writers and courts, that the power given to Congress to provide for organizing, arming, and disciplining the militia is not exclusive. It is defined to be merely an affirmative power, and not incompatible with the existence of a like power in the States; and hence the conclusion is, the power of concurrent legislation over the militia exists in the several States with the national government. . . . .

"Nor do we think the reservation of the power 'to the States respectively, the appointment of the officers, and the authority to train the militia according to the discipline prescribed by Congress,' as suggested by counsel, puts any restriction upon the States in respect to concurrent legislation concerning the militia. Mr. Justice Story, in speaking of that clause of the Constitution, says, 'that reservation constitutes an exception merely from the power given to Congress' to provide for organizing, 'arming, and discipling the militia,' and is 'a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers.' Obviously, that is all that clause of the Constitution does mean, and we adopt as our own view what that able jurist added: 'The exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia.'

"But the principal argument is made on the other branch of the case — viz., that the act of the general assembly 'to provide for the organization of the state militia' is repugnant to the laws of Congress on the same subject, constitutionally enacted, and is for that reason null and void. Wherein the 'spirit, intent, and effect

of the Illinois statutes is in conflict with the provisions of the act of Congress,' as insisted on in the argument, is not apparent. Neither in the title of the act, nor in any part of its provisions, does it appear the object of the state law is in conflict with the national law. The first section declares 'that all able-bodied male citizens of the State, between the ages of eighteen and forty-five years, except such as are expressly exempted by the laws of the United States, or are state or county officers, or on account of their profession or employment are exempted by the commander-in-chief, shall be subject to military duty, and designated as the "Illinois State Militia."' That is in exact conformity with the Act of Congress of 1792, and what more could the legislature do? The concession of counsel is, that an act of the state legislature to organize the state militia, if in conformity with the act of Congress on that subject, 'is inoperative and amounts to nothing,' and if it differs from the act of Congress, it is 'equally inoperative and void.' Assuming that to be a correct proposition, — and if it is confined to the organization and arming of the militia called to enter the actual service of the United States, it is the law, — then the act of the legislature is as comprehensive as it could constitutionally be made, so far as it purports to declare who shall constitute the whole body of the militia under the act of Congress.

"The second section is a declaration of legislative intention on the part of the State to coöperate with the general government in the matter of enrolling and organizing the entire militia of the State when it shall become necessary 'to execute the laws, suppress insurrection, or repel invasion, or quell riots, or when a requisition shall be made by the President of the United States for troops,' and should be read in the light of facts historically known to all. . . . . As the laws now are, it is improbable the entire militia of the States will ever be enrolled or summoned for discipline under the act of Congress, unless some great impending danger shall make it necessary. When such an exigency does occur, this statute makes it the duty of the governor, as commander-in-chief, by proclamation, to require the enrolment of the entire militia of the State, or such portion thereof as shall be necessary, in the opinion of the President, and to appoint enrolling officers, and to make all orders necessary to aid in the organization of the militia. Such a law is not in contravention of the Act of 1792, or with any other act of Congress in relation to the organization of the militia, but is rather in aid of all such laws." . . . .

CHAPTER XXVI.

COMPOUNDING CRIMES.

Compounding crime is agreeing not to prosecute it, § 1559. | Not necessary that principal should have been convicted, § 1560.

§ 1559. COMPOUNDING a crime is committed by agreeing not to prosecute it, when the party so agreeing knows it to have been committed.[1] The offence was held complete where a party received a note, signed by a person guilty of larceny, as a consideration for non-prosecution.[2] The bare taking of one's goods back again, however, or receiving reparation, is no offence, unless some favor is shown, or agreed to be shown, to the thief.[3] The offence has been sometimes, though erroneously, limited to compounding felonies. But to agree, for a valuable consideration, not to prosecute any misdemeanor, is indictable at common law, or under 18 Eliz. c. 5,[4] which in the United States may be viewed as part of the common law. But the rule does not, under 18 Eliz. c. 5, apply to offences cognizable solely before magistrates,[5] nor, even supposing the statute be absorbed in the common law, does it preclude cases of private settlement of misdemeanors purely private, such as assaults and private cheats. To facilitate such settlements statutes have been passed in some jurisdictions.

Compounding crime is agreeing not to prosecute it.

[1] 1 Hawk. P. C. c. 59, s. 5; 4 Blac. Com. 133. See, for form, Wh. Prec. 895, 896; and see State *v.* Duhammel, 2 Harring. 532.

[2] 1 Camp. 45; 2 M. & S. 201; Com. *v.* Pease, 16 Mass. 91. See Butt, ex parte, 13 Cox C. C. 374.

[3] R. *v.* Stone, 4 C. & P. 379; 1 Hawk. P. C. c. 59, s. 7; Plumer *v.* Smith, 5 N. H. 553.

[4] Johnson *v.* Ogilby, 3 P. Wms. 277; Com. *v.* Pease, 16 Mass. 91. See R. *v.* Stone, 4 C. & P. 379; R. *v.* Daly, 9 C. & P. 342; Brery *v.* Levy, 1 W. Bl. 443; R. *v.* Gotley, R. & R. 84; R. *v.* Best, 9 C. & P. 368; 2 Mood. C. C. 125; Dwight *v.* Ellsworth, 9 Up. Can. (Q. B.) 540. This, however, does not include suits for penalties. R. *v.* Crisp, 1 B. & Ald. 282.

[5] R. *v.* Crisp, 1 B. & Ald. 282.

§ 1560. On an indictment for compounding a felony, the record of the conviction is *primâ facie* evidence of the felony, but not conclusive as against the compounder.[1] But it is not necessary that the principal offender should have been convicted to sustain an indictment for compounding the offence.[2]

Not necessary that principal should have been convicted.

[1] State *v.* Williams, 2 Harring. 532.

[2] People *v.* Buckland, 13 Wend. 592. To indictments for compounding, the ordinary rules as to repugnancy apply. State *v.* Dandy, 1 Brev. 395.

CHAPTER XXVII.

MISCONDUCT IN OFFICE.

I. Offices based of Natural Law.
Responsibility of parent for child, and husband for wife, § 1563.
Misconduct must result in exposure of person neglected, § 1564.
Party charged must have means to discharge office, § 1565.
Person neglected must be incapable of self help, § 1566.
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Officer disobeying law is indictable, § 1568.
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And so of neglect of justices in suppressing riot, § 1584.
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I OFFICES BASED EXCLUSIVELY ON NATURAL LAW.

Responsibility of parent for child, and husband for wife.

§ 1563. The first relationship that engages us, when we take up the question of penal responsibility for neglect, is that of parent and child and of husband and wife.[1] In many cases, as will presently be seen, such

[1] In February, 1880, a case was tried in England, which brings into conspicuous prominence the distinctions taken in the text. The defendant, James Lewis Paine, was convicted of the murder of a young lady named

responsibility is imposed on those having special charge of others. But the duty of a parent to provide for a helpless child,

Maclean, with whom he was living in illicit intercourse. Miss Maclean, the daughter of an English officer of high rank, had been seduced by Paine, and was placed by him in lodgings as his wife, a marriage ceremony being pretended, he, however, having a wife still alive. Miss Maclean acquired habits of intemperance, which he encouraged, so that from time to time she took large quantities of spirits, to which her death was by the medical witnesses attributed. It was alleged, on the part of the defence, however, that the drink was administered to her at her own wish; and the question arose, therefore, whether his relation to her was such as bound him to protect her from the danger to which this habit exposed her. On these points Hawkins, J., in a charge, marked throughout by great ability, thus spoke:—

"Mere ordinary negligence or want of care and precaution will not be sufficient. The negligence which will make the man amenable for the crime of manslaughter must be culpable, wicked negligence, and that must be established before a jury can find him guilty of manslaughter. If that is not made out, the law does not punish the man. He may have been guilty of want of care, but unless that is criminal want of care he cannot be convicted. . . . . There must be some active steps taken. I do not mean in the shape of action, but an active step must be taken. If I were sitting at a table, for instance, where was a man not under my care, and I saw him take up a tumbler of poison, I should not be guilty of a crime if I did not stop him, because I am under no obligation to protect a stranger who chooses of his own free will to take his own life. And again, now, to illustrate the distinction between administering and merely sitting by. Supposing I were to go to a person and take a tumbler up to him, knowing that it contained poison, and were to say to him, 'Now, drink this, it will do you good,' and that man fell dead in consequence, I should be guilty of his murder, because my active encouragement induced him to do that which possibly otherwise he would not have done. When you are considering whether or not a man has induced another to take that which is deleterious to him, you must consider the state and condition of health and mind of the person upon whom the crime is said to have been perpetrated. Take, for instance, the case of a lunatic or an idiot being induced to take something which killed him. Then I will take another case —that in which a person is so enfeebled that the slightest suggestion will operate in influencing him to take that which will kill. In those cases the person so influencing would be guilty of a crime in the eye of the law. . . . . If such a person is in care of another, and obligation and duty such as that is cast upon him, it seems to me that if by gross, culpable, and wicked negligence he omits to protect the person against what she could have protected herself when strong, if that is done, and done with the intention to take life, the attorney general, and rightly too, says it is murder; but if there is a mere reckless inattention to wants of the individual, that would be manslaughter, and not murder, in the eye of the law." London Times, Feb. 27, 1880.

The defendant was convicted of manslaughter, and was sentenced to penal servitude for life.

and of a husband to provide for a helpless wife, lies at the foundation of society, and is wrought up with the law's chief sanctions.[1]

The progress of juridical reasoning in this respect is not without practical interest. According to the old Roman law, the father was privileged, under certain circumstances, to kill or abandon his new-born child. One of the first results of the establishment of Christianity was the enactment, under Constantine, of a law making the exposure of infants a Parricidium. In A. D. 374, under Valentinian and Valens, the offence was made capital. "Si quis necandi infantis piaculum aggressus sit, sciat se capitali supplicio esse puniendum."[2] The canon law went still further, placing the rule in its present shape, by making it penal for those having special charge of any helpless persons (Languidi) to expose them to bodily suffering.[3] This view has been accepted in the modern German codes,[4] which make penal the exposure (Aussetzung) of helpless persons, whether the helplessness results from infancy, sickness, or old age. Other motives may concur in the act, — the getting rid of a child, — the absorption of its patrimony, — the alteration of a line of descent; but such motives are not necessary to constitute the offence, and do not give it its peculiar type. The offence is complete when the offender (who has at the time the special charge of the dependent person) exposes the latter in a helpless state. The offender must actually abandon the person so left, and this without the intention of returning. To sustain an indictment, however, for misconduct of this class, the following conditions must exist: —

§ 1564. No matter how gross may be the mismanagement, for instance, by a parent of a child, the law does not interpose by way of punishment, unless physical injuries ensue. Erroneous moral and religious teaching,

Misconduct must result in exposure of the person

[1] R. *v.* Renshaw, 2 Cox C. C. 285; R. *v.* Shepherd, 9 Cox C. C. 123; L. & C. 147; R. *v.* Ryland, L. R. 1 C. C. 99; 11 Cox C. C. 569; R. *v.* Cooper, 1 Den. C. C. 459; R. *v.* Hogan, 2 Den. C. C. 277; 5 Cox, 255; and see cases cited supra, §§ 132, 374, 631 *et seq.* For a statutory prosecution see Shannon *v.* People, 5 Mich. 36.

[2] See L. 2. Cod. de infant. expos.; and see Nov. 153.

[3] C. ix. de infantibus et *languidis* expos.

[4] See Berner, Lehrbuch, § 178.

neglected to physical danger.

no matter how pernicious may be the consequences, it is not within the province of penal justice to correct. Jurisdiction such as this over parental teaching could not be assumed by the courts without arrogating to themselves the control of every household in the land, and destroying both home freedom and home responsibility. It is different, however, when the neglect exhibits itself in physical injury to the person thus neglected. Then (*e. g.* in case of a child's suffering from want of food or clothes through a parent's neglect) there is a *primâ facie* case for an indictment,[1] although, as has been seen,[2] conscientious error in this respect may be at common law a defence.

Party charged must have had means to discharge the office.

§ 1565. If the parent, however, has no means to support his children, he is not indictable for his omission to do so,[3] though where a poor law agency exists, he is indictable if he neglects to apply for aid to such agency. The indictment must aver either means in the parent, or neglect to apply for poor law aid.[4]

Person neglected must have been incapable of self-help.

§ 1566. It may be that an indictment would lie against a father for turning out his children as mendicants on the community. But in such case he would be indicted as principal in a nuisance or cognate misdemeanor, and not for neglect in supplying food and clothes. Whenever the child is capable of obtaining these for himself, then the father's special duty, on which alone an indictment can be based, ceases.[5] The person neglected must be helpless to sustain an indictment for such neglect.[6]

Neglect is a substantive offence.

§ 1567. If a parent neglects a child, leaving him without food, and the child in consequence dies, the parent is indictable for killing the child.[7] But if the child is rescued, or relieved by other parties, after injury sustained, the parent's criminal amenability is not thereby cancelled.[8] Expos-

[1] See supra, §§ 331, 359.

[2] Supra, § 336.

[3] R. *v.* Pelham, 8 Q. B. 959; R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569.

[4] R. *v.* Mabbett, 5 Cox C. C. 339; R. *v.* Chandler, Dears. C. C. 453; R. *v.* Rugg, 12 Cox C. C. 16.

[5] See Anon. 5 Cox C. C. 279. Supra, §§ 331, 339.

[6] R. *v.* Shepherd, 9 Cox C. C. 123; L. & C. 147.

[7] R. *v.* Bubb, 4 Cox C. C. 455. Supra, § 335.

[8] See, however, R. *v.* Philpott, 6 Cox C. C. 140.

ing to physical danger a helpless person, by those having such person in charge, is indictable if health be in any way injured.[1] But to maintain such an indictment some overt act of exposure and consequent injury must be proved.[2]

II. STATUTORY OFFICES.

1. *Disobedience.*

Officer disobeying law, indictable.

§ 1568. Excluding from consideration those higher offices of which impeachment is the exclusive mode of penal prosecution, and those cases of which military or naval courts have exclusive control, it is clear that when the law imposes on an individual a ministerial office, then disobedience to the requirements of that law in respect to such office is indictable.[3]

[1] R. *v.* Friend, R. & R. 20; R. *v.* Squire, 1 Russ. on Cr. 80, 678; R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569. See fully supra, §§ 152–7, 331–359.

For statutory offence see R. *v.* White, L. R. 1 C. C. 311; 12 Cox C. C. 83.

[2] Sir J. Stephen (Dig. C. L. art. 264) states the law as follows: —

"Every one commits a misdemeanor who, being the parent, or master, or mistress of any child of tender years, and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other necessaries for such child, so as thereby to injure the health of such child.

"Friend's case, R. & R. 20; R. *v.* Ryland, L. R. 1 C. C. 99. It is necessary to prove actual injury to the child's health; R. *v.* Phillpot, Dears. 179, and R. *v.* Hogan, 2 Den. 277; and that the defendant actually has, not merely that he might get from the relieving officer, the means of providing for the child. R. *v.* Chandler, Dears. 453."

Under the statute 31 & 32 Vict., making penal the exposing of children, we have the following: —

"B., A.'s wife, living apart from A., leaves C., their child, nine months old, lying in the road outside A.'s door. A., knowing its position, lets it lie there from 7 P. M. till 1 A. M. A.'s mother, D., knowing the child is there, and being in her house, acts in the same way as A. A. has abandoned and exposed C., but D. has not, as she was under no legal obligation to take charge of C. R. *v.* White, L. R. 1 C. C. 311.

"A. sends B., her child, five weeks of age, packed up in a hamper as a parcel, by railway to C., B.'s putative father, giving directions to the clerk to be very careful of the hamper, and send it by the next train. The child reaches C. safely. A. has abandoned and exposed B. R. *v.* Falkingham, L. R. 1 C. C. 222."

[3] R. *v.* James, T. & M. 300; 2 Den. C. C. 1; 3 C. & K. 167; R. *v.* Tracy, 6 Mod. 30; People *v.* Coon, 15 Wend. 277; Resp. *v.* Montgomery, 1 Yeates, 419; Cross *v.* State, 1 Yerg. 261; State *v.* Buxton, 2 Swan, 57; State *v.* McEntyre, 3 Ired. 171; State *v.* Leigh,

§ 1569. In the indictment the disobedience must be specially set forth. This must be done by averment of the facts from which the conclusion of law may be drawn. It is not enough to set forth merely the conclusion of law.[1]

Indictment must be special.

§ 1570. As is elsewhere fully shown,[2] it is not necessary when an officer is charged with misconduct to prove that he was duly commissioned. It is enough to show that he claimed to fill the particular office. Nor is it necessary in the indictment to do more than aver that he acted as officer of the particular class, or that he took the office upon himself,[3] one of which averments is essential.[4] An indictment averring a due election, and the taking of the office, has been held enough.[5] On an indictment for omission to act, however, he may set up that he had no legal authority to do the act omitted.[6]

Appointment need not be averred or proved.

§ 1571. To subject the superior officers of government, upon

3 Dev. & B. 127; State *v.* Maberry, 3 Strobh. 144; R. *v.* Bennett, 21 Up. Can. (C. P.) 238.

In R. *v.* James, supra, which was an indictment against a minister of the Church of England for refusing to solemnize marriage between parties having a lawful right to be married by him, the conviction, according to Sir J. Stephen (Dig. art. 122), "was quashed on the narrow ground that the parties did not sufficiently tender themselves for marriage. The objection that the offence was only an ecclesiastical one was taken, but no judgment was delivered on it. A refusal to bury would probably stand on the same footing. By 1 Edw. 6, c. 1, it is enacted that a minister 'shall not, without lawful cause, deny' (the sacrament) 'to any person that will devoutly and humbly desire it.' An indictment for such a denial would be incongruous and indecent, but it is difficult to find any definite legal ground for saying that it would not lie." See Jenkins *v.* Cook, L. R. 1 P. D. 80.

A sheriff who refuses to execute a criminal condemned to death commits a misdemeanor. R. *v.* Antrobus, 2 Ad. & El. 788.

A coroner who refuses to take an inquest on a body, after notice that it is lying dead in his jurisdiction, commits a misdemeanor. 2 Hale P. C. 58.

[1] State *v.* Shields, 8 Blackf. 151; State *v.* Longley, 10 Ind. 482; Dixon *v.* State, 4 Blackf. 312; State *v.* Jones, 10 Humph. 41.

[2] Infra, § 1589; Whart. Crim. Ev. §§ 164, 833.

[3] See, generally, R. *v.* Verelst, 3 Camp. 432; R. *v.* Borrett, 6 C. & P. 124; R. *v.* Gordon, 2 Leach C. C. 581; State *v.* Roberts, 52 N. H. 492; Com. *v.* Fowler, 10 Mass. 290; Com. *v.* McCue, 16 Gray, 226; Nelson *v.* People, 23 N. Y. 293; People *v.* Cook, 8 N. Y. 67; State *v.* Sellers, 7 Rich. 368; and cases cited infra, § 1589.

[4] Com. *v.* Grove, 7 Phila. 660.

[5] Edge *v.* Com. 7 Barr, 275.

[6] Com. *v.* Rupp, 9 Watts, 114, explained in Com. *v.* Grove, 7 Phila. 660.

whose uninterrupted presence at the helm the safety of the State depends, to indictments for misconduct in office, would be injurious to the body politic; and consequently in such cases impeachment is the sole instrument of penal revision. This principle applies to the executive officers of government so far as such officers are clothed with discretion; to the legislature,[1] and clearly to the judges of all courts of record, so far as concerns their judicial as distinguished from their ministerial acts.[2] Justices of the peace, however, are subject to indictment for all acts not committed within the range of judicial discretion.[3] Such is clearly the case with regard to merely ministerial officers,[4] and with regard to jurors.[5] But a ministerial officer is not indictable for the malfeasance in office of a deputy.[6]

Impeachable officers not subject to indictment.

2. *Oppression, Fraud, and Corruption.*

§ 1572. It is a misdemeanor at common law for a public officer, in the exercise or under color of exercising the duties of his office, to abuse any discretionary power with which he is invested by law, from an improper motive. In such cases the existence of the motive may be inferred either from the nature of the act or from the circumstances of the whole case.[7] Whether it is otherwise of an illegal exercise of

Oppression by officer is indictable.

[1] See Lord Denman's Life for a discussion of the prerogative of the legislature in Hansard's case; and see Hiss *v.* Bartlett, 3 Gray, 468; Story Const. § 794. But it is said to be doubtful whether impeachment lies against a legislator. See Cooley's Story, § 795.

[2] R. *v.* Webb, 1 W. Bl. 19; Houlden *v.* Smith, 14 Q. B. 841; Pratt *v.* Gardner, 2 Cush. 63; Yates *v.* Lansing, 9 Johns. 395; People *v.* Coon, 15 Wend. 277; People *v.* Norton, 7 Barb. 477; Lange *v.* Benedict, 17 Alb. L. J. 234; State *v.* Odell, 8 Blackf. 396; State *v.* Gardner, 2 Mo. 28. See also Bacon's Misc. 17; Story Const. §§ 793–5; 4 Bl. Com. 121. Even private arbitrators are protected. Pappa *v.* Rose, L. R. 7 C. P. 32, 525; Tharsis Co. *v.* Loftus, L. R. 8 C. P. 1.

[3] R. *v.* Borron, 3 B. & Ald. 432; R. *v.* Smith, 7 T. R. 80; R. *v.* Cozens, 2 Doug. 426; R. *v.* Jones, 9 C. & P. 401; People *v.* Norton, 7 Barb. 477; Wilson *v.* Com. 10 S. & R. 373; Resp. *v.* Montgomery, 1 Yeates, 419; Com. *v.* Callaghan, 2 Va. Cas. 460; Com. *v.* Alexander, 4 Hen. & Mun. 522; State *v.* Gardner, 2 Mo. 28.

[4] Com. *v.* Shed, 1 Mass. 228; Com. *v.* Mitchell, 3 Bush, 39; McBride *v.* Com. 4 Bush, 331; Wickersham *v.* People, 1 Scam. 129.

[5] Penn. *v.* Keffer, Addis. 290.

[6] Com. *v.* Lewis, 4 Leigh, 664.

[7] Stephen's Dig. C. L. art. 119, citing R. *v.* Wyatt, 1 Salk. 380; R.

authority caused by a mistake as to the law, made in good faith, is hereafter discussed.

So is fraud.

§ 1572 *a*. It is also indictable for a public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.[1]

[*For Bribery see infra*, § 1858.]

And so is corruption.

§ 1572 *b*. Public officers, including justices of the peace, are indictable for corruption if they accept or offer to accept, under color of office, any money or other benefit calculated in any way to influence their official course, or any money or valuable thing which is not due at the time when it is taken.[2] Nor is it necessary that any improper act on the part of

v. Bembridge, 3 Doug. 327, and 22 St. Tr. 1–159; Bacon, Abridgment, tit. "Office and Officer," N. State *v*. Wedge, 24 Minn. 158.

The following illustrations are given by Sir J. Stephen: —

"A. and B., justices of the peace, refuse licenses to the keepers of public-houses because they refuse to vote as the justices wish. A. and B. commit oppression. R. *v*. Williams, 2 Burr. 1317.

"A., a justice of the peace, sends his servant to the house of correction for being saucy, and giving too much corn to his horses. A. commits oppression. R. *v*. Okey, 8 Mod. 46.

"A., a justice, acting as such, orders B. to be whipped, without such proof or information as the law requires. A. commits oppression. 2 Ch. Cr. L. 286."

That an honest mistake in the exercise of jurisdiction, or of other functions, by a justice of the peace may be a defence, see R. *v*. Jackson, 1 T. R. 653; R. *v*. Badger, 4 Q. B. 468. Supra, § 87.

[1] Steph. Dig. Cr. L., art. 121. Of this the following illustrations are given: —

"A., an accountant in the office of the paymaster general, fraudulently omits to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums to himself after the time when they ought to have been paid to the Crown. A. commits a misdemeanor. R. *v*. Bembridge, 3 Dougl. 327.

"A., a commissary general of stores in the West Indies, makes contracts with B. to supply stores, on the condition that B. should divide the profits with A. A. commits a misdemeanor. R. *v*. Jones, 31 St. Tr. 251."

[2] R. *v*. Beale, cited in R. *v*. Gibbons, 1 East, 183; 4 Bl. Com. 139; Com. *v*. Callaghan, 2 Va. Cas. 460; People *v*. Walsh, 65 Ill. 58; Ballard *v*. Pope, 3 Up. Can. (Q. B.) 320. Infra, § 1858.

Lord Macaulay, in his Report on the Indian Code, thus writes: —

"We have not made the taking of presents by public functionaries gener-

the officer should follow. It is enough if he corruptly agree to open himself to improper influence.[1] Corrupt motive is essential

ally penal; because, though we think that it is a practice which ought to be carefully watched and often severely punished, we are not satisfied that it is possible to frame any law on the subject which would not be rendered inoperative either by its extreme severity or by its extreme laxity. Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No government would wish to prevent persons intimately connected by blood, by marriage, or by friendship, from rendering services to each other; and no tribunals would enforce a law which should make the rendering of such services a crime. Where no such close connection exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding. But a lime, a wreath of flowers, a slice of betel nut, a drop of attar of roses poured on his handkerchief, are presents which it would in this country be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents of more value than these may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed according to the usages of hospitality are presents of this description. It would be unreasonable to treat a man in office as a criminal for drinking many rupees-worth of champagne in a year at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment.

"It appears to us, therefore, that the taking of presents where a corrupt motive cannot be proved ought not in general to be a crime cognizable by the courts."

The English Commissioners, in the Draft Code of 1879 (p. 87), report the following as a codification in this respect of the common law: —

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to fourteen years' penal servitude, who,

"(*a*) Holding any judicial office, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself or any other person any money or valuable consideration, office, place, or employment whatever, on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity; or

"(*b*) Corruptly gives or offers to any person holding any judicial office, or to any other person, any money or valuable consideration, office, place, or employment whatever, on account of any such act or omission as aforesaid.

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to fourteen years' penal servitude, who,

"(*a*.) Being a justice of the peace, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to ob-

[1] Com. *v.* Chapman, 1 Va. Cas. 138; Barefield *v.* State, 14 Ala. 503; State *v.* Glascow, Conf. R. 38. See infra, § 1858.

to the offence,[1] though passion or party prejudice may constitute corruption, to which expectation of money is not essential.[2]

The sale of offices is an indictable offence under 5 & 6 Edw. 6, c. 16; if not at common law.[3] And for an officer to assign the fees of his office to another for a salary is such a sale.[4]

Indictment must be special.

§ 1573. In an indictment against an officer of justice for corrupt misbehavior in office, it is necessary that the act imputed as misbehavior be distinctly and substantially charged to have been done with knowingly corrupt, partial, malicious, or improper motives, though there are no technical words indispensably required in which the charge of corruption, partiality, and knowledge shall be made.[5] It is otherwise, however, as has been seen, in neglects, and in cases where bare acts are made indictable irrespective of intent.[6]

tain for himself or for any other person, any money or valuable consideration, office, place, or employment whatever, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any indictable offence, or to protect from detection or punishment any person having committed or intending to commit any such offence; or,

"(*b.*) Corruptly gives or offers to any such officer as aforesaid, any such bribe, advantage, or consideration as aforesaid, with any such intent as aforesaid.

"Every one charged with any offence against this section shall be bailable at discretion.

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to seven years' penal servitude, who

"(*a.*) Corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself or any other person, any money or valuable consideration whatever, on account of his having appointed to, or having procured or attempted to procure, for or in consideration that he will appoint to, or procure or attempt to procure for any person, any public office or employment; or,

"(*b.*) Corruptly gives or offers to give to any person any money or valuable consideration whatever, on any such account or consideration as aforesaid."

[1] See cases cited to § 1573; R. *v.* Jackson, 1 T. R. 653; R. *v.* Cozens, 2 Doug. 426; People *v.* Coon, 15 Wend. 277; Jacobs *v.* Com. 2 Leigh, 709; Com. *v.* Rodes, 6 B. Mon. 171.

[2] R. *v.* Brooke, 2 T. R. 190.

[3] R. *v.* Vaughan, 4 Burr. 2494; R. *v.* Pollman, 2 Camp. 229; Hopkins *v.* Prescott, 4 C. B. 578; R. *v.* Charretie, 13 Q. B. 447; Com. *v.* Callaghan, 2 Va. Cas. 460; R. *v.* Mercer, 17 Up. Can. (Q. B.) 625; which is a case of a resignation corruptly procured.

[4] R. *v.* Moodie, 20 Up. Can. (Q. B.) 389. See, generally, supra, § 1375.

[5] State *v.* Small, 1 Fairfield, 109; People *v.* Coon, 15 Wend. 277; Jacobs *v.* Com. 2 Leigh, 709; State *v.* Gardner, 2 Mo. 22; State *v.* Johnson, 2 Bay, 385; State *v.* Buxton, 2 Swan, 57. See R. *v.* Halford, 7 Mod. 193; R. *v.* Baylis, 3 Burr. 1318.

[6] Supra, § 88; infra, § 1582.

3. *Extortion.*

§ 1574. Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due,[1] or where none is yet due.[2]

Extortion is taking money unjustly by an official.

§ 1575. The summary penalties attached in each State to extortion have not generally taken away the common law remedy.[3]

Statutes do not ordi-

Where it was alleged that the party suffered to escape had been charged with falsely and fraudulently obtaining the signature of a certain person to a promissory note, by means of certain false pretences, without particularly describing the note, or averring the signature to have been obtained with the intent to cheat or defraud, &c.; it was held, that this being matter of inducement, the indictment was not objectionable in this respect. People *v.* Coon, 15 Wend. 277. In such a case it must be directly and positively charged that the offender was discharged without giving sufficient sureties, or sureties in a sufficient sum, for his appearance; it is not enough to allege that the magistrate discharged the offender upon his finding sureties in a small and trifling sum, to wit, fifty dollars. The offence cannot be charged argumentatively or inferentially. Ibid.

Indictments against supervisors, &c., for neglects as to roads, are considered supra, § 1473; infra, § 1584 *a*.

[1] See People *v.* Whaley, 6 Cow. 661; Com. *v.* Mitchell, 3 Bush, 39.

[2] 1 Hawk. c. 68, s. 1; Co. Lit. 368 *b*; Stevens *v.* Rothmel, 3 B. & B. 145; Com. *v.* Bagley, 7 Pick. 279; People *v.* Whaley, 6 Cow. 661; State *v.* Maires, 33 N. J. L. 142; Williams *v.* State, 2 Sneed, 160; Cross *v.* State, 1 Yerg. 261. In Pennsylvania there is an early case intimating that custom may sustain the demanding of fees in advance of services. Resp. *v.* Hannum, 1 Yeates, 71. But see Lincoln *v.* Shaw, 17 Mass. 410, and cases last cited; and State *v.* Vasel, 47 Mo. 416. That a *de facto* officer is so indictable see State *v.* McEntyre, 3 Ired. 171. That person acting as officer cannot deny he was such see supra, § 1570; Whart. Crim. Ev. § 833.

[3] Com. *v.* Bagley, 7 Pick. 279.

In Pennsylvania, by an act of assembly already noticed (Act of 21st March, 1806; 4 Smith, 332; Purd. 66; see supra, §§ 25 *et seq.*), it is provided that "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly, the directions of the said act shall be pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect." Under this act it was held, that as a *qui tam* action was given to an informer by the fee bill, in cases where a justice was guilty of extortion, the remedy at common law was absorbed. Com. *v.* Evans, 13 S. & R. 426. To remedy this defect, an act was passed (25th March, 1831; Pamph. 211; Purdon, 448) restoring the common law provision.

narily absorb common law.

The multitudinous statutes on this topic it is impracticable here to examine. We must content ourselves with noticing one or two points of principle.

Motive must be corrupt.

§ 1576. The taking illegal fees on the part of a public officer may often result from mistake. When the statute makes the bare act of taking an illegal fee indictable, then the defendant may be convicted, no matter what may have been his motive.[1] But to extortion at common law,

[1] State *v.* Cutter, 36 N. J. L. 125.

In State *v.* Cutter, supra, it was said by Beasley, C. J.: —

"But it is further argued on the part of the prosecution, that as the fees to which the justice was entitled are fixed by law, and as he cannot set up as an excuse for his conduct his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, *Ignorantia legis neminem excusat.* But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se*, or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offence charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry, as a fact to be found by the jury. This doctrine has often been applied to the offence of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defence if he can show, in a satisfactory manner, that being under a misapprehension as to his legal rights, he honestly believed the articles in question to be his own. R. *v.* Hall, 3 C. & P. 409; R. *v.* Reed, C. & M. 306.

"The adjudications show many other applications of the same principle, and the facts of some of such cases were not substantially dissimilar from those embraced in the present inquiry. In the case of People *v.* Whaley, 6 Cow. 661, a justice of the peace had been indicted for taking illegal fees, and the court held that the motives of the defendant, whether they showed corruption, or that he acted through a mistake of the law, were a proper question for the jury. The case in Com. *v.* Shed, 1 Mass. 228, was put before the jury on the same ground. This was likewise the ground of decision in the case of Com. *v.* Bradford, 9 Met. 268, the charge being for illegal voting, and it being declared that evidence that the de-

and under most of the statutes, corrupt motive is essential.[1] And if there be no such motive, and the money be received for

fendant had consulted counsel as to his right of suffrage, and had acted on the advice thus obtained, was admissible in his favor. This evidence was only important to show that the defendant, in infringing the statute, had done so in ignorance of the rule of law upon the subject. (See, however, infra, § 1835.) Many other cases, resting on the same basis, might be cited; but the foregoing are sufficient to mark clearly the boundaries delineated by the courts to the general rule, that ignorance of law is no defence where the mandates of a statute have been disregarded or a crime has been perpetrated.

"That the present falls within the exceptions to this general rule appears to me to be plain. There can be no doubt that an opinion very generally prevailed that magistrates had the right to exact the fees which were received by this defendant, and that they could be legally taken under similar circumstances. The prevalence of such an opinion could not, it is true, legalize the act of taking such fees; but its existence might tend to show that the defendant, when he did the act with which he stands charged, was not conscious of doing anything wrong. If a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, it would seem palpably unjust, and therefore inconsistent with the ordinary grounds of judicial action, to hold such conduct criminal, if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it. I think the defendant had the right in this case to prove to the jury that the moneys, which it is charged he took extorsively, were received by him under a mistake as to his legal rights, and that, as such evidence being offered by him was overruled, the judgment on that account must be reversed."

Bowman *v.* Blyth, 7 El. & Bl. 26 (1856), was an action against the defendant, who was a clerk to the justices of the peace, for taking illegal fees, under 26 Geo. 2, c. 14, s. 2, which enacts "that if any clerk . . . . shall, under pretence of any matter or thing done . . . . receive or demand any other or greater fee, &c., he shall forfeit," &c. The defendant contended that he received the fees "under a misapprehension that two sureties had entered into the recognizances." The plaintiff contended "that the statute prohibited absolutely the taking a greater fee . . . . and not merely the taking such greater fee with a corrupt intention." Lord Campbell, C. J., gave the opinion, in which the other justices of the Queen's Bench concurred: "On the point whether an offence has been committed by the defendant acting in ignorance of the fact, I am clearly of opinion that the complaint fails. *Actus non facit reum nisi mens sit rea.* Here the defendant, very reasonably believing that there were two sureties bound, besides the principal, has not, by making a charge in pursuance of his belief, incurred the forfeiture."

[1] Supra, § 85; Com. *v.* Shed, 1 Mass. 228; Runnells *v.* Fletcher, 15 Mass. 525; Lincoln *v.* Shaw, 17 Mass. 410; Shattuck *v.* Woods, 1 Pick. 171; Com. *v.* Bagley, 7 Pick. 279; People *v.* Coon, 15 Wend. 277; Jacobs *v.* Com.

extra work, the indictment is not sustainable at common law.[1] Corruption is to be inferred from the facts.[2]

Act must be complete.

§ 1577. A mere agreement, it is said, to pay, will not sustain a charge of extortion.[3] But if such an agreement can be made the basis of a suit, the law is otherwise.[4] And it is enough if any valuable thing is received.[5] No doubt, however, an incomplete act of extortion could be indicted as an attempt, if there be any overt act taken.[6]

All concerned are principals.

§ 1578. The offence being a misdemeanor, all concerned, if guilty at all, are guilty as principals, and may be jointly indicted. This rule results from the familiar doctrine so often announced, that in misdemeanors there are no accessaries.[7] As to the joinder of defendants, it has been said that, if there be concurrence in the extortion, the parties may be joined, though the parts assigned to each be distinct.[8]

How far indictment must be special.

§ 1579. The weight of authority in England is that the sum stated in the indictment is not material; proof of a less sum will sustain the indictment.[9] In several of the United States it has been held that the indictment must aver particularly the sum received, and how much of it, if any, was the legal charge.[10] But such precision would not seem to be necessary in North Carolina.[11]

2 Leigh, 709; State v. Gardner, 2 Mo. 22; State v. Porter, 3 Brev. 175; though see *contra*, State v. Dickens, 1 Hayw. 406; State v. Stotts, 5 Blackf. 460. Hence ignorant and honest belief that the fee is right is a defence at common law, unless such belief be negligent. Bowman v. Blyth, 7 El. & B. 26; State v. Cutter, 36 N. J. L. 125.

[1] Dutton v. City, 9 Phila. 597.

[2] Infra, § 1580.

[3] Com. v. Pease, 16 Mass. 91; Com. v. Cony, 2 Mass. 523.

[4] R. v. Burdett, 1 Ld. Raym. 148.

[5] R. v. Burdett, supra; State v. Stotts, 5 Blackf. 460.

[6] Supra, § 173.

[7] Supra, § 223.

[8] See R. v. Tisdale, 20 Up. Can. (Q. B.) 272. See, however, Wh. Cr. Pl. & Pr. § 303.

[9] R. v. Burdett, 1 Ld. Raym. 148; and see R. v. Gillham, 6 T. R. 265; R. v. Higgins, 4 C. & P. 247.

[10] People v. Rust, 1 Caines, 131; State v. Halsey, 1 South. 324; State v. Maires, 33 N. J. L. 142; State v. Coggswell, 3 Blackf. 55. That a variance in description of the money received may be fatal, see Garner v. State, 5 Yerg. 160; Johnson v. State, Mart. & Yerg. 129.

[11] State v. Dickens, 1 Hayw. 406.

Where an officer is charged with extortion, on the ground "that he oppressively sued out an execution," it is necessary that the facts which constituted the oppression should be set

"Corruptly" need not be averred if it can be supplied from other averments.[1]

4. *Negligence.*

§ 1580. Negligence in those charged with specific duties has been already considered.[2] It is important, however, to distinguish between an indictment for a crime produced by negligence, and an indictment for negligence itself. To sustain a conviction for a crime produced by negligence, a causal connection, under conditions which have been already set forth, must be established between the negligence and the crime.[3] It is otherwise when the indictment is for the negligence. Here the indictment is sustainable, if the offence be so constituted by statute, though no mischief occurred from the negligence.[4]

Need be no injury caused in cases of negligence.

§ 1581. Absence of malice is essential to the idea of negligence. Whenever there is malice, negligence ceases, and the offence becomes a malicious misdemeanor.[5]

Need not be malice.

§ 1582. A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he does not, and through mistake of law or of fact is guilty of negligence, he commits a penal offence. This seems hard law, but it is essential to the safety of the State. If an officer, enjoying the emoluments of office and wielding its occasionally vast powers, should be able to plead in defence of negligence that he mistook either law or fact, not only is there no negligence that could be punished, but ignorance and incompetency would be the masks under which all sorts of official misconduct could be sheltered. In municipal trusts, for instance, to plunder triumphantly, it would be only necessary to secure officers conveniently ignorant and inert. But this the policy of the law does not permit. It says: "You are bound to know the law and the facts; and if you lean on ad-

Mistake of law or fact no defence.

forth in the indictment and found by the jury. State *v.* Fields, Mart. & Yerg. 137.

[1] Supra, § 1573; R. *v.* Wadsworth, 5 Mod. 13; R. *v.* Tisdale, 20 Up. Can. (Q. B.) 272.

[2] Supra, §§ 125, 1563.

[3] Supra, §§ 152 *et seq.*

[4] Resp. *v.* Montgomery, 1 Yeates, 419; State *v.* Littlejohn, 1 Bay, 316; State *v.* Glascow, Conf. R. 38; Com. *v.* Mitchell, 3 Bush, 39; McBride *v.* Com. 4 Bush, 331. Compare cases cited supra, §§ 84–88.

[5] Supra, §§ 125 *et seq.*

visers or subalterns who mislead you, this is the very thing for which you are to be punished." It is necessary for the State that it should have at its command knowledge and vigilance in the guardians of its liberties and its treasures. In those holding public office, want of either knowledge or of vigilance, resulting in negligence, is a penal offence.[1] And, independently of these views, it is a general principle that wherever the law makes a naked act indictable, irrespective of intent, ignorance as to either law or fact is no defence.[2] At the same time, if the indictment charges a *negligent* ignorance of the law, the defendant is entitled to an acquittal if he can show that he showed the diligence common to specialists of his class.[3].

Drunkenness in public officer indictable.

§ 1583. It is an indictable offence for a public officer voluntarily to be drunk when in discharge of his duties. No harm may come to the public from his misconduct, but he has put himself in a position from which much harm might result, and for so doing he is amenable to penal justice.[4]

And so of neglect by officer in attempting to suppress riot.

§ 1584. From what has been said we reach the reasoning by which peace officers are required to attempt to suppress riots. The law requires them to be duly active and courageous in maintaining the public peace, and if they fail in this they are guilty of an offence to which mistaken views of their own powers, or mistaken views of the facts, are no defence.[5] And they are entitled to call on all citizens to

[1] Supra, § 84.

[2] See supra, § 88.

[3] Supra, § 85.

[4] Penn *v.* Keffer, Addison, 290; Com. *v.* Alexander, 4 Hen. & Mun. 522.

[5] R. *v.* Pinney, 5 C. & P. 254; 3 B. & Ad. 947; R. *v.* Neale, 9 C. & P. 431; Resp. *v.* Montgomery, 1 Yeates, 419; State *v.* Littlejohn, 1 Bay, 316. See supra, §§ 652 *a*, 1555; Whart. Cr. Pl. & Pr. §§ 5 *et seq.*

According to Sir J. Stephen, an officer is indictable who neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter. Steph. Dig. Cr. L. art. 122.

Of this he gives the following illustrations: —

"(1.) A., the mayor of B., neglects to perform various acts which it was in his power to do, and which a man of ordinary prudence, firmness, and activity might have been expected to do, in order to suppress riots in B. A. is guilty of a misdemeanor. R. *v.* Pinney, 5 C. & P. 254. Supra, § 1555.

"(2.) A., the lord mayor of London, refrains from making the proc-

aid them when resisted in the discharge of the duties imposed on them as guardians of the peace.[1]

§ 1584 *a*. Obstruction of highways by individuals has been already discussed.[2] In England, municipal authorities, whether county or parish, have been held indictable at common law for neglect in repairing thoroughfares, and in some cases a similar responsibility has been imposed in this country on counties and towns.[3] Whoever, in fact, undertakes or accepts the duty, may be indictable for its non-discharge.[4] But this liability is in all our States limited and defined by statutes too numerous and intricate to be here analyzed. Criminal courts in such cases, also, are rarely appealed to, the civil remedy being usually preferred by private litigants in cases of injury through municipal neglect.[5] On conviction, the repair of the road may be compelled as an abatement of the nuisance.[6]

And so of municipal neglect in repair of roads.

lamation in the Riot Act, and from ordering soldiers to disperse a mob, because he is afraid to do so — in circumstances in which a man of ordinary courage would not have been afraid. A. commits a misdemeanor. R. *v.* Kennett, 5 C. & P. 282.

[1] Supra, §§ 652 *a*, 1555.

In R. *v.* Kennett, supra, it was ruled that if, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *primâ facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect.

It is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. R. *v.* Neale, 9 C. & P. 431. Supra, § 1555.

[2] Supra, § 1473.

[3] See supra, § 93.

[4] Supra, § 1485. As to indictments for neglect see supra, § 125.

[5] See the cases in this relation classified in Whart. on Neg. §§ 956 *et seq.*; and see State *v.* Harsh, 6 Blackf. 346.

[6] Supra, § 1426. As to indictments against corporations see supra, § 91.

III. VOLUNTARY OFFICES.

Guardian, master, or keeper, indictable for neglect.

§ 1585. A guardian, master, or keeper of an asylum, who has a helpless person under his special charge, and neglects to rightly care for such helpless person, whereby the latter is exposed to physical harm, is indictable for the neglect where injury results.[1]

So of officers of ships and railroads.

§ 1586. The same reasoning establishes the indictability for negligence of sea officers, engineers, conductors, and brakesmen of railroads, when such negligence is in discharge of duties specially undertaken by them, and when by it passengers or others are injured.[2]

So of innkeepers.

§ 1587. An innkeeper who, when he has room in his house, refuses to receive a visitor who tenders a reasonable price for entertainment, is indictable at common law.[3] It should, however, be remembered that this duty is restricted to the entertainment of travellers in inns.[4]

[1] Supra, § 333; R. *v.* Friend, R. & R. C. C. 20; R. *v.* Warren, R. & R. 48, n.; R. *v.* Squire, 1 Russ. C. & M. 80, 678; R. *v.* Bubb, 4 Cox C. C. 455; R. *v.* Marriott, 8 C. & P. 425; R. *v.* Pelham, 8 Q. B. 959; R. *v.* Porter, L. & C. 394; 9 Cox C. C. 449; R. *v.* Smith, L. & C. 607; 10 Cox C. C. 82; State *v.* Hawkins, 77 N. C. 494. As to omissions see supra, §§ 152, 169. Assaults in such cases are discussed supra, § 635.

[2] See supra, §§ 337, 343, 349, 613.

[3] Hawk. P. C. 714, s. 2; R. *v.* Luellin, 12 Mod. 445; R. *v.* Ivens, 7 C. & P. 213; Fell *v.* Knight, 8 M. & W. 269; Hall *v.* State, 4 Harring. 132; State *v.* Matthews, 2 Dev. & Bat. 424; Whart. Prec. 911, 912. It is otherwise as to intruders. Supra, § 625.

On this position, common to the English and the Roman common law, an interesting question arises which is discussed by Bar, in his *Lehre vom Causalzusammenhange*, to which reference has been several times made. An innkeeper refuses to receive a guest, who in consequence is obliged to wander in the woods during an inclement night, and finally dies from freezing. Is there such a causal connection between the innkeeper's act and the death as to make the innkeeper responsible for the homicide? The answer is yes, supposing that the inn is the sole house in the vicinity in which shelter could have been obtained; but not otherwise. And this coincides with the view heretofore expressed, that A. is only responsible for the death of B. resulting from A.'s negligent discharge of duty, when on A. the duty in question was specially thrown.

[4] In an English case, decided in 1877, the evidence was that the defendant was the proprietor of a hotel, and that attached to the hotel and under the same roof and license, but with a separate front door, was a bar in which persons casually passing by obtained refreshments. The prosecutor, who was a near neighbor, had

§ 1588. Officers holding responsible posts in great business or social institutions, in which such vast interests depend on fidelity to official trust, are like statutory officers in this respect, that negligence on their part is justified neither by ignorance of law nor by mistake of fact.[1] The duties of their office, as well as the necessities of society, require them to be both well informed and vigilant; and if they make mistakes, however honest, they must bear the consequences. If ignorance were a defence to an indictment against railroad or other such officers, for negligence, the greater their ignorance, the more complete their impunity. The law would, in such case, give a premium to ignorance and sloth. Whatever good specialists, in their line, are accustomed to know, that they are bound to know.[2] And when charged with a violation of the law (as distinguished from negligence in the application of the law), then ignorance of the law is no defence.[3]

Ignorance and want of malice as a defence.

It is otherwise, however, with voluntary officers, such as innkeepers, clothed with no specific trust, and invested with no fiduciary care over others. And non-specialists, when charged with negligence, are only liable for the lack of such knowledge and diligence as is common to non-specialists of their class.[4]

It need scarcely be added that in no prosecutions for neglect is want of malice a defence. As has been shown, one of the conditions of negligence is want of malice.[5]

been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests; and letters had passed in which the defendant had objected to the dogs being brought into the bar, and the prosecutor had asserted his right to bring them. The prosecutor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshments, which the defendant refused him. On an indictment charging the defendant, as an innkeeper, with refusing refreshment to the prosecutor, it was ruled that he could not be convicted: first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; thirdly, because, had it been otherwise, the defendant had reasonable ground for his refusal. R. *v.* Rymer, L. R. 2 Q. B. D. (C. C. R.) 136; 13 Cox C. C. 378.

[1] Supra, §§ 84 *et seq.*

[2] Supra, § 87.

[3] Supra, § 84.

[4] Supra, §§ 87, 125.

[5] Supra, § 125.

IV. EVIDENCE.

Not necessary to prove officer's commission.

§ 1589. It is enough, as already shown, to prove that the person charged with misconduct in office held himself out to be an officer of the character described in the indictment. The reason is twofold: first, his pretension to hold the office is an admission that he is such an officer; and, secondly, he is liable, even though an usurper, for misconduct in the office thus wrongfully assumed.[1]

Malice and corruption to be inferentially proved.

§ 1590. Malice, corruption, or evil intent, when essential to the case, may be inferred, as presumptions of fact, from the evidence.[2]

V. RESISTANCE TO ILLEGAL ACTS OF OFFICERS.

§ 1591. To what extent illegal acts of officers can be resisted by individuals has been already incidentally discussed.[3]

[1] Supra, § 1570; infra, § 1617; Whart. Crim. Ev. §§ 164, 833. See, as sustaining this point, Com. v. Fowler, 10 Mass. 290; People v. Cook, 4 Selden, 67; State v. Perkins, 4 Zab. 409; Com. v. Rupp, 9 Watts, 114; State v. Hill, 2 Spear, 150; though see, in some respects qualifying above, State v. McEntyre, 3 Ired. 171.

[2] People v. Bogart, 3 Parker C. R. 143. Supra, § 1570; Whart. Crim. Ev. §§ 6–16, 23, 734.

[3] Supra, § 646.

CHAPTER XXVIII.

LIBEL.

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I. DEFAMATORY LIBELS.

Defamatory libel is a publication calculated to insult or injure the reputation of any person.

§ 1594. A defamatory libel is matter published without legal justification or excuse, the effect of which is to insult the person of whom it is published, or which is calculated to injure the reputation of any person by exposing him to hatred, contempt, or ridicule. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.[1]

Libel is a crime at common law.[2] A prosecution for libel is

[1] This is substantially the definition given in the English Draft Commission of 1879. See also Steph. Dig. Cr. L. art. 267.

[2] State *v.* Burnham, 9 N. H. 34; Com. *v.* Holmes, 17 Mass. 336, 338; Com. *v.* Kneeland, 20 Pick. 206, 232;

not to be regarded as a private action, subject to compromise by the parties, but is under the control of the State.[1]

§ 1595. The meaning of "defamatory," when applied to individuals, is the point next to be considered; and it may be generally said that defamation, in this sense, is confined to that which is (1.) Provocative of wrath; or, (2.) Exposes to public hatred or ridicule. Hence it is defamatory to publish that of another which will put him, supposing him to obey the impulses common to men under such circumstances, in a condition of mind which is likely to result in a breach of the peace. And even supposing there be no danger of any such action on his part, it is defamatory to expose him to public hatred, contempt,[2] or ridicule.[3]

Test of injury is provocation to wrath or exposure to public hatred or ridicule.

State *v.* Avery, 7 Conn. 268; 3 Swift's Dig. 340.

[1] R. *v.* The World, 13 Cox C. C. 305.

[2] Churchill *v.* Hunt, 2 B. & Ald. 685; 4 Taunt. 355; Macgregor *v.* Thwaites, 4 D. & R. 695; 3 B. & C. 24; Steel *v.* Southwick, 9 Johns. 214; Barthelemy *v.* People, 2 Hill (N. Y.), 248.

[3] 2 Wils. 403; R. *v.* Kinnersley, 1 W. Bl. 294; State *v.* Henderson, 1 Rich. 180; but see People *v.* Jerome, 1 Mich. 142.

An indictment will lie for all words spoken of another, which may have the effect of excluding him from society; as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal disease, the itch, or the like. Com. Dig. Action on the Case for Defamation D. 28, 29, F. 11, 19; 2 Burr. 930. But charging him with having had a contagious disease is not actionable; for, as this relates to a time past, it is no reason why his society should be avoided at present. 2 T. R. 473; Stevens *v.* Hayden, 2 Mass. 406; Bloss *v.* Tobey, 2 Pick. 320; Allen *v.* Hillman, 12 Pick. 101.

On the same principle, to charge a woman with libidinous habits, and with tempting another to commit adultery, is libellous. State *v.* Avery, 7 Conn. 268.

It has even been held libellous to charge a man with insanity; R. *v.* Harvey, 2 B. & C. 257; and to call a woman a hermaphrodite. Malone *v.* Stewart, 15 Ohio, 319. So it is libellous to publish of one, in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause, then under their consideration, upon a game of draughts. Com. *v.* Wright, 1 Cush. 46; R. *v.* Spiller, 2 Show. 205.

To charge a citizen with acting, in a nominating convention, under the influence of a bribe, is libellous; Hand *v.* Winton, 38 N. J. L. 122; and so with charging jurors with doing "injustice to their oaths;" Byers *v.* Martin, 2 Col. T. 605; and so with charging a party with engrafting silver ore in a rock in order to cheat in a mining adventure. Williams *v.* Godkin, 5 Daly, 499.

Sir J. Stephen (Dig. C. L. art. 268) gives the following instances of defamatory matter: —

"A question suggesting that illegitimate children were born and mur-

§ 1596. An indictment, *a fortiori*, will lie for all words spoken of another which impute to him the commission of some crime punishable by law, such as high treason, murder, or other felony (whether by statute or at common law); forgery, perjury, subornation of perjury, or other misdemeanor.[1]

Hence, imputation of crime is a libel.

§ 1597. It is indictable, also, to assist in a publication which may impute incapacity or dishonor to a man in his trade or livelihood; as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like.[2]

And so of reflecting on a man in his trade or livelihood.

§ 1598. Whatever, if made the subject of civil action, would be considered libellous without laying special damage, is indictable in a criminal court, and by this test, therefore, the law of libel, as expressed on actions for dam-

And so of whatever is the subject of civil ac-

dered in a nunnery. R. *v.* Gathercole, 2 Lew. C. C. 237.

"A. adds to his other vices ingratitude. Cox *v.* Lee, L. R. 4 Ex. 284.

"A. will not play the fool or the hypocrite (meaning that he would). 1 Hawk. P. C. 543.

"A. has the itch, and smells of brimstone. Villars *v.* Morristen, Holt, 216.

"I think," says Sir J. Stephen, "it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another, his name is A., meaning that his real name is A., and that the name of B., by which he passed, was falsely assumed, would not this be a libel?"

In Gregory *v.* R. 15 Q. B. 957, the Court of Exchequer Chamber held the following words sufficient to maintain an indictment for libel: "Why should T. be surprised at anything Mrs. W. does; if she chooses to entertain B. (the prosecutor), she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets to her table if she thinks fit." Where a placard was posted up to the following effect: "B. Oakley, game and rabbit destroyer, and his wife, the seller of the same in country and town." Quain, J., ruled that this was not *primâ facie* libellous; and as there was no innuendo showing that it charged an indictable offence, or that it related to the calling of the prosecutor, the learned judge quashed the indictment. R. *v.* Yates, 12 Cox C. C. 233, cited Roscoe's Cr. Ev. 659.

[1] Com. Dig. Action on the Case for Defamation, D. 1–10, F. 1–7, 12–18; 3 Wils. 186; 2 W. Bl. 750, 959; Cowp. 275; 2 Wils. 300; 6 T. R. 694; 9 East, 93; 5 Ibid. 463; 2 New Rep. 335; 4 Price, 46; 7 Taunt. 431; Wonson *v.* Sayward, 13 Pick. 402; Walker *v.* Winn, 8 Mass. 248; Chaddock *v.* Briggs, 13 Mass. 248; Miller *v.* Parrish, 8 Pick. 384; Gay *v.* Homer, 13 Pick. 535; Hotchkiss *v.* Oliphant, 2 Hill (N. Y.), 510; Stillwell *v.* Barter, 19 Wend. 487; Nash *v.* Benedict, 25 Wend. 645; Cramer *v.* Riggs, 17 Wend. 209; Smith *v.* State, 32 Tex. 594.

[2] Finch L. 186; Com. Dig. D. 22–

ages, is brought to bear on criminal prosecutions.[1] There are cases, however, in which an action would not lie without laying special damage, in which, nevertheless, an indictment is good. Thus, for instance, if a man write or print, and publish of another, that he is a scoundrel,[2] or villain,[3] it is a libel, and punishable as such; although in such cases a civil suit might not lie without special damage.[4]

tion without special damage.

§ 1599. Writings vilifying the character of persons deceased are libels, and may be made the subject of an indictment;[5] but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the people against them, or to excite them to a breach of the peace,[6] otherwise it cannot be sustained.[7]

And so of vilifying deceased persons.

§ 1600. The Roman law here offers some salutary restrictions for our guidance. Libels on a deceased person can be prosecuted only by the heir, who, on the principle of universal succession, represents the deceased. The prosecution in such case, must be limited to libels published after the ancestor's death; for libels which the latter did not prosecute, when he had capacity so to do, he is presumed to have condoned. Yet if a prosecution is instituted during the life of the libelled person, it is not barred by his death. "Iniuriarum actio" (and the term includes criminal as well as civil procedure) "neque heredi neque in heredem datur; semel autem lite contestata ad successores pertinere."[8] Yet even in this case a time arises when the interests of just historical criticism demand that the liberty of speech should be unrestrained; and when, even of the most illustrious of the dead, censures the most injurious must be permitted without penal amenability. The modern Roman law

But there should be limit as to time.

27, F. 9, 10; 2 W. Bl. 750; 2 Stark. (N. P.) 245, 297; 4 Esp. 191.

[1] 2 Stark. on Slander, 120.

[2] J'Anson *v.* Stuart, 1 T. R. 748.

[3] Bell *v.* Stone, 1 B. & P. 331; R. *v.* Pownell, W. Kel. 58; but see R. *v.* Granfield, 12 Mod. 98; Tappan *v.* Wilson, 7 Ohio, 190.

[4] 2 H. Bl. 531. See Tillson *v.* Robbins, 68 Me. 295.

[5] 5 Co. 125 *a*; Com. *v.* Clap, 4 Mass. 163.

[6] R. *v.* Topham, 4 T. R. 127.

[7] Com. *v.* Taylor, 5 Binn. 281. Sir J. Stephen says (art. 267): — "The publication of a libel on the character of a dead person is not a misdemeanor unless it is calculated to throw discredit on living persons."

[8] L. 13. D. 47. 10.

declares that this time arrives when the generation living at the death of the person libelled has passed away; and this limitation has been adopted by the codes of Austria and Saxony. By the North German Code, a code prepared by several eminent German jurists, the same effect is worked by the provision, that such prosecutions shall be instituted only by the parents, children, or spouse of the deceased.[1]

Unconscious or helpless persons are thus protected.

§ 1601. Can a person who, from insanity, or infancy, or helplessness, is incapable of resenting an injury, and who, consequently, cannot be supposed to be provocable to a breach of the peace, be protected by this mode of prosecution? Here, again, in default of English and American adjudications, we may look to the Roman law; and the solution is found in one of those maxims of terse beauty with which that law abounds. "Pati quis iniuriam, etiamsi non sentiat, potest." In other words, from unconscious as well as from conscious suffering the law intervenes to protect.

Corporations may prosecute for libel.

§ 1602. Whether a business corporation can be the subject of an indictable libel has been much doubted; but it is not questioned that libels on municipal corporations are indictable as seditious, and, following a parallel line of reasoning, when public credit is imperilled, and private interests assailed, by libels on a bank, or other trading corporation, then the remedy by indictment is reserved. The Roman law gives for this the additional reason, that by such attacks the honor of the individual corporators is as much imperilled as would be the case were they personally picked out for calumny; and hence, on the ground that such libels are provocative of breaches of the peace, penal redress is permitted. Yet for libels on a person or institution to whom the law assigns no definite body or bound, a prosecution cannot be had.[2] In our own law, as stated by Sir J. Stephen, a libel is indictable when defaming a "body of persons definite and small enough for individual mem-

[1] Berner, Lehrbuch, § 150.

[2] Hence the Prussian appellate court, in October, 1868, held, and with good reason, that trades unions and joint-stock companies, which have not availed themselves of the statutes authorizing incorporation, cannot prosecute for libellous attacks in which the names of the members of such societies are not specified. The society is, in the eye of the law, a phantom, which, as it cannot sue civilly, cannot appear as prosecutor in a criminal court. Berner, Lehrbuch, § 150

bers to be recognized as such, in or by means of anything capable of being a libel." [1]

Unwritten words not usually libels.

§ 1603. No indictment will lie for words, not reduced to writing, unless (1.) they are seditious, blasphemous, or indecent, so as to create a public scandal or likely to incite a tumult; [2] or, (2.) they are spoken contemptuously to a magistrate when in the discharge of his official duties; or, (3.) they constitute a challenge to fight.[3]

But otherwise as to pictures and signs.

§ 1604. Words are not essential to the constitution of a libel. If the author of an infamous charge could evade prosecution by putting it in pictures or material signs, then the law in this respect could be made nugatory. When we recall the pictures which still remain on the walls of Pompeii, and when we remember that before the age of printing, pictures and signs were not unfrequently used to convey vividly and concisely specific thoughts, we can understand why the Roman law coupled with verbal libels, libels which were symbolical or real. "Iniuriam fieri Labeo ait aut re aut verbis." [4] Symbolical or real libels have in later days taken the names of Pasquils, and comprehend, according to the curious classification of the North German Code, libellous pictures, wood-cuts, engravings, and

[1] Dig. C. L., art. 267. To this he adds this note: —

A religious society called the S. Nunnery, consisting of certain nuns and other persons, may be libelled, though no individual is specially referred to. R. v. Gathercole, 2 Lew. 237.

[2] Supra, § 1432.

[3] 2 Salk. 417; R. v. Langly, 6 Mod. 125; Bailey v. Dean, 5 Barb. 297; State v. Wakefield (Mo.), 9 Cent. L. J. 405; Townshend on Slander, 3d ed. 66. Infra, §§ 1607, 1615; Wh. Cr. Pl. & Pr. § 203.

A supposed exception is R. v. Benfield, 2 Burr. 980; Whart. Crim. Pl. & Prac. § 302, where sentence was passed on an indictment charging two defendants with publicly singing in the street libellous and obscene songs, reflecting on the prosecutor's son and daughter, with intention to discredit him and his children, and destroy his domestic peace. The reasons pressed in arrest of judgment were, 1. That an indictment will not lie for publishing two distinct libels on two distinct persons. 2. That several distinct defendants charged with several distinct offences, cannot be joined in the indictment. 3. That there was a general verdict on the count, whereas the latter song contained in it was not libellous, — which were severally overruled by the court. No exception was taken on the ground that the songs, not having been written, could not have been libellous. But as the songs were obscene, this, by itself, would sustain the indictment. Infra, § 1606.

[4] L. i. § 1. 47. 10.

plaster and other figures (Gusswerk). We have no such particularity in any of our statutes; but no doubt libels of this class are as indictable at common law as libels in writing.[1]

II. BLASPHEMOUS LIBELS.

Blasphemy indictable at common law.

§ 1605. Aside from the question already discussed,[2] whether Christianity is part of the common law, we may regard it as settled that maliciously to revile Christianity is an indictable offence at common law.[3] *A fortiori* is blas-

[1] This is, in fact declared in the definition already given. Supra, § 1595. "A gallows set up before a man's door" may be a libel. Steph. Dig. C. L. art. 268.

[2] Supra, § 20.

[3] 4 Black. Com. 60; Smith *v.* Sparrows, 4 Bing. 84, 88; R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Waddington, 1 B. & C. 26; Com. *v.* Kneeland, 20 Pick. 206; Thach. C. C. 346; Chapman *v.* Gillett, 2 Conn. 41; People *v.* Ruggles, 8 Johns. 290; Updegraff *v.* Com. 11 S. & R. 394; State *v.* Chandler, 2 Harring. 553. Compare Story's Miscellaneous Writ. 451; 2 Life of Story, 431.

In Vidal *v.* Girard, 2 How. 198, the heirs at law endeavored to set aside the will, on the ground that as it provided for a system of education from which "ecclesiastics" were to be excluded, it was void at common law, and the charity fell. "We are compelled to admit," says Mr. Justice Story, in giving the opinion of the court, "that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers, or the injury of the public." This view Mr. Binney, on the part of the devisees, in an argument, which has assumed a judicial weight from its fairness as well as from its ability, did not dispute. "Christianity is a part of the law of Pennsylvania, it is true, but what Christianity, and to what intent? It is Christianity without particular tenets; Christianity with liberty of conscience to all; and to the intent that its doctrines should not be vilified, profaned, or exposed to ridicule. It is Christianity for the defence and protection of those who believe, not for the persecution of those who do not." Argument, &c., in Vidal *v.* Girard, 103. Supra, § 20.

Sir J. Stephen states the law as follows: —

"Every publication is said to be blasphemous which contains matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the church by law established, or to promote immorality.

"Publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as true, are not blasphemous (within the meaning of this definition) merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the church by law established.

phemy written or printed against God so indictable.[1] But the disputes of learned men on controverted points cannot, unless a malicious intent is shown, be charged as blasphemy.[2]

"(*a.*) A denial of the truth of Christianity in general, or of the existence of God, whether the terms of such publication are decent or otherwise.

"(*b.*) Any contemptuous, reviling, or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established, whatever may be the occasion of the publication thereof, and whether the matter published is, or is not, intended in good faith as an argument against any doctrine or opinion.

"Every one who publishes any blasphemous document is guilty of the misdemeanor of publishing a blasphemous libel.

"Every one who speaks blasphemous words is guilty of the misdemeanor of blasphemy."

To this is appended the following:—

"There is authority for each of these views, as may be seen from a collection of all the cases on the subject in Folkard's edition of Starkie on Libel, pp. 593–603. Most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity. Mr. Starkie many years ago wrote, 'A wilful intention to pervert, insult, and mislead others, by means of contumelious abuse applied to sacred subjects, or by wilful misrepresentations and artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt.' This is the language of a man who means, but is reluctant to say plainly, 'You may deny Christianity to be true, but you must do it in a decent way and with regard to the feelings of others.' Lord Coleridge allows me to say that the left hand side of the page correctly states the law laid down in the last trial which took place for blasphemy, R. *v.* Pooley, tried at the Bodmin Summer Assizes, in 1857, before Coleridge, J. Lord Coleridge was counsel in that case."

The English Commissioners of 1879 say:—

"Section 141 provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community, and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing

[1] R. *v.* Waddington, 1 B. & C. 26. See R. *v.* Gathercole, 2 Lew. 237.

[2] R. *v.* Woolstan, 2 Str. 834; R. *v.* Atwood, Cro. Jac. 421; R. *v.* Taylor, Ven. 293; R. *v.* Curl, 2 Str. 789; R. *v.* Hall, 1 Str. 416; R. *v.* Sline, Dig. L. L. 83; R. *v.* Annett, 2 Burn, E. L. 217; R. *v.* Wilkes, 2 Stark. Slan. 141; R. *v.* Williams, Ibid.; R. *v.* Eaton, Ibid. 142; R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Waddington, 1 B. & C. 26; R. *v.* Taylor, 2 Stark. Slan. 148; Moxon's case, 2 Town. Mod. St. Tr. 356; Gathercole's case, 2 Lew. C. C. 237.

The prisoner's mere confession that he used the words charged will not authorize a conviction for blasphemy. The prosecutor must show that some one heard the words.[1]

in good faith and decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect in the case of R. *v.* Pooley, tried at Bodmin, 1857. We are not aware of any later authority on the subject. This provision is taken with some alteration from the Bill." Draft Commission, p. 21.

Blasphemy against God, it is ruled in New York, and contumelious reproaches, and profane ridicule of Christ and the Holy Scriptures, are offences punishable at common law, whether uttered by words or writing; and it follows, therefore, that to revile the name of the Saviour, and wantonly and maliciously to ridicule his character, are indictable. People *v.* Ruggles, 8 Johns. 290. To say "that the Holy Scriptures were a mere fable; that they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies," has been held indictable in Pennsylvania; Updegraff *v.* Com. 11 S. & R. 394; and the same position was taken in Delaware, after an able and thorough examination, by J. M. Clayton, C. J. In the latter case, the jury having found the defendant guilty on an indictment under the act against blasphemy, charging him with having proclaimed publicly and maliciously, with intent to vilify the Christian religion and to blaspheme God, that (here follow words grossly indecent and blasphemous), the court held the offence found to be blasphemy, and refused to arrest the judgment. State *v.* Chandler, 2 Harring. 553. The court refused to arrest the judgment, where the defendant was charged with uttering the same words, on another occasion, with intent to vilify the Christian religion and to blaspheme God, and was found not guilty of the intent to blaspheme God, but guilty of the whole indictment with that exception. Ibid.

In Massachusetts, under Stat. 1782, c. 8 (Rev. Stat. c. 130, § 15), it is blasphemy to deny the existence of God, with an intent to impair and destroy the veneration due him, although no words of malediction, reproach, or contumely are used; Com. *v.* Kneeland, 20 Pick. 206; and the statute is in accordance with the Constitution. Ibid. It is not necessary, in the evidence, to prove every assignment of blasphemy set forth in the indictment; if one is sufficiently proved, it is enough. Ibid.; Whart. Cr. Ev. § 134.

On an indictment for blasphemy for the following publication: "The Universalists believe in a God, which I do not; but believe that their God, with all his moral attributes (aside from nature itself), is nothing else than a chimera of their imagination;" it was held that the intent to deny the existence of the Deity, in the sense of the statute, must be presumed to have been made out. Com. *v.* Kneeland, 20 Pick. 206; Thach. C. C. 346.

It may be said that some of the above cases are on statutes, and cannot therefore be regarded as authorities at common law. But they are

[1] People *v.* Porter, 2 Parker C. R. 14.

III. OBSCENE LIBELS.

§ 1606. It is an indictable offence at common law to publish, or expose to public view, an obscene book or print;[1] or to pub-

authorities to the effect that such statutes are constitutional, and do not abridge freedom of speech. See further Com. *v.* Hardy, 1 Ashmead, 410; State *v.* Kirby, 1 Murph. 254; State *v.* Powell, 68 N. C. 259.

The Constitution of the United States requires that all officers, "both of the United States and of the several States, shall be bound, by oath of affirmation, to support this Constitution. But no religious tests shall ever be required as a qualification for any office or public trust under the United States."

In reference to this clause, Judge Story, in his Commentaries on the Constitution, thus speaks: "It was not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test or affirmation. It had a higher object: to cut off, forever, every pretence of any alliance between Church and State in the national government." Afterwards comes the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

On this Judge Story proceeds: "Now there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth.

"The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the apostles to the present age." See Campbell's Lives of Ch. Justices, ii. 512.

[1] State *v.* Brown, 1 Williams (Vt.), 619; Com. *v.* Holmes, 17 Mass. 336; Knowles *v.* State, 3 Day's Cas. 103; Com. *v.* Sharpless, 2 S. & R. 91; McNair *v.* People, 89 Ill. 441; Bell *v.* State, 1 Swan, 42.

In R. *v.* Hicklin, L. R. 3 Q. B. 360, Cockburn, C. J., said: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences;" "a definition," says the Alb. L. J., June 21, 1879, "which was substantially adopted by Judge Benedict in his charge to the jury in U. S. *v.* Bennett, 1879. The definition given by Judge Clark, on the trial of the indictment of Heywood under the same statute, was: "A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency." Hence in U. S. *v.* Bennett (Alb. L. J. June 21, 1879) it was held that under the federal statute prohibiting the mailing of obscene publications, it was

licly utter obscene language;[1] and so of any conduct tending to corrupt the morals of the people.[2] It is not necessary, in such a case, to aver the offence to be a *common nuisance;* the indictment being for an action of evil ex-

Obscenity indictable at common law.

for the jury to determine whether a publication was obscene.

[1] Barker *v.* Com. 19 Penn. St. 412; Bell *v.* State, 1 Swan, 42. Supra, § 1603.

[2] Supra, § 1432; R. *v.* Hicklin, L. R. 3 Q. B. 360; Com. *v.* Holmes, 17 Mass. 336; Knowles *v.* State, 3 Day's Cas. 103; Com. *v.* Sharpless, 2 Serg. & Rawle, 91.

In R. *v.* Hicklin, supra, the opinions of the judges are as follows: —

Cockburn, C. J.: "We have considered this matter, and we are of opinion that the judgment of the learned recorder must be reversed, and the decision of the magistrates affirmed. This was a proceeding under 20 & 21 Vict. c. 83, s. 1, whereby it is provided that, in respect of obscene books, &c., kept to be sold or distributed, magistrates may order the seizure and condemnation of such works, in case they are of opinion that the publication of them would have been the subject matter of an indictment at law, and that such a prosecution ought to have been instituted. Now, it is found here as a fact that the work which is the subject matter of the present proceeding was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. The magistrates must have been of opinion that the work was indictable, and that the publication of it was a fit and proper subject for indictment. We must take the latter finding of the magistrates to have been adopted by the learned recorder when he reversed their decision, because it is not upon that ground that he reversed it; he leaves that ground untouched, but he reversed the magistrates' decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic Church. Now, we must take it, upon the finding of the recorder, that such was the motive of the appellant in distributing this publication; that his intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession; and upon that ground of motive the recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved, namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from the recorder. I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character. It is quite clear that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been

ample.[1] Obscenity does not depend upon truth or falsity. If the effect is to deprave and corrupt others, the offence is com-

pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The very reason why this work is put forward to expose the practices of the Roman Catholic confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine. I take it therefore that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But, then, it is said for the appellant, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so. The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no. The law says you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good may be accomplished? In order to prevent the spread and progress of Catholicism in this country, or possi-

[1] Knowles *v.* State, 3 Day's Cas. 103. See State *v.* Appling, 25 Mo. 315; Slattery, ex parte, 3 Pike, 484.

plete.[1] And any public show or exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable as a nuisance at common law.[2]

bly to extirpate it in another, and to prevent the State from affording any assistance to the Roman Catholic Church in Ireland, is he justified in doing that which has necessarily the immediate tendency of demoralizing the public mind wherever this publication is circulated? It seems to me that to adopt the affirmative of that proposition would be to uphold something which, in my sense of what is right and wrong, would be very reprehensible. It appears to me the only good that is to be accomplished is of the most uncertain character. This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains. And for what? To prevent them, it is said, from becoming Roman Catholics, when the probability is, that nine hundred and ninety-nine out of every thousand into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion. It seems to me that the effect of this work is mischievous and against the law, and is not to be justified because the immediate object of the publication is not to deprave the public mind, but, it may be, to destroy and extirpate Roman Catholicism. I think the old, sound, and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out; and although I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act, at any rate that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that; you must abide by the law, and if you would

[1] R. *v.* Hicklin, L. R. 3 Q. B. 360; Com. *v.* Landis, 8 Phila. 453.

[2] Supra, §§ 1432, 1469; Knowles *v.* State, 3 Day's Cas. 103. See R. *v.* Sedley, 2 Str. 791; R. *v.* Hill, Ibid. 790; R. *v.* Read, Fost. Rep. 98; R. *v.* Curl, 2 Str. 789; R. *v.* Wilkes, 4 Burr. 2527, 2574; Willis *v.* Warren, 1 Hilton, 591.

§ 1607. Persons publishing books necessary for medical instruction may be liable for uttering obscene libels, if such books are generally and non-professionally disseminated, and the effect is to debauch society, or to make money by pandering to lascivious curiosity.[1] That

Philanthropic or scientific intent no defence.

accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal. I think, therefore, that the recorder's judgment must be reversed, and the order must stand."

Blackburn, J.: "I am of the same opinion. The question arises under the 20 & 21 Vict. c. 83, an act for 'the more effectually preventing the sale of obscene books,' and so forth; and the provision in the first section is this: [The learned judge read the section.] Now, what the magistrate or justices are to be satisfied of is that the belief of the complainant is well founded, and also 'that any of such articles so published for any of the purposes aforesaid are of such a character and description,' that is to say, of such an obscene character and description, that the publication of them would be a misdemeanor, and that the publication in the manner alleged would be proper to be prosecuted; and having satisfied themselves in respect of those things, the magistrates may proceed to order the seizure of the works. And then the justices in petty sessions are also in effect to be satisfied of the same three things: first, that the articles complained of have been kept for any of the purposes aforesaid, and that they are of the character stated in the warrant, that is, that they are of such a character that it would be a misdemeanor to publish them; and that it would not only be a misdemeanor to publish them, but that it would be proper to be prosecuted as such; and then, and then only, are they to order them to be destroyed. I think with respect to the last clause, that the object of the legislature was to guard against the vexatious prosecution of publishers of old and recognized standard works, in which there may be some obscene or mischievous matter. In the case of R. v. Moxon, 2 Mod. S. Tr. 356, and in many of the instances cited by Mr. Kydd, a book had been published which in its nature was such as to be called obscene or mischievous, and it might be held to be a misdemeanor to publish it; and on that account an indictable offence. In Moxon's case, supra, the publication of Shelley's 'Queen Mab' was found by the jury to be an indictable offence; I hope I may not be understood to agree with what the jury found, that the publication of 'Queen Mab' was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance. So whether the publication of the whole works of Dryden is or is not a misdemeanor, it would not be a case in which a prosecution would be proper; and I think the legislature put in that provision in order to prevent proceedings in such cases. It appears that the work in question was published, and the magistrates in petty sessions were satisfied that it was a proper subject for indictment, and their finding as to that accords with the view we entertain. Then there

[1] Com. v. Landis, 8 Phila. 453.

the object is philanthropic or scientific is no defence,[1] "if the publication is made in such a manner, to such an extent, or un-

was an appeal to the recorder in quarter sessions to reverse their decision, which appeal was successful. The learned recorder, in stating the grounds on which he reversed their decision, says, 'About one half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the latter half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words, and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlet as a member of the Protestant Electoral Union, to promote the objects of that society, and to expose what he deemed to be errors in the Church of Rome, and particularly the immorality of the confessional.' The recorder then says he was of opinion that the sale and distribution of the pamphlet would not be a misdemeanor, nor consequently be proper to be prosecuted as such, and upon that ground he quashed the magistrates' order, leaving to this court the question whether he was right or not. Upon that I understand the recorder to find the facts as follows: He finds that one half of the book was in fact obscene, and he finds that the effect of it would be such, that the sale and circulation of it was calculated to prejudice good morals. He does not find that he differs from the justices at all in matter of fact as to that, but he finds that the publication would not be indictable at all as a misdemeanor, and consequently that it would not be proper to prosecute it as a misdemeanor; and his reason for thinking it was not indictable as a misdemeanor is this: that the object of the person publishing was not to injure public morality, but with a view to expose the errors of the Church of Rome, and particularly the immorality, as he thought it, of the confessional; and, consequently upon those grounds, the recorder held it was not indictable. Then comes the question whether, upon those grounds, the publication was not indictable, and I come to the conclusion that the recorder was wrong, and that it would be indictable. I take the rule of law to be, as stated by Lord Ellenborough in R. *v.* Dixon, 3 M. & S. at p. 15, in the shortest and clearest manner: 'It is a universal principle that when a man is charged with doing an act' (that is a wrongful act, without any legal justification), 'of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act.' And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of R. *v.* Dixon, 3 M. & S. 11. The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to children unwholesome bread, but without intent to do them harm. The defendant was a

[1] Supra, §§ 88, 119; R. *v.* Hicklin, L. R. 3 Q. B. 360. See infra, § 1654.

der such circumstances, as to exceed what the public good requires in regard to the particular matter published." [1] Whether the effect is to deprave and corrupt is a question of fact. The

contractor to supply bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet Lord Ellenborough held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend the natural consequences of his act. So in the case in which a person carried a child which was suffering from a contagious disease along the public road, to the danger of the health of all those who happened to be in that road, it was held to be a misdemeanor, without its being alleged that the defendant intended that anybody should catch the disease. R. *v.* Vantandillo, 4 M. & S. 73. Lord Ellenborough said that if there had been any necessity, as supposed, for the defendant's conduct, this would have been matter of defence. If, on the other hand, the small-pox hospital were on fire, and a person in endeavoring to save the infected inmates from the flames took some of them into the crowd, although some of the crowd would be liable to catch the small-pox, yet, in that case, he would not be guilty of a wrongful act, and he does not do it with a wrong intention, and he would have a good defence, as Lord Ellenborough said, under not guilty. To apply that to the present case: the recorder has found that one half of this book is obscene, and nobody who looks at the pamphlet can for a moment doubt that really one half of it is obscene, and that the indiscriminate circulation of it in the way in which it appears to have been circulated must be calculated necessarily to prejudice the morals of the people. The object was to produce the effect of exposing and attacking the Roman Catholic religion, or practices rather, and particularly the Roman Catholic confessional, and it was not intended to injure public morals; but that in itself would be no excuse whatever for the illegal act. The occasion of the publication of libellous matter is never irrelevant, and is for the jury; and the jury have to consider, taking into view the occasion on which matter is written which might injure another, is it a fair and proper comment, or is it not more injurious than the circumstances warranted? But, on the other hand, it has never been held that the occasion being lawful can justify any libel, however gross. I do not say there is anything illegal in taking the view that the Roman Catholics are not right. Any Protestant may say that without saying anything illegal. Any Roman Catholic may say, if he pleases, that Protestants are altogether wrong, and that Roman Catholics are right. There is nothing illegal in that. But I think it never can be said that in order to enforce your views you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one, — school-boys and every one else, — when the inevitable effect must be to injure public morality, on the ground that you have an

[1] Steph. Dig. C. L. art. 172.

line is thus correctly drawn by the English Commissioners of 1869: "It shall be a question of law whether the occasion

innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do. It seems to me that never could be made a defence to an act of this sort, which is in fact a public nuisance. If the thing is an obscene publication, then, notwithstanding that the wish was, not to injure public morality, but merely to attack the Roman Catholic religion and practices, still I think it would be an indictable offence. The question, no doubt, would be a question for the jury; but I do not think you could so construe this statute as to say, that whenever there is a wrongful act of this sort committed, you must take into consideration the intention and object of the party in committing it, and if these are laudable, that that would deprive the justices of jurisdiction. The justices must themselves be satisfied that the publication, such as the publication before them, would be a misdemeanor on account of its obscenity, and that it would be proper to indict. The recorder has found that the pamphlet is obscene, and he supports the justices in every finding except in what he has reversed it upon. He finds the object of the appellant in publishing the work was not to prejudice good morals, and consequently he thinks it would not be indictable at all. But I do not understand him for a moment to say, that if he had not thought there was a legal object in view, it would not have been a misdemeanor at all, and that therefore it would have been vexatious or improper to indict it; nor do I think that anybody who looks at this book would for a moment have a doubt upon the matter. That being so, on the question of whether or not on the facts that the recorder has found it would be a misdemeanor and indictable as such, I come to the conclusion that it is a misdemeanor and that an indictment would lie; and I say the justices were right, and consequently the recorder's decision is reversed, and the order of justices is confirmed."

Mellor, J.: "I confess I have with some difficulty, and with some hesitation, arrived very much at the conclusion at which my lord and my learned brothers have arrived. My difficulty was mainly, whether or not this publication was, under the finding of the recorder, within the act having reference to obscene publications. I am not certainly in a condition to dissent from the view which my lord and my brothers have taken as to the recorder's finding, and if that view be correct, then I agree with what has been said by my lord and my brother Blackburn. The nature of the subject itself, if it may be discussed at all (and I think it undoubtedly may), is such that it cannot be discussed without to a certain extent producing authorities for the assertion that the confessional would be a mischievous thing to be introduced into this kingdom; and therefore it appears to me very much a question of degree, and if the matter were left to the jury, it would depend very much on the opinion which the jury might form of that degree in such a publication as the present. Now, I take it for granted that the magistrates themselves were perfectly satisfied that this work went far beyond anything which was necessary or legitimate for the purpose of attacking the confessional. I take it that the finding of the recorder is (as I suppose was the finding of the justices below) that though one half of the book consists of casuistical and

of the sale, publication, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent, or circumstances in, to, or under which the sale, publishing, or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question of fact whether there is or is not such excess. The motives of the seller, publisher, or exhibitor shall in all cases be irrelevant." [1]

controversial questions, and so on, and which may be discussed very well without detriment to public morals, yet that the other half consists of quotations which are detrimental to public morals. On looking at this book myself, I cannot question the finding either of the recorder or of the justices. It does appear to me that there is a great deal here which there cannot be any necessity for in any legitimate argument on the confessional and the like, and agreeing in that view, I certainly am not in a condition to dissent from my lord and my brother Blackburn, and I know my brother Lush agrees entirely with their opinion. Therefore, with the expression of hesitation I have mentioned, I agree in the result at which they have arrived."

Lush, J.: "I agree entirely in the result at which the rest of the court have arrived, and I adopt the arguments and the reasonings of my lord chief justice and my brother Blackburn."

In Pennsylvania the offence is prohibited by Rev. Code, § 55.

[1] English Draft Code of 1879, § 147.

Sir J. Stephen, in discussing this topic, says: "There are many authors — *e. g.* Aristophanes, Swift, Defoe, Rabelais, Boccacio, Chaucer — whose works can be published in a whole without the possibility of a prosecution, from whom, however, extracts could be made which, if put together, could not be published with impunity." As to scientific publications, he adds that "the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically, I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticise without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it." Steph. Dig. C. L. note to art. 172. See supra, § 1432.

Of the law thus expressed he gives the following illustrations: —

"A., a bookseller, publishes the work of a casuist, which contains, among other things, obscene matter. The work is published in Latin, and appears, from the circumstances of its publication, to be intended for *bonâ fide* students of casuistry only. A. has not committed a misdemeanor.

"B. extracts the obscene matter from the work so published, translates it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon cas-

Procuring obscene prints for distribution is indictable.

§ 1608. The *obtaining* and *procuring* of obscene prints, with intent to sell them, is a misdemeanor;[1] but it has been held that the mere keeping of them with that intent is not.[2]

Obscenity need not be fully set forth.

§ 1609. In the indictment, when the offence consists of words *spoken*, it has been said that the averment is sufficiently exact if there is a general conformity between the words *laid* and those *proved*;[3] but the more reasonable opinion is that the substance of what is alleged should be strictly proved.[4] As is elsewhere noticed, it has been held not necessary, when the indictment is for a libel, to set out the obscene language in full; it being considered enough to aver the fact of the obscenity of the writing, and to give this as an excuse for not setting it forth.[5] And however much doubt may be thrown on

uists. B. has committed a misdemeanor."

To this he appends the following note: —

"The second paragraph of this illustration is based upon R. *v.* Hicklin, L. R. 3 Q. B. 360; and see Steele *v.* Brannan, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred, in passing, to the question in Steele *v.* Brannan, L. R. 7 C. P. 269, 270 but expressed no opinion upon it. I confine this article to obscenity, because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might, with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and *bonâ fide* expression of opinions commonly regarded as immoral."

To same effect is Com. *v.* Landis, 8 Phila. 453.

It is inadmissible to prove that in other publications equally objectionable passages are to be found. U. S. *v.* Bennett, supra.

[1] R. *v.* Heath, R. & R. C. C. 184. See R. *v.* Fuller, R. & R. C. C. 308.

[2] Dugdale *v.* R. 1 Dears. & B. 64; 1 El. & Bl. 435. See supra, § 1432.

[3] Bell *v.* State, 1 Swan (Tenn.), 42. See Whart. Cr. Pl. & Pr. § 203.

[4] Infra, § 1615.

[5] State *v.* Brown, 1 Williams (Vt.), 619; Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 S. & R. 91; People *v.* Girardin, 1 Mich. 90; McNair *v.* People, 89 Ill. 441; though see R. *v.* Bradlaugh, 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68; State *v.* Hanson, 23 Tex. 234. And see discussion in 4 Southern Law Journal, 258 (June, 1878); Whart. Cr. Pl. & Pr. § 177. For form see Whart. Prec. 968.

this point, it is clear that an indecent picture need not be copied on the indictment.[1]

§ 1610. The *scienter*, in a count for selling obscene publications, should be inserted.[2] *Scienter.*

As has been seen, two persons may be jointly indicted for singing an obscene song.[3]

IV. SEDITIOUS LIBELS.

§ 1611. Every man may publish temperate investigations on the nature and form of government. Such matters are proper for public information;[4] but if the object and effect of the publication be to disturb the peace of families, or the quiet of society, or the existence of government, either federal or state, it becomes subject to indictment.[5]

Libels aimed maliciously at the existence of government indictable.

[1] Com. *v.* Sharpless, 2 S. & R. 91.

[2] Supra, § 119.

[3] R. *v.* Benfield, 2 Burr. 980. Supra, § 1603.

[4] See R. *v.* Collins, 9 C. & P. 456; R. *v.* Sullivan, 11 Cox C. C. 44, and cases cited infra.

[5] Ld. Raym. 418; 3 Term R. 428; 2 Wils. 275; Hawk. P. C. c. 73, s. 7; King *v.* Beere, 12 Mod. 221; King *v.* Laurence, 12 Mod. 311; R. *v.* Bedford, Gilbert's Cases, 297; R. *v.* Tutchin, 5 St. Trials, 527; R. *v.* Franklin, 9 St. Trials, 276; R. *v.* Horn, Ibid.; Re Crowe, 3 Cox C. C. 123; Thomas *v.* Croswell, 7 Johns. 264; King *v.* Root, 4 Wend. 113; Cramer *v.* Riggs, 17 Wend. 209; Resp. *v.* Dennie, 4 Yeates, 270; Com. *v.* Meeser, 1 Brewst. 492; Robbins *v.* Treadway, 2 J. J. Marsh. 540. See, for forms, Whart. Prec. 953, &c.

The English Commissioners of 1879 (Draft Code, p. 85) thus state the law:—

"A seditious intention is an intention,—

"To bring into hatred or contempt, or to excite disaffection against the person of her Majesty, or the government or constitution of the United Kingdom or of any part of it as by law established, or either house of parliament, or the administration of justice; or,

"To excite her Majesty's subjects to attempt to procure otherwise than by lawful means the alteration of any matter in church or state by law established; or,

"To raise discontent or disaffection amongst her Majesty's subjects; or,

"To promote feelings of ill-will and hostility between different classes of such subjects:

"Provided that no one shall be deemed to have a seditious intention only because he intends, in good faith,—

"To show that her Majesty has been misled or mistaken in her measures; or,

"To point out errors or defects in the government or constitution of the United Kingdom or of any part of it as by law established, or in the administration of justice, with a view to the reformation of such alleged errors or defects; or to excite her Majesty's subjects to attempt to procure

Yet while such is no doubt the law, prosecutions of this class have recently fallen, in England as well as in the United States, for several reasons, into disuse. In the first place, it is now generally felt that unless criticism is permitted to penetrate even to the foundations of government, revolution rather than reform may result. Time, says Bacon, is the greatest of destructives; and truth is to be constantly employed in repairing the breaches which time makes. The wise conservative, therefore, is often

by lawful means the alteration of any matter in church or state by law established; or,

"To point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of her Majesty's subjects.

"Seditious words are words expressive of or intended to carry into execution or to excite others to carry into execution a seditious intention.

"A seditious libel is a libel expressive of or intended to carry into execution or to excite others to carry into execution a seditious intention.

"A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention."

In Step. Dig. Cr. L. we have the following: —

"ARTICLE 93.

"*Seditious Intention defined.* — A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, her Majesty, her heirs or successors, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. 60 Geo. 3 & 1 Geo. 4, c. 8; and O'Connell *v.* R. 11 Cl. & F. 155, 234.

"An intention to show that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of her Majesty's subjects, is not a seditious intention. R. *v.* Lambert and Perry, 2 Camp. 398; R. *v.* Vincent, 9 C. & P. 91.

"ARTICLE 94.

"*Presumption as to Intention.* — In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

apparently the most destructive radical; as he is the most prudent repairer who, when the piers of a bridge are weakened by a storm, advises that the work of reconstruction should begin at the foundation. To prevent the application of revolutionary criticism to government is of all modes of government the most revolutionary. And closely allied with this position is another, that among countries used to freedom, libels only begin to bring the State into contempt when they are prosecuted by the State as contemptuous. The sedition laws, for instance, were among the chief causes of the overthrow of the administration of John Adams; and their repeal one of the chief causes of the popularity of that of Jefferson. If, however, seditious libels are to be prosecuted, it is well to keep in mind the noble words of princes from whose edicts the English common law, imbued as it is in so many other respects with the spirit of freedom, has much, in reference to the law of libel, to learn: "Imppp. Theodosius, Arcadius et Honorius, A. A. A., Rufino P. P. Si quis modestiae nescius et pudoris ignarus improbo petulantique maledicto nomina nostra crediderit lacessenda, ac temulentia turbulentus obtrectator temporum nostrorum fuerit, *eum poenae nolumus subiugari, neque durum aliquid nec asperum sustinere, quoniam, si ex levitate processerit, contemnendum est, si ex insania, miseratione dignissimum, si ab injuria, remittendum.*" [1]

So of libels on executive.

§ 1612. Libels on the executive, if couched in such a shape as to bring the government into contempt, are by the English common law the subjects of penal prosecution.[2] Whether the defendant really intended by his publication to alienate the affections of the people from the government was held by Lord Ellenborough not to be material; if the publication tend to have that effect, it has been held to be a seditious libel.[3]

[1] L. un. Cod. si quis imperatori maledixerit (9. 7).

[2] See 4 Blac. Com. 423; R. *v.* Harvey, 2 B. & C. 257; 3 D. & R. 464; R. *v.* Cobbett, Holt on Libel, 114; Starkie on Libel, 522, and comments, supra, § 1611.

[3] R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Harvey, 2 B. & C. 257; 3 D. & R. 464.

In U. S. *v.* Lyon, Wh. St. Tr. 336, the indictment being for a libel, the object of which was "to stir up sedition and to bring the President and the government of the United States into contempt," Judge Paterson, in charging the jury, said, "The only ques-

But to this it may be properly objected that though a mixture of other motives is no defence,[1] yet to a seditious libel a seditious motive is essential. And if there be reasonable ground for a belief by the defendant in the facts stated, and no proof of malice, censures of this class are not indictable.[2]

So of libels on foreign powers.

§ 1612 *a*. According to Sir J. Stephen, "Every one is guilty of a misdemeanor who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador, or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs."[3] No doubt this is the rule at common law, whenever the intent and effect are to stir up ill feeling with the power assailed. Such a prosecution may be instituted in a state court.[4]

tion you are to consider is that which the record submits to you. Did Mr. Lyon publish the writing given in the indictment? Did he do so seditiously? . . . . As to the second point you will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the President and government, and bringing them both into disrepute." By the statute, afterwards repealed, under which this prosecution took place, "the jury have a right to determine the law and the fact, under the direction of the court, as in other cases." The salient point of the libel was as follows: "Whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power; in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice," &c. The defendant, then a member of Congress, was convicted, imprisoned, and fined. The prosecution, however, was impolitic, if within the letter of the statute; and was followed soon afterwards by the repeal of the statute and the overthrow of the party in power. "The bringing the government into contempt," alleged by the indictment, was done far more effectively by the prosecution than by the libel.

[1] Supra, § 119.

[2] See Brightly's Penn. Dig. 1631, citing Com. *v.* Reed, 30 Leg. Int. 424.

[3] Steph. Dig. C. L. art. 99. To this is appended the following note: "R. *v.* D'Eon, 1 Blac. 510; R. *v.* Lord G. Gordon, 22 St. Tr. 213–233. (This was the case of a libel on Marie Antoinette seven years after the defendant's acquittal for high treason.) R. *v.* Vint (1801). Vint wrote of the Emperor Paul, 'The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency.' Starkie, by Folkard, 669. R. *v.* Peltier, 28 St. Tr. 529; 6th Rep. C. L. Com. art. 50, p. 34."

[4] In Chief Justice McKean's charge to the grand jury of Philadelphia, in view of the prosecution of Cobbett for

§ 1613. Libels on the legislature may be regarded not only as tending to breaches of the peace, but as high breaches of privilege.[1] They may also be punished as contempts. But while it may be proper to prosecute criminally the author of a libel charging a *legislator* with corruption, criticisms, no matter how severe, on a *legislature*, are within the range of

So of libels on legislature.

libelling the Spanish minister, occurs the following: —

"At a time when misunderstandings prevail between the Republic of France and the United States, and when our general government have appointed public ministers to endeavor to effect their removal, and restore the former harmony, some of the journals or newspapers in the city of Philadelphia have teemed with the most irritating invectives, couched in the most vulgar and opprobrious language, not only against the French nation and their allies, but the very men in power with whom the ministers of our country are sent to negotiate. These publications have an evident tendency, not only to frustrate a reconciliation, but to create a rupture, and provoke a war between the sister republics, and seem calculated to vilify, nay to subvert, all republican governments whatever.

"Impressed with the duties of my station, I have used some endeavors for checking these evils, by binding over the editor and printer of one of them, licentious and virulent beyond all former example, to his good behavior; but he still perseveres in his nefarious publications; he has ransacked our language for terms of insult and reproach, and for the basest accusations against every ruler and distinguished character in France and Spain with whom we chance to have any intercourse, which it is scarce in nature to forgive; in brief, he braves his recognizance and the laws. It is now with you, gentlemen of the grand jury, to animadvert on his conduct; without your aid it cannot be corrected. The government that will not discountenance, may be thought to adopt it, and be deemed justly chargeable with all the consequences.

"Every nation ought to avoid giving any real offence to another. Some medals and dull jests are mentioned and represented as a ground of quarrel between the English and Dutch in 1672, and likewise called Louis the XIV. to make an expedition into the United Provinces of the Netherlands in the same year, and nearly ruined the commonwealth.

"We are sorry to find our endeavors in this way have not been attended with all the good effects that were expected from them; however, we are determined to pursue the prevailing vice of the times with zeal and indignation, that crimes may no longer appear less odious for being fashionable, nor the more secure from punishment from being popular."

The indictment was ignored, so the prosecution went no further.

[1] See Sir W. W. Wynne, on the House of Commons. See also 1 Mod. 144; 2 Ld. Raym. 938; 1 Wils. 299; 8 Term R. 314; 14 East, 1. In this country, may be noticed Wm. Ketalta's case, Journ. Assembly of New York, 1795; George Clarke's case, Ibid. 1810, Journ. of Senate; Jefferson Parliamentary Practice, § 3; Anderson's case, Journ. of Congress, January, 1818. Compare discussion of Hansard's case in Lord Denman's Life.

the liberty of the press, unless the intention and effect be seditious.[1]

So of libels on courts.

§ 1614. Intemperate reflections on the proceedings of courts of justice, when bringing public justice into contempt, are distinctively libellous.[2] As hereafter seen, it is libellous even to publish a correct account of judicial proceedings if accompanied with comments and insinuations tending to asperse a man's character.[3] It is libellous, also, to charge a jury with malice or corruption.[4]

Seditious words may be indictable.

§ 1615. Seditious words, though not in writing, are of themselves indictable when publicly uttered with malicious intent.[5] Great particularity, however, as in indictments for obscene or profane words, is requisite; for prosecutions of this class are perilous agencies, and should be kept within bounds. Thus, any variance in substance will be fatal; as where the words were set out in the indictment in the third person, "*He is*," &c., and proved to have been spoken in the second person, "*You are*," &c.;[6] and where the words set out imported they were spoken of a thing then present, and the words were proved to have been spoken of a thing not then present.[7]

§ 1616. Slanderous words spoken to a magistrate, when in the execution of his office, are of themselves indictable.[8]

[1] Infra, § 1634.

[2] Holt's Law of Libel, 170; 1 Hawk. c. 73, s. 8; R. *v.* White, 1 Campb. 359, n.; R. *v.* Collins, 9 C. & P. 456; R. *v.* Staples, Andr. 228; Foster *v.* Com. 8 W. & S. 77. See Wh. Prec. 944.

[3] Com. *v.* Blanding, 3 Pick. 304; Thomas *v.* Croswell, 7 Johns. 264. A fair and strict report, however, is no libel. Lewis *v.* Walter, 4 B. & Ald. 605. See infra, § 1639.

[4] R. *v.* Spiller, 2 Show. 207; Com. *v.* Wright, 1 Cush. 46, and cases cited § 1595.

[5] Cro. Jac. 407; 2 W. Blac. 790. Wh. Prec. 961; Wh. Cr. Pl. & Pr. § 203.

In the English Draft Code of 1879 we have the following:—

"Seditious words are words expressive of, or intended to carry into execution, or excite others to carry into execution, a seditious intention." As to this the commissioners say: "On this very delicate subject we do not undertake to suggest any alteration of the law. It is not easy to find explicit authority earlier than Frost's case (22 St. Tr. 471, tried before Lord Eldon in 1793) for the proposition, that to speak seditious words is an indictable offence." Sec. 102.

[6] R. *v.* Berry, 4 T. R. 217. See supra, § 1609.

[7] Walters *v.* Mace, 2 B. & Ald. 756; Updegraff *v.* Com. 11 S. & R. 394. Compare R. *v.* Fussell, 3 Cox C. C. 291; R. *v.* Crowe, 3 Cox C. C. 123.

[8] R. *v.* Pocock, 2 Str. 1157; R. *v.*

§ 1617. Where the alleged libellous writing reflects on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is in almost all cases either directly or impliedly admitted by the libel itself;[1] proof that he was in the habit of acting as such officer or professional man would, in that case, be sufficient; but if the gist of the libel is that the prosecutor had acted in a particular office without proper appointment, it is said to be essential to prove such appointment.[2]

Public officer prosecuting need not prove his appointment.

V. PUBLICATION.

§ 1618. Publication of a libel is ordinarily defined as its communication or delivery or exhibition to any person other than the party libelled, provided that the person publishing knows, or has an opportunity of knowing, the contents of the libel. It has, however, been held that evidence which shows that a libel came to the hands of the person libelled[3] may amount inferentially to proof of publication.[4]

Publication must be to third person.

Weltje, 2 Camp. 142; 2 Salk. 698. Wh. Cr. Pl. & Pr. §§ 203, 965.

[1] Supra, §§ 1570, 1589; Whart. Crim. Ev. §§ 164, 833; 4 T. R. 366; 1 B. & P. (N. R.) 196, 208; Jones *v.* Stevens, 11 Price, 235; Pearce *v.* Whale, 5 B. & C. 38.

[2] Whart. Crim. Ev. §§ 164, 835; Smith *v.* Taylor, 1 B. & P. (N. R.) 196; 11 Mod. 308; 4 M. & S. 548; 1 Ad. & El. 695; 3 Bing. 432. Supra, §§ 648 *et seq.*

[3] R. *v.* Burdett, 4 B. & Al. 95; R. *v.* Wegener, 2 Stark. (N. P.) 245; R. *v.* Brooke, 7 Cox C. C. 251; State *v.* Avery, 7 Conn. 268; Hodges *v.* State, 5 Humph. 112; Swindle *v.* State, 2 Yerg. 581.

[4] R. *v.* Burdett, 4 B. & Al. 95; R. *v.* Wegener, 2 Stark. (N. P.) 245. See State *v.* Avery, 7 Conn. 268; Hazleton Coal Co. *v.* Megargel, 4 Barr, 324; Swindle *v.* State, 2 Yerg. 581.

According to Sir J. Stephen (Dig. Cr. L. art. 270), to publish a libel "is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to any person other than the person libelled, provided that the person making the publication knows, or has an opportunity of knowing, the contents of the libel [(submitted) if it is expressed in words, or its meaning if it is expressed otherwise.]"

"A libel, published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not only by the person who actually sells or exhibits it, but also by his master, if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

"Provided, that whenever, upon the trial of any person for the publication of a libel, evidence has been given

§ 1619. A publication consisting solely in exhibition to the party libelled is wanting in one of the necessary constituents of a libel; namely, exposure of the party libelled to public contempt. Hence, when the libel is in a sealed letter sent by mail, the indictment must charge that it was sent with the intention of provoking a breach of the peace, or other misdemeanor.[1]

When libel is in sealed letter, intent to provoke breach of peace must be charged.

§ 1620. In cases of mailed libels, the defendant may be indicted for a publication either in the county in which the letter was mailed, or in that to which it was directed.[2] If a libel is written in one county, and sent by post addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county.[3] And if a libellous letter is sent by the post addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication.[4]

Venue may be in place either of mailing or of delivery.

§ 1621. It is said, however, that the post-mark of a particular place within the county, upon a letter containing the libel, is no evidence of a posting in that county; for the post-mark might be forged.[5] But it would seem that post-marks are evidence that the letters on which they are printed were in the office post-marked, at the date thereby

Post-marks may be evidence of mailing.

which establishes a presumptive case of publication against the defendant, by the act of any other person by his authority, the defendant may prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on his part."

The law is thus given by the English Commissioners of 1879, Draft Code, p. 111:—

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

[1] R. v. Wegener, 2 Stark. (N. P.) 245; Hodges v. State, 5 Humph. 112; 1 Hawk. c. 73, s. 11. That a postal card is a publication see Robinson v. Jones, 20 Alb. L. J. 202.

[2] R. v. Burdett, 4 B. & Al. 95; U. S. v. Worrall, 1 Dall. 388; Whart. St. Tr. 189. See fully supra, § 288; and see particularly Whart. Crim. Ev. § 113.

[3] Seven Bishops' case, 12 How. St. Tr. 331, 332; R. v. Jones, 4 Cox C. C. 198; 1 Den. C. C. 551; Whart. Crim. Ev. § 113.

[4] R. v. Watson, 1 Camp. 215.

[5] Ibid. See Whart. on Ev. § 1325.

specified.[1] The better opinion is, that the post-mark is *primâ facie* evidence that the letter was put into the office at the place marked,[2] and that it was received by the person to whom it was addressed when the address is correct.[3]

§ 1622. Selling the libel to the agent of the person libelled is publication.[4] So the delivery of a newspaper to the officer of the stamp-office is a sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself.[5]

Selling is publication.

§ 1623. A party who communicates libellous matter to another, with a view to its publication, is guilty of publishing, on the principle that in misdemeanors all participants are principals.[6] And one who furnishes the facts of a libel published in a paper, and consents to its publication, is indictable for the libel.[7]

Instigator is principal.

§ 1624. Printing is not sufficient proof of publication, as the writer may have acted as compositor and pressman himself.[8]

Printing not *per se* publication.

§ 1625. Where a libel was published in a newspaper printed in the State of Rhode Island, but which usually circulated in a county in Massachusetts, and the number containing the libel was actually circulated in such county, it was held that this was evidence of a publication in such county.[9]

Circulation proof of publication.

§ 1626. The identical libel published must be produced; though where it is in the prisoner's exclusive possession, or has been lost or destroyed, or where, from other circumstances, its production is out of the power of

Of non-obtainable libel parol proof is admissible.

[1] See R. *v.* Plumer, R. & R. 264; R. *v.* Johnson, 7 East, 65.

[2] R. *v.* Johnson, 7 East, 65; Fletcher *v.* Braddyll, 3 Stark. (N. P.) 64; 2 Stark. on Slan. 36, 38; and see cases in Whart. on Ev. § 1325.

[3] Shipley *v.* Todhunter, 7 C. & P. 680; Warren *v.* Warren, 4 Tyrw. 850; New Haven Bk. *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321; 2 Greenl. on Ev. § 416.

[4] Brunswick *v.* Harmer, 14 Q. B. 185.

[5] R. *v.* Amphlit, 6 D. & R. 126; 4 B. & C. 35.

[6] Adams *v.* Kelly, R. & M. (N. P.) 157.

[7] Clay *v.* People, 86 Ill. 147.

[8] R. *v.* Lovett, 9 C. & P. 462.

[9] Com. *v.* Blanding, 3 Pick. 304.

the prosecutor, then, as in other cases of non-producible papers, secondary evidence is admissible of its contents.[1]

Master responsible for servant.

§ 1627. Evidence that the libel was purchased in a bookseller's shop, or at a newspaper office, or the office of a newsvender, of a servant there, in the course of business, will at common law maintain a count, charging the master with having published it,[2] even though it be proved that the master was not privy to it,[3] though the better view is that the publisher is not responsible unless negligent.[4]

Admissions may prove libel.

§ 1628. The admission of the defendant himself, of the fact of his concern in the libel, is sufficient,[5]

[1] Johnson *v.* Hudson, 7 Ad. & El. 233; Huff *v.* Bennett, 2 Sand. 703; Wh. Cr. Ev. § 199.

[2] Infra, § 1649; 4 Bac. Abr. Libel, b. 2; R. *v.* Almon, 5 Burr. 2686; Com. *v.* Morgan, 107 Mass. 199. See Com. *v.* Gillespie, 7 S. & R. 469, per Duncan, J.

[3] R. *v.* Walter, 3 Esp. 21; R. *v.* Gutch, M. & M. 433; Atty. G. *v.* Sidden, 1 C. & J. 220. See fully supra, §§ 246 *et seq.*

[4] Infra, § 1649.

Under Lord Campbell's Act (6 & 7 Vict. c. 96), the publisher is not responsible for his servant's independent act, in cases where the master is non-negligently ignorant of the act. Under this act, on the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants, it was ruled by Cockburn, C. J., and Lush, J., that there must be a new trial; for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. It was held by Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved; and that the case was properly withdrawn from the jury. R. *v.* Holbrook, L. R. 3 Q. B. D. 60. 14 Cox C. C. 185. For second trial see infra, § 1649; compare London Law Times, Nov. 15, 1879, p. 48.

In Com. *v.* McClure, 3 Weekly Notes, 58, it was held that under a provision in the Pennsylvania Constitution, where a libel relates to matter proper for public investigation, and is published without negligence or malice, the publisher is not responsible. See supra, §§ 246 *et seq.*

[5] Com. *v.* Guild, Thach. C. C. 329; Townsh. on Sland. 495 *a*.

but does not prove that he published it in a particular county.[1]

VI. WHAT COMMUNICATIONS ARE PRIVILEGED.[2]

1. *From the Relation of the Parties.*

§ 1629. A publication, though defamatory, yet if written *bonâ fide*, or in confidence, or with a view of investigating a fact in which the party making it is interested, *Bonâ fide* confidential per-

[1] Seven Bishops' case, 12 How. St. Tr. 331. See Whart. on Ev. §§ 623 *et seq.*

[2] Sir J. Stephen, in note xvi. to his Dig. of Cr. Law, says: —

"The word 'malicious,' in reference to the offence of libel, has been elaborated by the judges into a whole body of doctrine on the subject, in the same sort of way as the words 'malice aforethought' in the definition of murder.

"The process was of this sort. Malice was first divided into malice in fact and malice in law, — malice in fact being personal spite, and malice in law being defined to be 'a wrongful act done intentionally, and without just cause or excuse.'

"Inasmuch as the publication of a libel must always be intentional, and inasmuch as the courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime unless there was some just cause or excuse for it. What amounts to a 'just cause or excuse' was decided by a multitude of cases. The phraseology employed in their decisions has been as follows. Defamatory matter which it was considered lawful to publish has been described as a 'privileged communication.' This 'privilege' has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege: absolute, if it justifies the publication, whatever may be the state of mind of the publisher; qualified, if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

"The law thus falls into the singular condition of a see-saw between two legal fictions, — implied malice on the one hand, and privilege, absolute or qualified, on the other.

"I will give a single instance of the intricacy to which this leads. A. writes of B. to C., 'B. is a thief.' Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment, and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A., namely, the privilege of saying to C. that B. is a thief, qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B., however, proves not only that he was not a thief, but that A. must have

sonal communications are privileged.

may not be a libel.[1] A person, also, has a right to communicate to another any information he is possessed of in a matter in which they have a mutual interest, if there be no malice or officiousness.[2]

known it when he said that he was. This raises a presumption of express malice, or malice in fact, in A., and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

"This machinery of express and implied malice, and qualified and absolute privilege, is only a roundabout and intricate way of saying that, as a general rule, it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule, by virtue of which it is not a crime to defame a man,—

"(*a.*) If the defamatory matter is true, and its publication is for the public good.

"(*b.*) Although the defamatory matter is false,

"(i.) If the libeller, in good faith, believes it to be true, and publishes it for certain specified reasons;

"(ii.) Although he knows it to be false, if he publishes it in a particular character.

"By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient, and proximately complete, the scaffold may be taken down."

The English Commissioners of 1879, in the Draft Code, p. 112, state the rules in this relation as follows:—

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

"No one commits an indictable offence by publishing, in any proceeding held before or under the authority of any court of justice, or in any inquiry held under the authority of any statute, or by order of her Majesty, or of any of the departments of state, or of the lord lieutenant, any defamatory matter.

"No one commits an indictable offence by publishing to either house

[1] See infra, § 1643.

[2] See Moore *v.* Terrell, 4 B. & Ad. 871; 1 N. & M. 559. Thus, a letter from a son-in-law to his mother-in-law, volunteering advice about her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice be shown. Todd *v.* Hawkins, 2 M. & R. 20; 8 C. & P. 88. See Home *v.* Bentinck, 2 B. & B. 130; Townsh. on Sland. 322.

§ 1630. *Meddlesomeness* is the test in respect to purely volunteer communications. If a communication be merely meddlesome, — if it be not dictated by common interests or by any distinctive personal duty, — then the

Meddlesomeness is the test.

of parliament defamatory matter contained in a petition to either house, or by publishing, by order or under the authority of either house of parliament, any paper containing defamatory matter, or by publishing any extract from or abstract of any such paper: Provided such extract or abstract is published in good faith and without ill-will to the person defamed.

"No one commits an indictable offence by publishing in good faith, for the information of the public, a fair report of the proceedings of either house of parliament, or of the public proceedings of any court of justice, whether preliminary or final, nor by publishing in good faith any fair comment upon any such proceedings.

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

"No one commits an indictable offence by publishing fair comments upon any person who takes part in public affairs: Provided such fair comments are confined to the public conduct of such person in such affairs.

"No one commits an indictable offence by publishing fair comments on any published book or other literary production, or any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance, or communication: Provided that nothing herein contained shall justify or excuse the publishing of defamatory matter on any person other than the author, artist, or publisher of such book or literary production, or composition or work of art, or the performer, manager, or conductor of such performance, or the maker of such communication: Provided, also, that nothing herein contained shall excuse or justify the publishing of any defamatory matter on such author, artist, publisher, performer, manager, conductor, or maker, except so far as it fairly arises out of such criticism.

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

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

"The sale by a servant of any book, pamphlet, print, or writing, or other thing, whether periodical or not, shall not make his master or employer

privilege cannot be invoked.[1] In other words, "The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed, either in extent or in manner, what is reasonably sufficient for the occasion."[2]

Master's character of servant is privileged.

§ 1631. A master is privileged to give a correct character of a servant, upon any inquiry made to him relative to the servant; and no action lies for the answer.[3] But it is otherwise where a false answer is given maliciously.[4]

criminally responsible in respect of defamatory matter contained therein, unless it be proved that such master or employer authorized such sale, knowing that such book, pamphlet, print, writing, or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

"It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true: Provided that such defence shall not be entertained unless it is pleaded in the manner hereinafter provided for."

[1] Shipley *v.* Todhunter, 7 C. & P. 680. The following are among the leading cases on this point.

Where B., a tradesman, is dismissed from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, and B. after this writes a letter to A. vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication, if it be done *bonâ fide*, and without malice. Compare, however, Coward *v.* Wellington, 7 C. & P. 531.

A. had sold goods to B., a tradesman, and before the delivery of them, C., without being asked or solicited in any way to do so, spoke words injurious to the credit of B., as a tradesman, this was held not a privileged communication; but if he had been asked by A. as to the credit of B., it would have been so. R. *v.* Watts, 8 C. & P. 614. See McDougall *v.* Claridge, 1 Camp. 267; Storey *v.* Challands, 8 C. & P. 234.

[2] Steph. Dig. C. L. art. 278.

When the existence of the relation establishing the duty has been proved, the burden of proving that the statement was not honestly believed to be true is upon the prosecutor. Ibid.

Reasonableness of belief is immaterial when a communication is privileged. Clark *v.* Molyneux, 14 Cox C. C. 10.

[3] Hargrave *v.* Le Breton, 4 Burr. 2425; Pattison *v.* Jones, 3 Man. & R. 101; 8 B. & C. 578; Child *v.* Affleck, 9 B. & C. 403; 4 Man. & R. 338; 1 M. & P. 33, 61, 692.

[4] Kelly *v.* Partington, 4 B. & Ad. 700; 2 N. & M. 460.

§ 1632. Public policy requires that the officers of all trusts, whether religious, charitable, or financial, should be closely watched by the governing bodies of such trusts. Hence *bonâ fide* communications from a director or member of any society exercising such trust, to a fellow director or member, as to the character of an officer or candidate for office, are privileged.[1] The question of good faith is for the jury.[2] If there be malice, privilege may be no defence.[3]

So of *bonâ fide* communications by directors of companies.

§ 1632 *a*. A business publication, which becomes necessary in a particular juncture of a party's affairs, may be privileged on the ground of necessity,[4] though it might otherwise be libellous. This is the case with an advertisement, by a party *bonâ fide* and reasonably believing notes to have been fraudulently obtained from him, notifying the public to this effect.[5] But it is otherwise when such publication is unnecessary.[6]

So of *bonâ fide* business publications.

§ 1633. A circular letter, sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respect-

So of communications by

Sir J. Stephen (Dig. C. L. art. 273) illustrates the topic in the text as follows: —

"A. being asked the character of B., who had been in his service, by C., who is about to engage B. as a servant, writes of B., in a letter to C., the words "B. is a drunkard and a thief." If A. honestly and on reasonable grounds believes that B. is a drunkard and a thief, though in fact he is neither, this is not a libel.

"If A. published this letter in a newspaper it would be a libel.

"As soon as the circumstances under which the letter was written are proved or appear, the burden of proving that A. did not honestly and on reasonable grounds believe B. to be a drunkard and a thief is upon B., in a prosecution or action by B. Beatson *v.* Skene, 5 H. & N. 838."

[1] Blackburn *v.* Blackburn, 4 Bing. 395; 1 M. & P. 33, 63; 3 C. & P. 146; Thompson *v.* Shackell, M. & M. 187; Green *v.* Chapman, 5 Scott, 340; 4 Bing. (N. C.) 92; Kelly *v.* Tinling, L. R. 1 Q. B. 699 (a case of a church warden criticising a clergyman); though see Martin *v.* Strong, 1 N. & P. 29; 5 Ad. & El. 535. As to church discipline see infra, § 1641. In Phil. &c., R. R. *v.* Quigley, 21 How. 202, it was held that a report of a committee of stockholders, containing defamatory matter, lost its privilege by being published.

[2] Gassett *v.* Gilbert, 6 Gray, 94.

[3] Bodwell *v.* Osgood, 3 Pick. 379. But see infra, § 1654.

[4] See supra, § 95.

[5] Com. *v.* Featherston, 9 Phila. 594.

[6] Com. *v.* Sanderson, 5 Clark (Pa.), 54. See Com. *v.* Odell, 3 Pitts. R. 449.

commercial agencies, &c.

ing certain bill transactions, is not a privileged communication.[1] The test in such cases, and also in cases relative to commercial agencies, is that already invoked. If the communication be a *bonâ fide* reply to a previous correspondent seeking for information, it is privileged. If it be an officious address, purely volunteer, and sent unasked by the person libelled, there is no privilege. And a commercial agency is not privileged to communicate to its subscribers information prejudicial to a party as to whom no inquiry was made.[2]

2. *From Public Policy.*

So of legislative speeches and proceedings.

§ 1634. The defendant may show that the alleged libel formed part of a speech delivered by him as a member of a legislature; and this privilege extends to the subsequent faithful report of his speech in a public newspaper.[3] So he may prove that the matter alleged to be libellous was contained in a petition to the legislature, or was a part of the proceedings of the legislature; though for an extrinsic publication wantonly malicious, this has been ruled to be no defence.[4] In England, in a case of great political celebrity, this law was reiterated by the Queen's Bench, and it was maintained that a publication which was *per se* a malicious libel

[1] Getting *v.* Foss, 3 C. & P. 160. See Ward *v.* Smith, 6 Bing. 749.

[2] Com. *v.* Stacey, 8 Phila. 617.

"A business," said Allison, J., "such as that conducted by the defendant, if properly managed, may be of the greatest service to the business men of the country; but if carried on with a reckless disregard of the rights of others may be converted into an evil against which no man can protect himself. . . . . There is no great hardship imposed on an agency of this kind, if they are required to know beforehand that their statements are true, and *that the persons to whom they are sent have an interest in receiving the information;* and this could be accomplished by requiring every subscriber to furnish to the agency from time to time the names of the firms with whom they had established business relations, or who may apply to them for credit." Com. *v.* Stacey, 8 Phila. 621.

[3] Wason *v.* Walter, L. R. 4 Q. B. 73, qualifying R. *v.* Creevey, 1 M. & S. 273; R. *v.* Lord Abingdon, 1 Esp. 226; Coffin *v.* Coffin, 4 Mass. 1, 31; Com. *v.* Blanding, 3 Pick. 304.

[4] 1 Hawk. c. 73, s. 7. See Fairman *v.* Ives, 1 D. & R. 252; R. *v.* Lee, 5 Esp. 123; M'Gregor *v.* Thwaites, 3 B. & C. 24; 5 D. & Ry. 447; Townsh. on Sland. 342; Home *v.* Bentinck, 2 B. & B. 130 (though see Dickson *v.* Lord Wilton, 1 F. & F. 419); Com. *v.* Clap, 4 Mass. 163; Com. *v.* Morris, 1 Va. Cas. 176.

could not be defended on the ground that it was directed by parliament.[1] Upon this was enacted the statute of 31 Vict. c. 23, making publication by direction of parliament a defence.[2]

In the United States, in view of the vast benefit arising from full and faithful reports of the proceedings of the legislatures, both federal and state, we must conclude that the fact that a publication is a report of legislative proceedings, fairly and fully made, is an absolute bar. For it is only by a fair and full report of legislative action that the people are able to exercise a wise control over their representatives, and the due dignity and propriety of the representative body can be maintained. A legislature sitting in secret has great temptation to transcend its own bounds and invade private rights; and a legislature would be practically invested with secrecy if it was an indictable offence to publish its proceedings whenever those proceedings were offensive. In maintaining this great principle, as in the case of judicial reports to be hereafter noticed, the incidental annoyance to individuals must be overlooked.[3] But this reasoning does not apply to extracts maliciously made out of the range of the ordinary reports.

So of official reports.

§ 1635. Personal censures, when within the proper limit of an official report, are privileged. Eminently is this the case in the military service, where the public safety requires that official duty in this respect should be fearlessly performed. So far has this been pushed in England, that it has been ruled by the Queen's Bench that the report of a military officer is privileged, even though made maliciously and without probable cause.[4] But such publication becomes libellous when directed to parties disconnected with government.[5]

[1] Stockdale *v.* Hansard, 11 Ad. & El. 253; 2 Per. & D. 346. A full discussion of this remarkable case will be found in Lord Denman's Life.

[2] See 11 Ad. & El. 297; 3 Per. & D. 346.

[3] See Davison *v.* Duncan, 7 E. & B. 229; Wason *v.* Walter, L. R. 4 Q. B. 95, argument of Cockburn, C. J.; Stanton *v.* Andrews, 5 Up. Can. (Q. B.) 221.

[4] Dawkins *v.* Lord Paulet, L. R. 5 Q. B. 94, Cockburn, C. J., dissenting; Beatson *v.* Skene, 5 H. & N. 838. See Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255; Home *v.* Bentinck, 2 B. & B. 130; R. *v.* Abingdon, 1 Esp. 226.

[5] Harwood *v.* Green, 3 C. & P. 141.

§ 1636. Communications to a governor or other appointing power are privileged, if they do not contain malicious defamatory fabrications, or if they have such probable cause as may operate to show absence of malice.[1]

So of communications to electing or appointing power as to candidate.

But a communication to the public at large, in a newspaper, as to the qualifications of a candidate for office, the appointment to which is made by a board of limited number, does not stand on the same footing of privilege as if addressed to the appointing power.[2]

But pertinent criticisms on the character of candidates for popular election, addressed to the electors, are held privileged.[3]

§ 1637. Counsel in the discharge of their duty, and in matters relative to the issue, may make observations injurious to individuals, and publish the same when required by professional duty,[4] but the publication of such slanderous matter is not justifiable, unless it is shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.[5]

So of professional publications by counsel.

The same reasoning prevents the defence of privilege from being maintained by counsel who publish defamatory speeches made by them on trial.[6]

[1] Harwood *v.* Green, 3 C. & P. 141; Thorn *v.* Blanchard, 5 Johns. 508; Com. *v.* Morris, 2 Wheel. C. C. 465; 1 Va. Cas. 176; Gray *v.* Pentland, 2 S. & R. 23; S. C., 4 S. & R. 420; Flitcraft *v.* Jenks, 3 Whart. 158. Compare Harrison *v.* Bush, 5 E. & B. 344; Curtis *v.* Mussey, 6 Gray, 261; Rogers *v.* Spalding, 1 Up. Can. (Q. B.) 258; Stanton *v.* Andrews, 5 Up. Can. (Q. B.) 211; Com. *v.* Odell, 3 Pitts. R. 449.

[2] Hunt *v.* Bennett, 19 N. Y. 173.

[3] See cases cited above; though see, as limiting this view, Aldrich *v.* Press Co. 9 Minn. 133.

[4] Hodgson *v.* Scarlett, 1 B. & Ald. 232.

[5] Flint *v.* Pike, 6 D. & R. 528; 4 B. & C. 473; Com. *v.* Clap, 4 Mass. 163; Com. *v.* Culver, 1 Clark (Pa.), 361; 2 Penn. L. J. 359.

Thus, it was held indictable for a member of the bar, in an affidavit filed of record, wantonly to charge J. G. with fornication. Com. *v.* Culver, *ut supra*. So, where one acting as counsel prepared and presented a declaration, in which were inserted allegations that the defendant was "reputed to be fond of sheep, bucks and ewes, and of wool, mutton, and lamb," and to be "in the habit of biting sheep;" and it was added, that "if guilty, he ought to be hanged or shot;" it was held that an indictment charging such matter as libellous, and alleging malice, was good on demurrer. Gilbert *v.* People, 1 Denio, 41.

[6] R. *v.* Creevey, 1 M. & S. 273. See Snyder *v.* Fulton, 34 Md. 128.

§ 1638. Libel cannot be maintained for words spoken or deposed on trial, no matter how malicious.[1]

And so of evidence of witnesses on trial.

§ 1639. It is lawful, also, to publish the history of a litigated case, consisting of the facts in evidence, and of the law as applied to those facts.[2] Hence it is lawful to publish the fact that an individual was arrested, and the charge for which arrested, though the publisher has no right, while the charge is in the course of investigation, to assume that the accused is guilty.[3] Even though the report contain irrelevant statements defaming a stranger, this is no libel if the report is fair.[4] The privilege of the publisher, however, does not avail if an unfair summary of the evidence is given.[5] And a publication of proceedings in a court of justice, containing defamatory matter, would be a libel, if the account be highly colored or false;[6] or be commented upon with scandalous remarks and insinuations;[7] or is *ex parte*;[8] or where the publication is not for the purpose of making a true report,[9] but maliciously for libel-

And so of legal proceedings.

[1] Henderson *v.* Broomhead, 4 H. & N. 569; Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255; 4 F. & F. 806; Seaman *v.* Netherclift, L. R. 1 C. P. D. 540, cited at large in Whart. on Ev. § 722.

[2] Wason *v.* Walter, L. R. 4 Q. B. 73; Ryalls *v.* Leader, L. R. 1 Exch. 296; Usill *v.* Hales, L. R. 3 C. P. D. 206, 319.

[3] R. *v.* Fleet, 1 B. & Ald. 379; R. *v.* Lee, 5 Esp. 123; Wason *v.* Walter, L. R. 4 Q. B. 73; Usher *v.* Severance, 20 Me. 9.

[4] Ryalls *v.* Leader, L. R. 1 Exch. 296.

[5] R. *v.* Abingdon, 1 Esp. 726; Saunders *v.* Mills, 6 Bing. 213; Lewis *v.* Walter, 4 B. & Ald. 605. See Roberts *v.* Brown, 10 Bing. 519.

[6] Waterfield *v.* Bishop of Chichester, 2 Mod. 118; Stiles *v.* Nokes, 7 East, 493; Pittock *v.* O'Neill, 63 Penn. St. 253.

[7] Lewis *v.* Clement, 3 B. & Ald. 702; S. C. in error, 7 Moore, 100; 2 B. & B. 257; 1 Price P. C. 181; Stile *v.* Nokes, 7 East, 493; R. *v.* Fleet, 1 B. & Ald. 379; R. *v.* Fisher, 2 Camp. 563; R. *v.* Lee, 5 Esp. 123; Clark *v.* Binney, 2 Pick. 113; Com. *v.* Blanding, 3 Pick. 304; Thomas *v.* Croswell, 7 Johns. 264.

[8] Saunders *v.* Mills, 6 Bing. 213; 3 N. & P. 520; R. *v.* Fisher, 2 Camp. 563; R. *v.* Fleet, 1 B. & Ald. 379.

[9] In Stevens *v.* Sampson, Eng. C. A. Nov. 1879, 27 W. R. 86, the defendant, who was not a reporter or otherwise connected with the press, sent to a newspaper a report of certain proceedings in a county court. The report contained matter defamatory of the plaintiff, and in an action brought by him against the defendant for the libel, the jury found that the report was a fair and substantially accurate one, but was sent with a certain amount of malice. It was ruled that the plaintiff was entitled to judgment upon these findings.

"The argument," said Lord Coleridge, C. J., "has arisen from the peculiar form of verdict given at the

ling the party, or as a vehicle of blasphemy, indecency, or the like.[1] The fairness of the report is a question for the jury.[2] But with these qualifications the policy of the law is to encourage full reports of judicial proceedings in the daily press. In this way public attention is given to litigated issues, and important evidence frequently elicited; the people generally are practically instructed in the law of the land; and a large auditory secured, by which the decorum of bench and bar is in no small degree subserved. To these great public ends the occasional private inconveniences to individuals must yield.[3] What has

trial. To the question put by the learned judge whether the defendant sent this report to the papers honestly and with the purpose of furnishing information to the public on a matter on which he thought they ought to be informed, or from a desire to injure the plaintiff, the jury returned that it was a substantially accurate and fair report, though sent by the defendant to the paper with a certain amount of malice. Now, in my opinion, there are no shades of malice; if any malice exists it is sufficient to do away with privilege. I think that upon the findings judgment has been properly entered for the plaintiff. In every case in which the defence of privilege is relied on, the defendant must show, not only that the occasion was privileged, but also that he made use of the occasion in a *bonâ fide* manner and without malice. In this case the second element is wanting, for the jury have found that there was a certain amount of malice. Privileged communications are divided into those which are absolutely privileged, such as the statements made by judges, counsel, or witnesses in courts of justice, and those which are privileged only where the communication is made without actual malice. This is the first attempt to include the report, though fair, of proceedings in courts of justice containing defamatory matter in the first category. For myself I do not feel disposed to extend the cases of absolute privilege."

Bramwell, L. J., added: "This is a libel, and the only defence set up is that it is privileged. That being so, it is for the defendant to show that he acted on that privilege. It is found that he did not; then the privilege fails him. In the case of a master being applied to for the character of a servant, the answer, if honestly made, would be privileged, even though he entertained some ill-will towards the servant. So if an ordinary reporter, bearing malice towards a party to any legal proceedings, reported the true report of those proceedings, would he be liable because of that ill-will? I think he would be said to be acting under his duty there; but here the defendant was an entire volunteer, and had no duty whatever cast upon him to make these proceedings public, which is a distinction."

[1] R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Creevey, 1 M. & S. 279; Lake *v.* King, 1 Saund. 131, 133.

[2] Cooper *v.* Lawson, 1 P. & D. 15; 8 Ad. & El. 746, S. C.; Gompertz *v.* Levy, 1 P. & D. 214; Lewis *v.* Levy, E., B. & E. 551.

[3] See remarks of Cockburn, C. J., Wason *v.* Walter, L. R. 4 Q. B. 87, 88.

been said applies with increased strength to papers addressed to a court. It is not libellous to present charges of any character as a basis for legal action to a court of justice having jurisdiction, and this rule holds good even in cases in which the party making the statement makes it maliciously, knowing it to be false.[1]

So of criticisms of public abuse and wrong, and of literary and artistic criticism.

§ 1640. Every man has a right to give every public matter a candid, full, and free discussion; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, or is limited to a *bonâ fide* statement of public abuse or wrong, allowing something for the ordinary action of partisanship, that will be no libel; but if a paper go beyond this limit, and be calculated to excite tumult, or by its bitterness to provoke an assailed party to violence, it is a libel.[2]

It is also ruled that it is not libellous to publish a fair comment upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism. To constitute fairness, it is requisite that the comment should be either true, or if false, should express the real opinion of its author (as to the existence of matter of fact, or otherwise), such opinion having been formed with a reasonable degree of care, and on reasonable grounds. Malice, however, in either case, may rebut fairness.[3] It is further held that every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement, to public criticism, and every person who takes part in any dramatic performance, or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.[4]

And so of discipline by voluntary societies

§ 1641. Where a member of a church consents that the church shall investigate any complaint which may be preferred against him in writing, by a person not a member, it has been held that such a complaint is not libel-

[1] Steph. Dig. C. L. art. 276, citing Cutter *v.* Dixon, 4 Co. 14 *b*; Henderson *v.* Broomhead, 4 H. & N. 569; Dawkins *v.* Rokeby, L. R. 7 H. L. 744; Dawkins *v.* Paulet, L. R. 5 Q. B. 94.

[2] R. *v.* Collins, 9 C. & P. 456; Kelly *v.* Tinling, L. R. 1 Q. B. 699.

[3] But see infra, § 1654.

[4] Steph. Dig. C. L. art. 274, citing Dibdin *v.* Swan, 1 Esp. 28; Henwood *v.* Harrison, L. R. 7 C. P. 606; Carr *v.* Hood, 1 Camp. 354; Thompson *v.* Shackell, M. & M. 187; Jenner *v.* A'Beckett, L. R. 7 Q. B. 11.

lous, unless shown to have been made without probable cause, or as a pretence and cover for the design of slandering.[1] And so is it with charges preferred *bonâ fide* by one member of an Odd Fellows society against another.[2]

The publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged; although it speaks of the expelled member as "the offender," and remarks that "the society has vindicated its action in this case, and its right to act in all parallel cases."[3]

3. *Practice when Privilege is set up.*

Question of privilege not for jury.

§ 1642. When privilege is set up as a defence, the proper course, it is said, is for the judge to ask the jury whether the matter was published *bonâ fide;* and if they find it was, then it is for the judge to say whether the privilege is made out. It is error to leave the question of privilege to the jury.[4]

VII. TRUTH, WHEN ADMISSIBLE.[5]

At common law truth no justification.

§ 1643. At common law the general rule is, that the truth is inadmissible as a defence in a criminal prosecution for a libel,[6] though the doctrine was doubted by Kent, J., and Thompson, J., in a celebrated case in which the Supreme Court of New York were equally divided, and

[1] Remington *v.* Congdon, 2 Pick. 310. See Bradley *v.* Heath, 12 Pick. 163. So as to charges preferred in Friends' meeting; R. *v.* Hart, 1 W. Bl. 386; and as to charges against officers of churches or societies, supra, § 1632.

[2] Streety *v.* Wood, 15 Barb. 105.

[3] Barrows *v.* Bell, 7 Gray, 301.

[4] Stace *v.* Griffith, L. R. 2 P. C. App. 428, by Lord Chelmsford.

[5] By a statute of the United States, applicable to the District of Columbia, "the truth may be given in evidence under the general issue as a justification of the alleged libel; and if it

[6] 1 Hawk. P. C. p. 543; R. *v.* Dean of St. Asaph, 3 T. R. 428; R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Halpin, 9 B. & C. 65; 1 Doug. 387; State *v.* Burnham, 9 N. H. 34; Com. *v.* Clap, 4 Mass. 163; State *v.* Lehre, 2 Brev. 446.

which led to the passage of the Act of 6th April, 1805, afterwards incorporated in the Constitution.[1] In those States, if there

appears that the matter charged as libellous was true, or published with good motives or justifiable ends, the defendant shall be acquitted." Stat. Feb. 25, 1865.

A similar provision existed in the federal sedition act, passed in the administration of John Adams, and now repealed.

In Massachusetts: "In every prosecution for writing or for publishing a libel, the defendant may give evidence, in his defence upon a trial, of the truth of the matter contained in the publication charged to be libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall further be made to appear on the trial that the matter, charged to be libellous, was published with good motives and for justifiable ends." Rev. Stat. Mass. c. 133, § 6.

Under this section, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends. Com. *v.* Bonner, 9 Met. 410.

In New York, "No reporter, editor, or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument, or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication." Laws of N. Y. 1845, c. 130, § 314.

"Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libellous comments or remarks superadded to and interspersed or connected with such report." Ibid. § 2.

The Constitution of New York provides: "In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." Art. 7, § 8. Similar provisions exist in the constitutions of Mississippi and Michigan.

In Pennsylvania, by the 7th section of the Bill of Rights: "In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence." Const. of 1874.

It is provided in the same section of the Bill of Rights, "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

In Ohio: "Every citizen may freely speak, write, and publish his senti-

[1] People *v.* Croswell, 3 Johns. Cas. 337.

be any such, where there is no statutory or constitutional limitation, the common law doctrine remains in force.[1] But these exceptions are too few and temporary to need discussion. It is enough to say that the general rule in England as well as in the United States now is, that "the publication of a libel is not a misdemeanor if the defamatory matter is true, and if the publisher can show that it was for the public benefit that such matter should be published."[2]

When purpose is honest, truth may be admitted to disprove malice.

§ 1644. As it may be shown that the publication was for a justifiable purpose and not malicious, nor with the intent to defame, so there may be cases where the defendant, having acted in discharge of a supposed duty and with honest purpose, may give in evidence, even at common law, the truth of the words, when such evidence will tend to negative the malice and intent to defame.[3]

"Cases," so is this conclusion expressed, "may occur wherein circumstances extrinsic of the meaning published may rebut the presumption of *malice* in publishing matter in a certain degree detracting."[4] In a case determined in Massachusetts, before the truth was there made admissible by statute, it was said: "Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge

ments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." Swan's Stat. p. 11.

In other States statutory provisions exist of the same general character. See 2 Starkie on Slander, by Wendell, 221, note.

[1] Davis's Va. Crim. Law, 276; State v. Burnham, 9 N. H. 34; Com. v. Clap, 4 Mass. 163, 168; Com. v. Blanding, 3 Pick. 304; Com. v. Snelling, 15 Pick. 337, 339; Com. v. Sanderson, 3 Penn. L. J. 269; 5 Clark (Pa.), 54; Com. v. Morris, 1 Va. Cas. 176; 2 Wheel. C. C. 465; State v. Lehre, 2 Brev. 446; State v. Allen, 1 McCord, 525.

[2] Steph. Dig. C. L. art. 272, citing R. v. Newman, 1 E. & B. 263, 558; and see supra, § 1629. Compare argument of Lord Macaulay in Report on Indian Code, p. 550, infra, § 1654.

[3] State v. Burnham, 9 N. H. 34; Com. v. Clap, 4 Mass. 163, 169; Com. v. Morris, 1 Va. Cas. 176, and cases hereinafter stated. And see Bul. N. P. 8; 4 Burr. 2425; 1 T. R. 110; 3 C. & P. 587. Supra, § 1631.

[4] George on Libel, 153; 1 Starkie's Law of Slander, 292, and the cases there cited.

by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame."[1] In another case in the same State the same rule was recognized, though it was held that it must, in the first place, be shown, from the position of the parties or from extrinsic evidence, that the object of the publication was the discharge of a public or private duty.[2] And in a later case, in Philadelphia, it was held that where a guest in a public hotel had given out in the newspapers that he had been robbed of his money at the hotel, in the night-time, and the proprietor replied to the publication by a counter statement, in which he denied that the robbery charged had been committed at his house, and narrated facts which reflected unfavorably on the prosecutor, the truth was to be admitted to rebut the legal presumption of malice.[3]

§ 1644 *a*. By the statutes already noticed, permitting truth to be proved, this right is subject to certain conditions. In such cases the limitations of the statutes are to be strictly maintained, and the evidence of the truth of the libel is only admissible in the cases and under the conditions the statutes specify.[4]

Under statute truth admissible on condition.

[1] Com. *v.* Clap, 4 Mass. 169; and see further Coffin *v.* Coffin, 4 Mass. 1, 31.

[2] Com. *v.* Buckingham, 2 Wheel. C. C. 438.

[3] Com. *v.* Sanderson, 3 Penn. L. J. 269; 5 Clark (Pa.), 54.

[4] By Lord Campbell's Act (6 & 7 Vict. c. 96):—

Sect. 4. And be it enacted that if any person shall maliciously publish any defamatory libel knowing the same to be false, every such person being convicted thereof shall be liable to be imprisoned in the common jail or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

Sect. 5. And be it enacted that if any person shall maliciously publish any defamatory libel, every such person being convicted thereof shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Sect. 6. And be it enacted that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence

§ 1645. But though the alleged libel is true, and though it was uttered under a sense of duty, the defendant, if the publication be malicious, may be guilty at common law of a libel.[1] And even under statutes making the truth in such cases admissible, if a person publish defamatory

Truth and honesty no defence when publication is malicious.

to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation; and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court in pronouncing sentence to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove and disprove the same: Provided, always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided, also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: Provided, also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.

By Russell Gurney's Act (30 & 31 Vict. c. 35), s. 8:—

And whereas complaint is frequently made by persons charged with indictable offences upon their trial that they are unable, by reason of their poverty, to call witnesses on their behalf, and that injustice is thereby occasioned to them, and it is expedient to remove as far as practicable all just ground for such complaint: Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . . such justice or justices, before he or they shall commit such accused person for trial or admit him to bail, shall, immediately after obeying the directions of sect. 18 of 11 & 12 Vict. c. 42, demand and inquire of the accused person whether he desires to call any witnesses; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement upon oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing. . . . .

[1] R. v. Creevey, 1 M. & S. 273; Ld. Raym. 341; People v. Stone, 5 Bost. L. Rep. 153; Gage v. Robinson, 12 Ohio, 250. But see infra, § 1654.

matter of another, without any lawful occasion for making a publication, and where the end is to gratify a spirit of detraction,

Under these statutes it has been held that where a criminal information for libel is laid, the magistrate, upon the preliminary inquiry before him, has no jurisdiction to hear evidence relating to the truth of the libel, or to any other justification. If publication is proved he is bound to commit. R. *v.* Carden, 4 L. T. N. S. 504 (Labouchere's case).

In this case Cockburn, C. J., said: —

"By the common law of England, independently of any statutory enactment found in Lord Campbell's Act, the law as it was settled prior to that act, and as it remains still, apart from that act, whatever it may have been in ancient times, the truth was not a defence on a criminal charge of libel. It therefore can only become a defence under the statute, and it became a defence under that act only on certain statutory conditions, which must be complied with. The magistrate, independently of that statute, clearly could not have received the evidence unless it was made obligatory upon him to do so for some collateral purpose under Russell Gurney's Act. By the common law, independently of statute, the magistrate could not enter into the inquiry. But, then, Lord Campbell's Act introduced a great and important alteration and innovation in our law, enabling the accused to enter into the truth of the libel. But under that act the defence does not arise at that stage, and it cannot, therefore, be insisted on before the magistrate. Suppose that Mr. Labouchere had succeeded in fully showing the truth of the libel, what would have been the duty of the magistrate? He would have been obliged to commit Mr. Labouchere or to hold him to bail, because the matter could not have been gone into at that time, and could only be used for the purpose of defence when the statutory conditions had been complied with, and they cannot be complied with at that stage of the inquiry. There must first be a commitment or holding to bail upon the charge, and then an indictment found, and then a plea to it, and a plea such as to satisfy the exigency of the statute, for until there is such a plea upon the record no defence can be rested on the ground of truth. How, then, can the magistrate enter into that inquiry, which is beyond his province and jurisdiction, seeing that if the truth be established to the utmost extent desired still he must commit, supposing there is a libel and that the publication of it is sufficiently brought home to the accused? To me, therefore, it is abundantly clear that any inquiry into the truth of the libellous matter goes beyond the province of the magistrate, and was wholly irrelevant to the only inquiry it was competent to him to enter into, — that is, to examine whether, apart from the statutory defence, which can only be raised at an ulterior stage of the proceedings, the case was sufficiently brought home to the accused. That is my view as to the jurisdiction — that the jurisdiction of the magistrate is confined to the inquiry whether or not, on a proper view of the whole evidence, he arrives at the conclusion that the case is one which he ought to send to trial. If the case was one which he was bound to send to trial, and the defence was one which could not be raised till after the commitment, and after an indictment and upon plea properly pleaded, it is clear that, as the defendant has only a right to give evidence having reference to

or to bring the subject of it into contempt and disgrace, the proof of truth on trial does not justify or excuse the publication; and in such cases an indictment may be sustained, whether the libel be true or false. It is true that if the end to be attained by a publication is justifiable, *e. g.* to remove an incompetent officer, or to prevent the election of an unsuitable one, or to give useful information to the community or to those who have a right and ought to be informed, the end is lawful; and the occasion being one in which matter of such a nature may properly be published, the party making the publication may either justify or excuse it. Where, however, there is merely the color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, he is as liable as if no such pretence existed.[1] Truth, when proved, is in such cases sometimes an aggravation rather than a justification. It is the interest of the community that old offences should in most cases be forgotten. There are few men, no matter how valuable their services ultimately to society, who might not have been ruined, if at the turning points of their lives they had been visited by the publication of youthful wrongs done by them. Hence he who maliciously explores the past life of an intended victim, with the purpose of crushing him by bringing to public notice some act of shame, long past, it may be long repented of and condoned, may deserve a severer punishment than one who invents a false charge, easily disproved. In the former case, the injury inflicted by the libeller is far more destructive than in the latter. Even should the truth, under the statutes, be admissible, yet unless

the issue before the magistrate, Sir R. Carden would be bound to reject evidence going beyond it, and that, therefore, he was right in refusing to hear this evidence. But then it is said that though the evidence of the truth of the matters in the libel would not be available before the magistrate with a view to induce him to decline to commit the defendant, it may yet be received with a view to its being available for a collateral purpose, that is, for the perpetuation of testimony. But, looking to the statutes, I find no reference to the perpetuation of evidence as the object, though, incidentally, the perpetuation of the evidence is a great advantage that arises from the procedure established as to the taking of evidence, but it is not the only one, for other important advantages result from the procedure."

[1] Com. *v.* Snelling, 15 Pick. 337; Stow *v.* Converse, 4 Conn. 17; Sterling *v.* Sherwood, 20 Johns. 204; Root *v.* King, 7 Cow. 613.

on public grounds it ought to have been published, it is no defence. And when the statutory condition is that the publication be with good motives and for good ends, if these requisites be not shown, the truth should be rejected.

Justification must be as broad as the charge.

§ 1646. When the defendant attempts to justify by proving the truth, the justification must be as broad as the charge. The verification of part will not be enough.[1] And the truth must be fully established.[2]

Common rumor or hearsay no justification.

§ 1647. It is not sufficient justification, when a publication is not privileged, that the matter charged in the libel was a matter of common report. Thus in an indictment for a libel in charging one as being a "murderer and forsworn," it is not competent for the defendant to prove that there had been a general report in the neighborhood that such person was a murderer and forsworn.[3]

VIII. MALICE, HOW PROVED AND REBUTTED.

Malice need not be special.

§ 1648. To constitute malice in the publisher of a libel, it is not necessary that personal ill-will to the person libelled should be shown.[4] It is enough, as in the parallel case of homicide, if there be a general mischievous temper or recklessness analogous to that which throws dangerous missiles into a thoroughfare, without caring on whom they may fall.[5]

Publisher not excused by

§ 1649. Malice is inferred as a presumption of fact from publication;[6] and publication of a libel is not ordinarily excused by the publisher's ignorance that it contained

[1] Usher *v.* Severance, 20 Me. 9; State *v.* Burnham, 9 N. H. 34.

[2] Com. *v.* McClure, 3 Weekly Notes, 58.

[3] State *v.* White, 7 Ired. 180.

Under the Massachusetts statute the defendant cannot show, short of proving the truth, that the information upon which he acted came from so creditable a source and under such circumstances as to leave no doubt upon his mind of its truth. Com. *v.* Snelling, 15 Pick. 337; Thach. C. C. 318. Under the same statute, upon an indictment for a libel imputing general misconduct to a magistrate, it is competent for the court to order the defendant to elect whether he will give the truth in evidence; and upon his making his election to do so, to file a bill of particulars, specifying the particular instances of misconduct which he purposes to prove, and to hold him strictly to the proof of the particular specification. Com. *v.* Snelling, 15 Pick. 337; Thach. C. C. 318.

[4] Wason *v.* Walter, L. R. 4 Q. B. 73; Com. *v.* Bonner, 9 Met. 410. Supra, § 119.

[5] See supra, §§ 101 *et seq.*, 819.

[6] Barthelemy *v.* People, 2 Hill (N. Y.), 248.

his ignorance of contents.

libellous matter.[1] Hence the publisher of a newspaper is *primâ facie* responsible for all that appears in it; nor is this presumption rebutted by evidence that he never saw or was aware of the libellous matter in his newspaper until after its publication. To constitute a defence, it is necessary for him to prove that he used due care in directing the paper, and that the libel was published notwithstanding such care.[2]

§ 1650. In England, by the passage of Mr. Fox's bill, libels

[1] Supra, § 1627; Curtis *v.* Mussey, 6 Gray, 261; People *v.* Wilson, 64 Ill. 195: a case of contempt. For ignorance as a defence see supra, § 88.

[2] Com. *v.* Morgan, 107 Mass. 199. Supra, § 1627.

In England, it is now a good defence, under 6 & 7 Vict. c. 96, § 7, to show that the libel was published without the authority, consent, or knowledge of the proprietor, and from no want of due care on his part. R. *v.* Holbrook, L. R. 3 Q. B. Div. 60; 14 Cox C. C. 185. Supra, § 1627.

On the second trial of R. *v.* Holbrook, Dec. 20, 1878 (reported in London Law Times, Dec. 28, 1878), Cockburn, C. J., said:—

"The question is as to what will give immunity to the proprietor under that enactment. No doubt it would not be enough, in the first instance, to show that he had not specifically authorized the insertion of the article; but it appears to me equally untenable to say that because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. If the principal were expressly to prohibit the insertion of libellous matter in the paper, would not that be sufficient? Surely the answer must be in the affirmative; for, unless he himself superintends the insertion of every article (in which case the statute would be useless), what can the proprietor do more? And surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by the agent." See, for full report, R. *v.* Holbrook, 39 L. J. (N. S.) 536.

"I can never accede," says Lord Denman, in a note given by his biographer (1 Arnould's Life of Lord Denman, London, 1873, p. 200), "to the doctrine that the publisher is criminally answerable for a paper, of the contents of which he was utterly ignorant, notwithstanding the authority of Lord Mansfield or any other judge. . . . . It is to me incomprehensible that a jury should be charged to find such persons guilty on an indictment which states that they, 'with mischievous intentions, maliciously published.'" No doubt if the evidence shows that the publication was not "malicious," and if this averment cannot be stricken out as surplusage so as to leave an indictable offence behind, the defendant should be acquitted. But if it was the defendant's duty to have supervised his paper either personally or through adequate agents, then he is liable for libellous publications which appear through his neglecting (either through himself or his agents) his duty of supervision.

For observation to the same effect by Cockburn, C. J., in Lambri's case, see 67 London Law T. p. 1.

were put on the same basis as all other criminal offences, and the question of malicious intent was opened to the decision of the jury. With the exception of a single case, already referred to, where the Supreme Court of New York was equally divided,[1] the law in this country has been, even in those States where there is no statutory guarantee, that the jury have a right, under the instructions of the court, to give their verdict on the whole issue, and decide the question, one of fact, whether the matter charged be libellous or not, as well as the question of fact as to the publication, and the truth of the innuendoes.[2]

Question of malice for jury.

[1] People *v.* Croswell, 3 Johns. Cas. 337.

[2] Davis's Va. Crim. Law, 280; State *v.* Lehre, 2 Brev. 446; State *v.* Allen, 1 McCord, 525; Shaver *v.* Linton, 13 Up. Can. (Q. B.) 534.

In State *v.* Goold, 62 Me. 509, it is said by Walton, J.: —

"One of the instructions to the jury in this case was in our judgment erroneous. They were told that it was the duty of the court to direct them whether the publication in question was or was not libellous, and that it was their duty to be governed by the direction which the court gave them upon that point; and the court did instruct them in effect that the publication in question was libellous.

"This ruling was undoubtedly in accordance with what was formerly held to be the law in England; but this view of the law was never adopted in this country.

"In this State, the right of the jury, in all indictments for libels, to determine, at their discretion, both the law and the fact, is secured by a constitutional provision. Art. 1, § 4.

"Pleading this provision in the light of history, we cannot doubt that it was the intention of the framers of the Constitution that the jury should have the right to determine, not only as matter of fact whether the defendant was the author or publisher of the article in question, but also, as matter of law, whether it was or was not libellous. Whether the defendant published the article in question is plainly a question of fact. Whether its publication was illegal is plainly a question of law. Such was the answer of the twelve judges of England to the House of Lords. Their answer was, 'that the criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be, in all cases and under all circumstances, matter of law, and not matter of fact.' 22 State Trials, 298.

"While, therefore, it is undoubtedly true that the question of libel or no libel is purely a question of law, we cannot doubt that it is the province of the jury in this State, by virtue of the constitutional provision referred to, to answer it.

"This they do when they return a general verdict of guilty or not guilty. To justify a verdict of guilty, the jury must not only find, as matter of fact, that the defendant published the article in question, but they must also determine, as matter of law, that its publication was illegal; for without

§ 1651. Evidence that the defendant published other copies of the same libel,[1] or other cognate libels,[2] provided they refer to the subject of the libel set out in the indictment,[3] or are such as to show a system of libelling,[4] is receivable, in order to prove the malicious or seditious intent.[5] But if such publications are *posterior* to the one complained of, it would seem they are not admissible,[6] unless offered as in the same line and as part of a system with that on trial.[7] And libellous writings found on the defendant's

Other libels admissible to prove system.

the element of illegality there could be no guilt; while, to justify a verdict of not guilty, the jury must fail to be satisfied upon one or the other of these points. . . . .

"It seems to be now settled in England as well as this country, that the judge is not bound to state to the jury, as matter of law, whether the publication in question is or is not a libel; that the proper course for him to pursue is to define to the jury what a libel is, and then leave it to them to determine whether the publication in question does or does not come within that definition. 2 Greenl. on Ev. § 411; Shattuck *v.* Allen, 4 Gray, 540.

"But while it is undoubtedly true that in prosecutions for libel the defendant has a right to have the question of libel or no libel submitted to the jury, we think it is equally clear that it is a right which it is competent for him to waive. If he chooses to admit for the purposes of the trial that the publication in question is a libel, we think he is no longer in a condition to complain because the question is not submitted to the jury. Being admitted, it is no longer a question for either court or jury; and it is impossible for the defendant to be aggrieved by any views the court may entertain or express, as to whose province it would be to pass upon the question if the answer to it were not admitted.

"The bill of exceptions in this case shows that the defendant expressly admitted that the publication in question was a libel. He also admitted that he composed, wrote, and published the article. He claimed the right to go to the jury upon the question of malice only. This right was accorded to him as fully as he desired. All this appears by the bill of exceptions. He was not, therefore, — in fact he could not be, — an aggrieved party by the views expressed by the judge of the Superior Court, as to whose duty it would have been to pass upon the questions of law involved in the issue, if the answer to these questions had been controverted. He expressly waived his right to go to the jury upon these questions by his admissions."

[1] Whart. Crim. Ev. § 52; Plunkett *v.* Cobbett, 5 Esp. 136.

[2] R. *v.* Pearce, Peake (N. P.), 75. See Whart. Crim. Ev. § 52.

[3] Finnerty *v.* Tipper, 2 Camp. 72; Com. *v.* Harmon, 2 Gray, 289.

[4] Whart. Crim. Ev. § 52.

[5] State *v.* Riggs, 39 Conn. 498; Com. *v.* Snelling, 15 Pick. 337; Thach. C. C. 318.

[6] U. S. *v.* Crandall, 4 Cranch C. C. 683; Thomas *v.* Croswell, 7 Johns. 264; Whart. Crim. Ev. §§ 32–52.

[7] See Finnerty *v.* Tipper, 2 Camp. 72; Watson *v.* Moore, 2 Cush. 133; Townshend on Libel, § 390; Whart. Crim. Ev. § 38.

person cannot, it seems, be put in evidence, without in some way showing that he knew or approved of their contents.[1]

Whole publication admissible.

§ 1652. The defendant, it is said, has a right to have the whole of the publication read from which the alleged libellous passage is an extract.[2] Two articles, however, not simultaneously published in the same paper or book, cannot be coupled, in order to ascertain whether or not one of them is libellous.[3]

No defence that libel was a joke.

§ 1653. When the defendant does not justify, he cannot be permitted to prove that the person libelled treated part of the libellous matter as a joke on himself.[4]

Counter evidence of good motive inadmissible.

§ 1654. Evidence of public philanthropic designs on part of the defendant is not admissible to rebut the presumption of malice.[5] No man has a right to libel another for the latter's moral instruction, or for the edification of the community. On the other hand, if a publication be proper and meritorious, the fact that malice contributed to its concoction does not make it libel.[6]

[1] U. S. *v.* Crandall, 4 Cranch C. C. 683; Wh. Cr. Ev. § 682.

[2] Cook *v.* Hughes, R. & M. 112. See Thornton *v.* Stephen, 2 M. & Rob. 45; Scripps *v.* Foster, 41 Mich. 742.

[3] Usher *v.* Severance, 20 Me. 9.

[4] Com. *v.* Morgan, 107 Mass. 199.

[5] R. *v.* Hicklin, L. R. 3 Q. B. 360; Com. *v.* Snelling, 15 Pick, 337. Supra, §§ 88, 119, 1607.

[6] Lord Macaulay, in his Report on the Indian Code, thus writes: —

"When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he shall be punished or not. But when an act which is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that his motives were bad.

"If A. kills Z., it is proper to inquire whether the killing was malicious; for killing is *primâ facie* a bad act. But if A. saves Z.'s life, no tribunal inquires whether A. did so from good feeling, or from malice to some person who was bound to pay Z. an annuity; for it is better that human life should be saved from malice than not at all. If A. sets on fire a quantity of cotton belonging to Z., it is proper to inquire whether A. acted maliciously; for the destruction of valuable property by fire is *primâ facie* a bad act. But if Z.'s cotton is burning, and A. puts it out, no tribunal inquires whether A. did so from good feeling or from malice to some other dealer in cotton, who, if Z.'s stock had been destroyed, would have been a great gainer; for the saving of valuable property from destruction

IX. INDICTMENT.[1]

§ 1655. It is necessary that the *publication* should be expressly

is an act which it is desirable to encourage, and it is better that such property should be saved from bad motives than that it should be suffered to perish. Since, then, no act ought to be made punishable on account of malicious intention, unless it be in itself an act of a kind which it is desirable to prevent, it follows that malice is not a test which can with propriety be used for the purpose of determining what true imputations on character ought to be punished, and what true imputations on character ought not to be punished; for the throwing of true imputations on character is not *primâ facie* a pernicious act. It may, indeed, be a very pernicious act. But we are not prepared to say that in the majority of instances it is so. We are sure that it is often a great public service; and we are sure that it may be very pernicious when it is not done from malice, and that it may be a great public service when it is done from malice. It is perfectly conceivable that a person might, from no malicious feeling, but from an honest though austere and injudicious zeal for what he might consider as the interests of religion and morality, drag before the public frailties which it would be far better to leave in obscurity. It is also perfectly conceivable that a person who has been concerned in some odious league of villany and has quarrelled with his accomplices may, from vindictive feelings, publish the history of their proceedings, and may by doing

[1] For forms, see Wh. Prec. as follows: —

(939.) General frame of indictment.

(940.) Libel on an individual generally.

(941.) Publishing generally.

(942.) Posting a man as a scoundrel, &c.

(943.) Libel upon an attorney, contained in a letter.

(944.) Publishing an *ex parte* statement of an examination before a magistrate for an offence with which the defendant was charged.

(945.) Information for writing and publishing a libel against the king and government.

(946.) For publishing the same in other newspapers.

(947.) Libel on the President of the United States.

(948.) Another form for same.

(949.) Libel on a judge and jury when in the execution of their duties.

(950.) Libel on a sheriff, attributing to him improper motives and conduct, in getting up petitions, &c., for the locating of the seat of justice in a particular county.

(951.) Libel on a justice of the police court in Boston, &c.

(952.) Libel on an officer, said libel consisting of a paper alleged to have been read by the defendant at a public meeting, but which was in the defendant's possession, or destroyed, and consequently was not produced to the grand jury.

(953.) Seditious libel. The libellous matter consisting in an address to the electors of Westminster, of which the defendant was the representative, charging the government with trampling upon the people, &c.

(954.) Publishing, at a time of pop-

averred, since a mere private composition and writing, seen only by the writer, is not an offence.[1] Publication must be averred.

so render a great service to society. Suppose that a knot of sharpers lives by seducing young men to the gaming-table and pillaging them to their last rupee. Suppose that one of these knaves, thinking himself ill-used in the division of the plunder, should revenge himself by printing an account of the transactions in which he has been concerned. He is prosecuted by the rest of the gang for defamation. He proves that every word in his account is true. But it is admitted that his only motives for publishing it were rancorous hatred and disappointed rapacity. It would surely be most unreasonable in the court to say: 'You have told the public a truth which it greatly concerned the public to know; you have been the saving of many promising youths; you have been the means of ridding society of a dreadfu pest; you have done, in short, what it was most desirable that you should do; but as you have done this, not from public spirit, but from dislike of your old associates, we pronounce you guilty of an offence, and condemn you to fine and imprisonment.'

"It is evident that society cannot spare any portion of the services which it receives. Far from scrutinizing the motives which lead people to render such services, and punishing such services when they proceed from bad motives, all societies are in the habit of offering motives addressed to the selfish passions of bad men for the purpose of inducing those men to do wha is beneficial to the mass. We offer pardons and pecuniary rewards to the worst members of the community for

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ular commotions, resolutions attacking the government as bloodthirsty, &c.

(955.) Libel in German in the Circuit Court of the United States.

(956.) Libel in French against a foreign potentate.

(957.) Sending a letter to a commissioner of revenue in the United States containing corrupt proposals.

(958.) Writing a seditious letter with intent to excite fresh disturbance in a district in a state of insurrection.

(959.) Hanging a man in effigy.

(960.) Insulting a justice in the execution of his office.

(961.) For seditious words.

(962.) Another form for same.

(963.) Uttering blasphemous language as to God.

(964.) Same under Rev. Stat. Mass. c. 130, § 15.

(965.) Blaspheming Jesus Christ.

(966.) Blaspheming the Holy Ghost.

(967.) Composing and publishing blasphemous libel.

(968.) Obscene libel. First count, not setting forth libellous matter.

(969.) Second count. Publishing an obscene picture.

(970.) Exhibiting obscene pictures.

(971.) Against the printer of a newspaper for publishing an advertisement by a married woman, offering to become a mistress.

(972.) Indictment for threatening to accuse of an infamous crime.

(973.) Sending a letter, threatening to accuse a person of a crime. Mass. Rev. Sts. c. 125, § 17.

(974.) Sending a letter threatening to burn a dwelling-house. Mass. Rev. Sts. c. 125, § 17.

(975.) Sending a threatening letter.

[1] R. *v.* Burdett, 4 B. & Ald. 95.

§ 1656. The alleged libellous matter, also, must be set out accurately, any variance being fatal,[1] though matters not in the libellous passage, or of record, need not be exactly alleged. Thus, an indictment charging that the defendant published a libel on the twenty-first of the month may be supported by proof of a publication on the nineteenth of the same month. But it is otherwise if the indictment has alleged that the libel was published in a paper dated the twenty-first of the month.[2]

Libellous matter must be exactly set forth.

Where parts are selected, they must be set forth thus: "In a certain part of which said," &c., "there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning," &c., "according to the tenor and effect following, that is to say:" "And in a certain other part,"[3] &c., &c.

The date at the end of the libel need not be set forth.[4]

If the libel be in a foreign language, it must be set forth in such language, verbatim, together with a correct translation.[5]

§ 1657. In another work is considered the mode of setting out writings of this class.[6] It is enough now to say that if the indictment does not on its face profess to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer, or in arrest of judgment.[7] It is not sufficient to profess to set it forth

Indictment must profess to set forth words of libel.

the purpose of inducing them to betray their accomplices in guilt. That the quarrels of rogues are the security of honest men is an important truth which has passed into a proverb; and of that security we should to a certain extent deprive honest men if we were to make it an offence in one rogue to speak the truth about another rogue under the influence of passions excited in the course of a quarrel." Supra, § 1635.

[1] Cartwright *v.* Wright, 1 D. & R. 230; Wright *v.* Clements, 3 B. & Ald. 503; Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Sweeney, 10 S. & R. 173; State *v.* Brownlow, 7 Humph. 63; Walsh *v.* State, 2 McCord, 248. See Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; Whart. Crim. Ev. §§ 114 *et seq.*

[2] Com. *v.* Varney, 10 Cush. 402.

[3] See 1 Camp. 350, per Lord Ellenborough; Archbold's C. P. 494; Whart. Cr. Pl. & Pr. § 180.

[4] Com. *v.* Harmon, 2 Gray, 289.

[5] Zenobio *v.* Axtell, 6 T. R. 162; Whart. Cr. Pl. & Pr. § 181; and see supra, §§ 731–3.

[6] See Whart. Cr. Pl. & Pr. §§ 167 *et seq.*

[7] Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; State *v.* Twitty, 2 Hawks, 248; State *v.* Goodman, 6 Rich. 387.

according to its substance or effect.[1] And where the indictment alleged that the defendant published, &c., an unlawful and malicious libel, *according to the purport and effect, and in substance* as follows, it was ruled that the words between *libel* and *as follows* could not be rejected as surplusage.[2]

§ 1658. Where it does not appear from the paper itself who its author was, nor the persons of and concerning whom it was written, nor the purpose for which it was written, these facts should be explicitly averred, for the consideration of the jury, in all cases in which they are material.[3]

Authorship must be averred.

§ 1659. Where the persons alleged to have been libelled are alluded to in ambiguous and covert terms, it is not sufficient to aver generally that the paper was composed and published "of and concerning" the persons alleged to have been libelled, with innuendoes accompanying the covert terms, whenever they occur in the paper as set out in the indictment, that they meant those persons, or were allusions to their names. There should be a full and explicit averment that the defendant, under and by the use of the covert terms, wrote of and concerning the persons alleged to be libelled.[4]

Libellous matter must be charged to relate to prosecutor.

The court will regard the use of fictitious names and disguises, in a libel, in the sense that they are commonly understood by the public.[5]

Under a declaration which alleges the publication of a certain "libel concerning the plaintiff," but contains no innuendoes, colloquiums, or special averments of facts to connect the publication with the plaintiff, if no evidence be offered to connect him therewith, except the publication itself, the question whether the publication refers to the plaintiff is for the court, and not for the jury.[6]

An allegation that the defendant published a libel, "tending to blacken the honesty, virtue, integrity, and reputation of the said A. B., and thereby to expose him to public hatred, ridicule,

[1] Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Wright, 1 Cush. 46; State *v.* Brownlow, 7 Humph. 63.

[2] Com. *v.* Wright, 1 Cush. 46; Whart. Cr. Pl. & Pr. §§ 167 *et seq.*

[3] State *v.* Henderson, 1 Rich. 179.

[4] R. *v.* Marsden, 4 M. & S. 164; State *v.* Henderson, 1 Rich. 179; State *v.* Brownlow, 7 Humph. 63.

[5] State *v.* Chace, Walker, 384.

[6] Barrows *v.* Bell, 7 Gray, 301.

and contempt, in which said false, scandalous, malicious, defamatory, and libellous matters of and concerning the character, honesty, virtue, integrity, and reputation of the said A. B.," &c., is a sufficient allegation that it was "of and concerning A. B." [1]

Innuendo can interpret but not enlarge.

§ 1660. An innuendo is an interpretative parenthesis thrown into the quoted matter to explain an obscure term.[2] It can explain only where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It can interpret, but cannot add.[3] It may serve as an explanation, but not as a substitute.[4] Thus in an action for the words "He is a thief," the defendant's meaning in the use of the word "he" cannot be explained by an innuendo "meaning the said plaintiff," or the like, unless something appear previously upon the record to ground that explanation; but if the words had previously been charged to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for when it is alleged that the defendant said of the plaintiff "He is a thief," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he." [5] Whatever is insensible must thus be explained by innuendo. And "when the language is equivocal and uncertain, or is defamatory only because of some latent meaning, or of its allusion to extrinsic facts and circumstances, then an inducement or innuendo or

[1] Taylor v. State, 4 Ga. 14.

[2] See infra, § 1665.

[3] See 2 Salk. 512; Cowp. 684; Mix v. Woodward, 12 Conn. 262; Van Vechten v. Hopkins, 5 Johns. 211; State v. Neese, N. C. T. R. 270; Bradley v. State, Walker, 156; State v. Henderson, 1 Rich. 179. It was held in Pennsylvania, in 1870, that where no new essential fact is requisite to the frame of an indictment for libel, which requires to be found by the grand jury as the ground of a colloquium, and where the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone. Com. v. Keenan, 67 Penn. St. 203.

[4] State v. Atkins, 42 Vt. 252; though see Com. v. Keenan, 67 Penn. St. 203; Com. v. Meeser, 1 Brewst. 492.

[5] Archbold's C. P. 494; State v. White, 6 Ired. 418.

both are indispensable to express and render certain precisely what the libel is of which the defendant is accused." [1]

Where the plaintiff averred, by way of innuendo, that the defendant, in attributing the authorship of a certain article to a "celebrated surgeon of whiskey memory," or to a "noted steam doctor," meant by these appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad, for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect.[2]

When an alleged libel affects the prosecutor only in his business standing, such business must be averred.[3]

In another case, in an action on the case against a man for saying of another "He has burnt my barn," the plaintiff cannot, by way of innuendo, say, "meaning my barn full of corn;" [4] because this is not an explanation derived from anything which preceded it on the record, but is the statement of an extrinsic fact not previously stated. But if in the introductory part of the declaration it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete.[5]

§ 1661. The question of the truth of the innuendoes is for the jury; and they must be supported by evidence unless they go to matters of notoriety, or of which the court takes judicial notice.[6]

Truth of innuendoes is for jury.

[1] Durfee, C. J., State *v.* Corbett, S. C. Rh. I. 1879, citing State *v.* Henderson, 1 Rich. 179.

[2] Miller *v.* Maxwell, 16 Wend. 9. See also 2 Hill, 472, and 12 Johns. 474.

[3] Com. *v.* Stacey, 8 Phila. 617.

[4] Barham *v.* Nethersal, 4 Co. 20 *a*.

[5] Archbold's C. P. 494; 4 R. Ab. 83, pl. 7; 85, pl. 7; 2 Ro. Rep. 244; Cro. Jac. 126; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3; Golstein *v.* Foss, 9 D. & Ry. 197; 6 B. & C. 154; Clement *v.* Fisher, 1 M. & Ry. 281; Alexander *v.* Angle, 1 C. & J. 143; 7 Bing. 119; R. *v.* Tutchin, 5 St. Tr. 532.

[6] See cases cited supra; State *v.* Atkins, 42 Vt. 252; Com. *v.* Keenan, 67 Penn. St. 203; State *v.* Perrin, 2 Brev. 474.

In an indictment for a libel against J. C., which libel described her as the only daughter of the widow Roach, the innuendo stated the identity of Mrs. R.'s daughter and of the

§ 1662. How a lost or destroyed document is to be pleaded is elsewhere discussed.[1] As we have seen, the weight of opinion is that it is not necessary that obscene language should be set out in full; a general averment of its nature will be sufficient if there be a proper excuse.[2]

Unobtainable and obscene libel.

X. VERDICT.

§ 1663. "Guilty of publishing *only*" is not a verdict on which judgment can be entered; and the court should refuse to receive it, or, if it be received, direct a second trial.[3] But a verdict on an indictment for composing, writing, printing, and publishing a libel, that the defendant is "guilty of publishing as alleged in the indictment, and not guilty as to the residue," is equivalent to a general verdict of guilty; since the allegations in the indictment "compose," "write," &c., can be rejected as surplusage.[4]

"Guilty of publishing only" is insufficient.

On an indictment, also, for "composing, printing, and publishing," the defendant may be found guilty of "printing and publishing."[5]

XI. THREATENING LETTERS.

§ 1664. We have already noticed certain classes of threatening letters which have been held, when followed by extortion, to constitute robbery.[6] We have now to consider the sending threatening letters as a substantive offence. In many cases such letters may be libels, whose publishers are indictable at common law.[7] The offence, however, is in most jurisdictions, both in England and in the United States, specifically indictable by statutes.[8] Under these statutes it is

Extorting money by threatening letters is indictable.

prosecutrix, Mrs. C. It was held unnecessary to prove that the prosecutrix was the only daughter. State *v.* Perrin, 1 Tr. Con. Rep. 446; 2 Brev. 474.

[1] Whart. Cr. Pl. & Pr. § 176; Whart. Crim. Ev. §§ 118, 199.

[2] Supra, § 1609.

[3] R. *v.* Woodfall, 5 Burr. 2661. See Webber *v.* State, 10 Mo. 4.

[4] Com. *v.* Morgan, 107 Mass. 199.

[5] Whart. Crim. Ev. § 134; R. *v.* Hunt, 2 Camp. 583; R. *v.* Williams, Ibid. 646; State *v.* Locklear, Busbee, 208. As to divisible verdict see Whart. Cr. Pl. & Pr. § 742.

[6] Supra, § 852.

[7] Supra, §§ 1691 *et seq.*

[8] Mr. Fisher, in his Digest of Criminal Law, gives the English statutes as follows: —

"1. *Statutes.*

"4 Geo. 4, c. 54, repealed so much of the Black Act, 9 Geo. 1, c. 22, and so much of 27 Geo. 2, c. 15, and of

necessary, in order to sustain an indictment, that a threat should have been manifestly intended.[1] Where a particular statute[2]

30 Geo. 2, c. 24, as related to this subject; and by 7 & 8 Geo. 4, c. 27, 4 Geo. 4, c. 54, was repealed so far as it related to letters threatening to kill, murder, burn, and destroy, and to accessaries to such offences and rescue of such offenders; 24 & 25 Vict. c. 95, repeals 4 Geo. 4, c. 54; 7 & 8 Geo. 4, c. 29; 7 Will. 4 & 1 Vict. c. 87, and 10 & 11 Vict. c. 66; 24 & 25 Vict. c. 96, is the statute in force on the subject."

"2. *Demanding Money or Valuables, with Menaces.*

"By 24 & 25 Vict. c. 96, s. 44, 'whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (*Former provision*, 7 & 8 Geo. 4, c. 29, s. 8.)

"By s. 45, 'whosoever shall, with menace or by force, demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.' (*Previous provision*, 7 Will. 4 & 1 Vict. c. 87, ss. 7, 12.)

"By s. 49, 'it shall be immaterial whether the menaces or threats be of violence, injury, or accusation, to be caused or made by the offender, or by any other person.'"

[1] R. *v.* Girdwood, 1 Leach C. C. 142; 2 East P. C. 1120.

Demanding money by threats without "reasonable or probable cause" being indictable under the statute, it has been held that these words must be taken to apply to the state of the prisoner's mind at the time of making the demand; and the jury must look at all the circumstances for the purpose of deciding whether at that time the prisoner *bonâ fide* believed that she or he had reasonable cause. R. *v.* Miard, 1 Cox C. C. 22.

Upon an indictment for sending a letter demanding money, with menaces, and without reasonable or probable cause, it appeared that the prisoner, who had been in the prosecutor's employ as traveller, had afterwards set up in business for himself, married, and become the father of children. There was no evidence of the prosecutor having indulged in the slightest familiarity with the prisoner's wife, or of the prisoner having at any time any ground to suspect that such had been the case, and the prosecutor denied it; but the prisoner sent to him letters imputing to the prosecutor adultery with his wife; that he was the father of one of his children; stating that

[2] See 24 & 25 Vict. c. 96, s. 46.

makes it indictable to accuse another of crime with "menaces" and "threats," with intent to extort money, it has been held that threatening to expose a clergyman charged with criminal intercourse with a woman in a house of ill-fame, in his own church and village, to his own bishop, to all the other bishops, and to the Archbishop of Canterbury, and also to publish his shame in the newspapers, is such a threat as a man of ordinary firmness cannot be expected to resist, and therefore falls within the word menaces used in the statute.[1] And so, under another statute, has been held to be a letter to the effect that if money is deposited in a particular place an attack would be averted.[2] A false statement that a warrant has issued to arrest A. on a criminal charge is "threatening" to accuse A. of crime.[3] And so is threatening to enter a complaint;[4] and threatening to imprison on a fictitious charge.[5] Though it would seem not essential that the prosecutor should be actually frightened,[6] the threat must be such as would naturally create alarm.[7] It is immaterial, in such cases, so far as concerns the defendant's penal responsibility, whether the prosecutor was guilty or innocent;[8] but this issue may be material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money or merely to compound a felony.[9]

A letter in the defendant's own name, sent to enforce the payment of a debt, is not within the statute;[10] and it has been

many a man would have sent a bullet through him; that he was to refund £44. The judge left to the jury whether the meaning of the letters was to demand a sum of money, and to menace him with adultery, or to send the child to the prosecutor's house; and whether there was any reasonable or probable cause for the demand. The jury having found against the defendant on all these points, the conviction was sustained. R. v. Chalmers, 16 L. T. (N. S.) 363.

[1] R. v. Miard, 1 Cox C. C. 22. See Kistler v. State, 54 Ind. 400.

[2] R. v. Pickford, 4 C. & P. 227; R. v. Smith, T. & M. 214; 1 Den. C. C. 510; 2 C. & K. 882.

[3] Com. v. Murphy, 12 Allen, 449. Supra, § 1151.

[4] Com. v. Carpenter, 108 Mass. 15.

[5] R. v. Robertson, L. & C. 483; 10 Cox C. C. 9.

[6] State v. Bruce, 24 Me. 71.

[7] R. v. Walton, 9 Cox C. C. 268; L. & C. 483. Compare R. v. Smith, T. & M. 214; 1 Den. C. C. 510. For requisites of indictment see Com. v. Moulton, 108 Mass. 309; Com. v. Dorus, 108 Mass. 307; State v. Young, 26 Iowa, 122; State v. Morgan, 3 Heisk. 262.

[8] R. v. Cracknell, 10 Cox C. C. 408; R. v. Richards, 11 Cox C. C. 43.

[9] Ibid.

[10] People v. Griffin, 2 Barb. 427.

further held that a threatening letter, referring in its terms to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, was not a threatening letter within 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, although the writer did not subscribe his name.[1] A letter is not regarded as anonymous when it indicates on its face the sender.

Letters may be explained by parol.

§ 1665. A letter, when ambiguous, may be explained by parol proof of extraneous facts as well as by declarations of the writer.[2] The prosecutor may be asked as to what appeared to him to be the meaning of the letter.[3] The meaning is for the jury if the terms be ambiguous,[4] and is to be inferred from all the circumstances of the case;[5] though whether a certain charge, not ambiguous, threatens a crime is for the court.[6]

Material facts must be averred and proved.

§ 1666. The person threatened must be averred and proved,[7] and so must the fact of sending.[8] The letter must be set out if obtainable.[9] The venue may be laid in the place of reception.[10] If inspection be desired, the court will, on motion of the prisoner's counsel, as soon as the

[1] R. v. Heming, 2 East P. C. 1116; 1 Leach C. C. 445, n.

[2] Supra, § 1660; R. v. Tucket, 1 Mood. C. C. 134; R. v. Cooper, 8 Cox C. C. 547; R. v. Hendy, 4 Cox C. C. 243.

[3] R. v. Tucket, 1 Mood. C. C. 134; R. v. Hendy, 4 Cox C. C. 243.

[4] Ibid.; R. v. Carruthers, 1 Cox C. C. 138; R. v. Cooper, 8 Cox C. C. 547.

[5] R. v. Menage, 8 F. & F. 310; R. v. Coghlan, 4 F. & F. 316; R. v. Braynell, 4 Cox C. C. 402; State v. Hollyway, 41 Iowa, 200; Longley v. State, 43 Tex. 490. That proof of reception of spoils is admissible to prove intent see State v. Bruce, 24 Me. 17.

[6] Brabham v. State, 18 Oh. St. 485; Com. v. Carpenter, 108 Mass. 15; State v. Morgan, 3 Heisk. 262. As to what constitutes "infamous crime" under the statutes see R. v. Hickman, 1 Mood. C. C. 34; R. v. Redman, 10 Cox C. C. 159; L. R. 1 C. C. 12; Kistler v. State, 54 Ind. 400. See State v. Vaughan, 1 Bay (S. C.), 282.

[7] R. v. Dunkley, 1 Mood. C. C. 90.

[8] R. v. Jones, 2 Cox C. C. 434; 2 C. & K. 398; R. v. Paddle, R. & R. 484. A letter signed by two initials, as R. R., was held a letter without a name subscribed thereto within 9 Geo. 1, c. 22. R. v. Robinson, 2 Leach C. C. 749; 2 East P. C. 1110.

[9] R. v. Hunter, 2 Leach C. C. 624; R. v. Lloyd, 2 East P. C. 1122.

[10] Supra, §§ 288, 1206; R. v. Girdwood, 2 East P. C. 1120; 1 Leach C. C. 142; R. v. Essex, 2 East P. C. 1125; People v. Griffin, 2 Barb. 427.

bill is found, order that the letter be deposited with the officer of the court, that the prisoner's witnesses may inspect it.[1]

§ 1666 *a*. To prove intent, prior threats of the same kind are admissible.[2] The sending is to be inferred from facts. It has been held that the dropping a letter in a man's way, in order that he might pick it up, was a sending of it;[3] and it was said that there was a "sending," although the party saw the prisoner drop the letter, if the prisoner did not suppose the party knew him, and intended he should not.[4] As will presently be seen, a letter threatening A., but directed to B., which is left at a place accessible to A., with the intention that it should reach as well A. as B., is "sent" to A.;[5] and fastening a threatening letter on a gate in a public highway is some evidence to go to the jury of a sending thereof.[6] A conviction, however, cannot be sustained where the only evidence against the defendant was his own statement that he should never have written it but for W. G.[7] And when there is no person in existence of the precise name which the letter bears as its address, it is a question for the jury whether the party into whose hands it falls was really the one for whom it was intended.[8] The bare delivery of a letter containing threats, though sealed, is held to be evidence of a knowledge of its contents.[9]

§ 1666 *b*. Letters threatening to "burn or destroy" are also made specifically indictable by statute in England.[10] Under

R. *v.* Harrie, 6 C. & P. 105. On an indictment, with three counts for three separate letters, it was proposed to prove the sending of all three. It was held, that evidence of one only was admissible. R. *v.* Ward, 10 Cox C. C. 42.

[2] Whart. Crim. Ev. § 46; R. *v.* Cooper, 3 Cox C. C. 547; R. *v.* McDonnell, 5 Cox C. C. 153.

In the latter case it was proved that the prisoner had gone up to the prosecutor and said to him, "If you do not give me a sovereign I will charge you with an indecent assault." It was held that inasmuch as, if the jury believed that such language had been used by the prisoner, the intent was manifest, evidence for the prosecution tending to show that the prisoner had made a similar charge two years before ought not to be admitted. But this is no adequate reason for rejecting the evidence.

[3] R. *v.* Wagstaff, R. & R. 398.

[4] Ibid.

[5] R. *v.* Grimwade, 1 Cox C. C. 67; 1 Den. C. C. 30; 1 C. & K. 592.

[6] R. *v.* Williams, 1 Cox C. C. 16.

[7] R. *v.* Howe, 7 C. & P. 268.

[8] R. *v.* Carruthers, 1 Cox C. C. 138.

[9] R. *v.* Girdwood, 1 Leach C. C. 142; 2 East P. C. 1120.

[10] By 24 & 25 Vict. c. 97, s. 50, "whosoever shall send, deliver, or ut-

this statute, where a count charged T. with sending to V. and threatening to burn certain houses, laying them as the property of O., V.'s tenant, it was proved that T. dropped the letter in a public road near V.'s house; that A. found it and gave it to H., who opened and read it, and gave it to E., who showed it to both O. and V. It was ruled that this was a sending under the statute.[1]

Threats to destroy and kill indictable.

§ 1666 *c*. By another statute,[2] sending a letter threatening murder is made a felony. The letter, under this statute, must be construed in its natural sense, as explained by circumstances; though when necessary the indictment may explain by innuendoes and prefatory matter.[3] To put a letter in a place where it would be likely to be seen by the person to whom it is directed is "uttering" it.[4]

ter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping." (*Former provisions*, 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.)

[1] R. *v.* Grimwade, 1 Den. C. C. 30; 1 C. & K. 592; 1 Cox C. C. 67. See, as to sending, supra, § 1666 *a*.

Under prior statutes we have the following rulings:—

Under 27 Geo. 2, c. 15, a conviction for sending a letter to P., threatening "to set fire to his mill, and likewise to do all the public injury they were able to him, in all his farms and seteres," was set aside, it appearing that P. had not then any mill to which the threat of burning would apply (having parted with it three years before); and the threat as to the farm, &c., not necessarily implying a burning. R. *v.* Jepson, 2 East P. C. 1115.

A conviction under 4 Geo. 4, c. 54, s. 3, was also set aside on an indictment charging that the prisoner sent a letter to T. L., threatening to burn the house of J. R., as the threat must be to the owner of the property; and if the letter was sent to T. L., with intent that it should reach J. R., and did reach him, it should have been charged in the indictment as sent to J. R. R. *v.* Jones, 2 C. & K. 398; 1 Den. C. C. 218; 2 Cox C. C. 434; R. *v.* Grimwade, 1 Cox C. C. 67.

[2] 24 & 25 Vict. c. 100, s. 16.

[3] R. *v.* Boucher, 4 C. & P. 562. Under similar statute see State *v.* Young, 26 Iowa, 122; Longley *v.* State, 43 Tex. 490; Buie *v.* State, 1 Tex. Ap. 58.

[4] R. *v.* Jones, 5 Cox C. C. 226.

CHAPTER XXIX.

ESCAPE, BREACH OF PRISON, AND RESCUE.

I. Against Officer for an Escape.
- Escape is permitting a prisoner's departure from custody, § 1667.
- Negligence need not be proved by prosecution, § 1668.
- Deputy jailers are liable as jailers, § 1669.
- Jailers need not be *de jure*, § 1670.
- Indictment must specify offence, § 1671.

II. Breach of Prison.
- Prison breach is a forcible departure from custody, § 1672.
- Offence extends to escape from civil process, § 1673.
- Enough if process be regular, § 1674.
- Custody of any kind is enough, § 1675.
- Attempt is indictable, § 1676.
- Law of principal and accessary applies, § 1677.
- Voluntary escape is indictable, § 1678.
- Necessity a defence, § 1679.

III. Rescue.
- Rescue is violent delivery of prisoner from custody, § 1680.

I. AGAINST OFFICER FOR ESCAPE.[1]

§ 1667. "Every one who knowingly, and with intent to save the person escaping from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

Escape is permitting prisoner to depart from custody.

"Is guilty of high treason if the escaped prisoner was in his custody for, and was guilty of, high treason;

"Becomes an accessary after the fact to the felony of which the escaped prisoner was guilty if he was in his custody for, and was guilty of, felony; and

"Is guilty of a misdemeanor if the escaped prisoner was in his custody for, and was guilty of, a misdemeanor." [2]

[1] See Whart. Prec. as follows:—
(633.) Escape. Indictment for a conspiracy to.
(921.) Voluntary, indictment against jailer for.
(923.) Negligent, indictment against constable for.
(924.) Escape. Indictment against prisoner for.
(1053–4.) Attempt to facilitate a third party, indictment for.

[2] Steph. Dig. C. L. art. 144, to which is appended the following note: Hawk. P. C. 192, 196, 197; 1 Russ.

It is a misdemeanor at common law for an officer having lawful charge of a prisoner, negligently to permit the departure of such prisoner from his custody, no matter how slight may be such departure.[1] The custody may be that of a prison, or a chamber, or even that of constructive tactual arrest in the open streets.[2] And any undue liberty given to a prisoner, which he uses to effect his escape, imposes responsibility on the custodian giving the liberty.[3]

Negligence need not be proved by prosecution.

§ 1668. Where the offence charged is a negligent escape, it is not necessary to prove negligence in the defendant, as the law implies it;[4] and if it be alleged in defence that the prisoner by force rescued himself, or was rescued by others, and the officer made fresh pursuit after him, but without effect, and took throughout every precaution in his power, the burden of making out this defence is on the defendant. And so severe is the policy of the law in this respect, that nothing but the act of God, or of irresistible adverse force, is held an excuse.[5]

Deputy jailers are liable as jailers.

§ 1669. The deputies of a jailer are charged with the same high responsibilities as are imposed on the jailer himself. It is otherwise, however, with his servants, who are not deputies, and who are only responsible for negligence in their particular spheres, or for connivance.[6] But the custody must have been lawful.[7]

Cr. 583; Weaver *v.* Com. 29 Penn. St. 445. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact. Steph. Dig. *ut supra.*

[1] Colby *v.* Sampson, 5 Mass. 310, 312; Com. *v.* Farrell, 5 Allen, 130; State *v.* Addcock, 65 Mo. 590. See R. *v.* Shuttleworth, 22 Up. Can. (Q. B.) 372; State *v.* Martin, 32 Ark. 124.

[2] R. *v.* Bootie, 2 Burr. 864; State *v.* Doud, 7 Conn. 384; Luckey *v.* State, 14 Tex. 400; R. *v.* Shuttleworth, 22 Up. Can. (Q. B.) 372.

[3] Smith *v.* Com. 59 Penn. St. 320; Hopkinson *v.* Leeds, 78 Penn. St. 396; Green *v.* Hern, 2 Penn. R. 167.

[4] See 1 Hale, 600; Blue *v.* Com. 4 Watts, 215.

[5] State *v.* Halford, 6 Rich. 58; Shattuck *v.* State, 51 Miss. 575.

It is enough also to prove that the warrant or authority on which the prisoner was convicted was legal; it is not requisite for the prosecution to prove that the person actually committed the offence with which he was charged. 2 Hawk. c. 28, s. 16.

[6] State *v.* Errickson, 3 Vroom, 421. See Kavanaugh *v.* State, 41 Ala. 399.

[7] See State *v.* Beebe, 13 Kans. 589; Wilckens *v.* Willett, 4 Abb. Ap. Dec. 596.

Jailer need not be *de jure*.

§ 1670. A *de facto* jailer is responsible for an escape; nor does the question of the legality of the jailer's appointment at all affect the issue.[1]

Indictment must specify offence.

§ 1671. The indictment must allege the offence with which the defendant was charged;[2] though when there is no warrant, but simply a verbal arrest, the offence may be set out in popular terms.[3]

II. BREACH OF PRISON.

Prison breach is a forcible departure from custody.

§ 1672. Prison breach is the forcible breaking out of the place of lawful confinement,[4] by a person involuntarily confined, against the will of his custodian; and by the English common law the offence is a felony if the commitment was for felony, or a misdemeanor, if the commitment was for a misdemeanor.[5]

Offence extends to escape from civil process.

§ 1673. Where the defendant is confined simply on civil process, there are intimations that the old common law offence of breach of prison is not reached.[6] Certainly it is not, so far as the question of felony is concerned; but it is equally clear that it is misdemeanor at common law to escape from any lawful imprisonment, whether on civil or criminal process.[7]

Enough if process be regular.

§ 1674. It is enough to sustain the prosecution if the process were regular.[8] The question of the defendant's guilt or innocence is not relevant to the issue.[9] At the same time, if no felony were committed at all, and there was

[1] 2 Hawk. c. 19. See Com. *v.* Connell, 3 Grat. 587. Supra, §§ 1589, 1617; Whart. Crim. Ev. §§ 164, 833.

[2] Kyle *v.* State, 10 Ala. 236; and so as to those assisting the escape. State *v.* Jones, 78 N. C. 420.

[3] R. *v.* Bootie, 2 Burr. 864.

An indictment against a jailer for permitting a prisoner in his custody to have an instrument in his room with which he might break the jail and escape, and for failing to carefully examine, at short intervals, the condition of the jail, and the occupation of the prisoner at the said jail, in consequence of which the prisoner escaped, does not state an indictable offence. Com. *v.* Connell, 3 Grat. 587.

[4] State *v.* Beebe, 13 Kans. 589.

[5] R. *v.* Haswell, R. & R. 458; R. *v.* Martin, R. & R. 196. See 2 Hawk. P. C. c. 18, s. 16; Com. *v.* Briggs, 5 Met. 559; People *v.* Tompkins, 9 Johns. 70.

[6] 2 Hawk. P. C. c. 28, s. 16.

[7] R. *v.* Allan, C. & M. 295. See State *v.* Murray, 15 Me. 100.

[8] As to arrest see Wh. Cr. Pl. & Pr. §§ 1–12.

[9] 2 Hawk. P. C. c. 18, s. 16; Com.

no prior legal arrest of the prisoner, a mere commitment would be void, and the breaking innocent.[1] But the dismissal of a case by the magistrate is not such a discharge of a prisoner as will justify him in an escape from the lock-up, to which he was remanded by the magistrate.[2]

Custody of any kind enough.

§ 1675. The breaking need not be from a public prison. If there be force, it is a prison breach to escape from an officer in the streets.[3]

Attempt is indictable.

§ 1676. When the breaking out is not accomplished the defendant may be indicted for an attempt.[4] But a breach is effected by throwing down, when escaping, a loose brick on top of a prison wall.[5]

Law of principal and accessary applies.

§ 1677. Assistance to one breaking prison, or escaping from custody,[6] in his undertaking, is governed by the rules applying to principals and accessaries. If the prison breach is felony, a person supplying the means to effect it, or waiting to carry off the prisoner after his escape, is accessary before or after the fact as the case may be. If the prison breach is a misdemeanor, then a person so assisting is a principal in the misdemeanor.[7] The indictment must aver the principal's offence.[8] And a person knowingly harboring

v. Miller, 2 Ashm. 61. See People *v.* Washburn, 10 Johns. 160.

[1] 2 Hawk. c. 18, s. 7.

[2] R. *v.* Waters, 12 Cox C. C. 390.

In R. *v.* Waters, 12 Cox C. C. 390, the defendant was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him to custody without any evidence on oath. The defendant was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates. It was ruled by Martin, B., that the dismissal by the magistrates was not equivalent to an acquittal by a jury; that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand; and that these facts were no defence to the indictment for breaking prison.

[3] 2 Hawk. c. 18, s. 4; R. *v.* Bootie, 2 Burr. 864; R. *v.* Stokes, 5 C. & P. 148; Com. *v.* Filburn, 119 Mass. 297; State *v.* Beebe, 13 Kans. 589. Supra, § 1667.

[4] Supra, §§ 173 *et seq.*; People *v.* Rose, 12 Johns. 339. Under Alabama statute see Luke *v.* State, 49 Ala. 30.

[5] R. *v.* Haswell, R. & R. 458.

[6] Com. *v.* Filburn, 119 Mass. 297.

[7] See R. *v.* Haswell, R. & R. 458; R. *v.* Allan, C. & M. 295; State *v.* Murray, 15 Me. 100; Com. *v.* Filburn, 119 Mass. 297; People *v.* Tompkins, 9 Johns. 70. Supra, § 241. As to Mass. statute and indictment thereon see Com. *v.* Filburn, 119 Mass. 297.

[8] Supra, § 1671.

the fugitive after his escape may be guilty as an accessary after the fact.[1]

Voluntary escape is indictable.

§ 1678. A distinction is taken by the old writers between breach of prison and escape. To breach of prison some force is necessary; some breaking of the continuity of the prison, some tearing away from custody.[2] But if this element is not present, *e. g.* if the doors be left open and the prisoner walks without interruption out, the indictment must be for an escape, and is under no circumstances more than a misdemeanor.[3] Nor is a confinement within prison walls an essential condition of the offence. A prisoner's voluntary departure from bounds out of prison assigned him by the jailer is a "voluntary escape."[4] He is under arrest, if he is ordered to be subject to arrest.[5]

§ 1679. It need scarcely be added that for the technical of-

[1] Supra, § 241. See Com. *v.* Miller, 2 Ashm. 61; and infra, § 1680.

[2] See R. *v.* Haswell, R. & R. 458; R. *v.* Kelly, 1 Cr. & Dix, 203.

[3] 2 Hawk. c. 18, s. 19; R. *v.* Allan, C. & M. 295.

[4] Riley *v.* State, 16 Conn. 47. See Green *v.* Hern, 2 Penn. R. 167.

[5] Com. *v.* Sheriff, 1 Grant, 187.

Whether, in a humane jurisprudence, the unresisted escape of prisoners from custody is a punishable offence may well be doubted. The later Roman common law holds that it is not. The law of freedom, so argue eminent jurists, is natural; the instinct for freedom irrepressible; if the law determines to restrain this freedom, it must do so by adequate means; and it cannot be considered an offence to break through restraint when no restraint is imposed. Undoubtedly it is a high phase of Socratic heroism for a man condemned to death or imprisonment to walk back, when let loose, to be executed or imprisoned. But the law does not undertake to establish by indictment Socratic heroism. It would not be good for society that the natural instinct for self-preservation should be made to give way to so romantic a sentiment as is here invoked; and it is a logical contradiction to say that the scaffold and the cell are to be used to prove that the scaffold and the cell are of no use. If men voluntarily submit to punishment, then compulsory punishment is a wrong. Beside this, a jailer may argue that if we hold that a prisoner is under bonds as much when he is let loose as when he is locked up, there is no reason for over-carefulness in locking-up. Following these views, the conclusion has been reached that an unresisted escape is not *per se* an indictable offence (see Berner, Lehrbuch, p. 548; Henke Handbuch, iii. § 179; Koch, § 618); and this view has been adopted by all modern German codes. The English decisions on this point may be too firmly settled to be now shaken; but considerations such as those which have been mentioned may not be without their use in adjusting the punishment on convictions for unresisted escapes.

fence of prison breach, necessity (*e. g.* a conflagration in the prison) is a defence.[1] The same defence avails on an indictment against the officer.[2]

Necessity a defence.

III. RESCUE.

§ 1680. Rescue is a violent delivery of a prisoner from lawful custody; and is committed by one who would be a principal in the second degree in a prisoner's breach of prison, and who was present actually or constructively assisting by violence in such prison breach.[3] It may also be consummated by wresting a prisoner violently from custody, even though the prisoner should take no part in the violence.[4] Rescue, like prison breach, is either felony or misdemeanor, as the crime charged on the prisoner rescued is felony or misdemeanor.[5] But there must be knowledge by the rescuer that the person rescued was under some arrest;[6] and if the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.[7]

Rescue is violent delivery of prisoner from custody.

An unsuccessful rescue may be indicted for an attempt.[8]

[1] See supra, §§ 95 *et seq.*

[2] Shattuck *v.* State, 51 Miss. 575.

[3] See People *v.* Rathbun, 21 Wend. 509.

[4] State *v.* Cuthbert, T. Charl. 13. See Com. *v.* Filburn, 119 Mass. 297.

[5] 2 Hawk. P. C. c. 18, s. 10.

[6] State *v.* Hilton, 26 Mo. 199.

[7] Steph. Dig. C. L. art. 145: — "Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor, respectively." Steph. Dig. C. L. citing 1 Hale P. C. 606; 1 Russ. on Cr. 597.

[8] See supra, §§ 173 *et seq.*; State *v.* Murray, 15 Me. 100.

CHAPTER XXX.

BIGAMY AND POLYGAMY.

I. Effect of Place of First Marriage.
Ordinarily marriage valid by *lex loci contractus* is valid everywhere, § 1683.
But not so as to converse, § 1684.

II. Effect of Time and Place of Second Marriage.
Offence indictable in place of arrest, § 1685.

III. Third Marriage during Second Bigamous Marriage.
Third marriage after second void marriage may not be bigamy, § 1686.

IV. Accessaries.
If a misdemeanor, all concerned are principals, § 1687.
Hence person marrying bigamous person is principal, § 1688.

V. When Second Marriage was void or voidable.
No defence that bigamous marriage was independently voidable, § 1689.

VI. Where First Marriage was voidable.
No defence that first marriage was voidable, § 1690.

VII. Parties beyond Seas, or Absent.
Exception of beyond seas does not apply to cases where offender knows of continuous life of absentee, § 1691.
Exception as to other absence only applies to cases where there is no knowledge of such life, § 1692.
Exception does not apply to party deserted, § 1693.

VIII. Consummation not necessary, § 1694.

IX. Intermediate Divorce.
Valid divorce from first marriage is a defence, § 1695.
Honest belief in a divorce no defence, § 1695 *a*.

X. Evidence.
1. *Proof of Marriage.*
In bigamy prior marriage has to be proved beyond reasonable doubt, § 1696.
Consensual marriage valid, § 1697.
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Internationally marriage may be proved by parol, § 1699.
Where prior consensual marriage is set up, it should not be rested on a mere confession, § 1700.
Of foreign marriages registry is best evidence, § 1701.
Prior invalid marriages may be ratified, § 1702.
2. *Proof of Death or Divorce of First Husband or Wife*, § 1703.
Death, if occurring within seven years, must be substantively proved, § 1704.
Honest belief in death within that time no defence, § 1705.
Presumption of continuance of life depends on circumstances, § 1706.
After seven years, burden is on prosecution to prove knowledge by defendant, § 1708.
3. *Witnesses.*
When first marriage is proved, second wife is a witness, § 1709.
Other witnesses admissible to prove marriage, § 1710.

XI. Indictment.
Second marriage must appear to be unlawful, § 1711.
Variances as to second marriage are fatal, § 1712.
Exceptions in statute need not be negatived, § 1713.
First marriage must be averred, § 1714.

XII. Religious Privilege no Defence.
No defence that polygamy was a religious privilege, § 1715.

§ 1682. BIGAMY is committed by a party who, when already legally married to one person, marries another person.[1]

[1] The definition of the English Commissioners, in the Draft Code of 1879, is as follows: —

"Bigamy is —

"(*a.*) The act of any person who, whilst any valid marriage wherever contracted subsists between himself or herself and any person, goes through a form of marriage with any other person in any place in any part of the world; or,

"(*b.*) The act of any person who, not being married, knowingly goes through a form of marriage in any part of the world with any person whom he or she knows to be married.

"The expression 'form of marriage' means any form either recognized as a valid form of marriage by the law of the place where it is gone through, or, though not so recognized by the law of that place, such that a marriage celebrated there in that form is recognized as binding by the law of England or Ireland: Provided that every such form otherwise valid shall, for the purposes of this section, be deemed to be valid notwithstanding any act or default of the person charged with committing bigamy:

"Provided, also, that the fact that the parties would, if unmarried, have been incompetent to contract marriage, shall be no defence upon a prosecution for bigamy:

"Provided, also, that no one shall be deemed to commit bigamy by going through such a form of marriage as aforesaid, if he or she has been continually absent from his or her wife or husband for seven years then last past, and is not proved to have known that his wife or her husband was alive at any time during those seven years; but unless there be such absence as aforesaid, a belief on any grounds whatever that a wife or husband is dead shall be no defence to a charge of bigamy, if such wife or husband was in fact alive when the form of marriage was gone through."

The following is from Steph. Dig. C. L. art. 257: —

"Every one commits the felony called bigamy, and is liable, upon conviction thereof, to a maximum punishment of seven years' penal servitude, who, being married, marries any other person during the life of his or her wife or husband.[2]

"The expression 'being married' means being legally married.[3] The word 'marries' means goes through a form of marriage which the law[4] of the place where such form is used recognizes as binding,[5] whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the bigamy,[6] have been insufficient to constitute a binding marriage.

"Provided, that this article does not extend, —

"(i.)[7] To a second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty; nor,

[2] 24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations.

[3] See Illustration (2).

[4] Burt *v.* Burt, 29 L. J. (Probate) 133.

[5] See Illustration (3).

[6] See Illustration (4).

[7] The act does extend to a subject of her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland. R. *v.* Topping, Dears. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.

I. EFFECT OF PLACE OF FIRST MARRIAGE.

§ 1683. Ordinarily a foreign marriage, valid by the place where it was solemnized, is regarded in bigamy as valid by the *lex delicti commissi*, which is usually the law of

Ordinarily marriage

"(ii.) To any person marrying a second time, whose husband or wife has been continually absent from such person for seven years then last past, and has not been known by such person to be living within that time.

"The burden of proving such knowledge is upon the prosecutor when the fact that the parties have been continually absent for seven years has been proved;[1] nor,

"(iii.) To any person who, at the time of such second marriage, was divorced from the bond of the first marriage, nor to any person whose first marriage has been declared void by the sentence of any court of competent jurisdiction.

"A divorce *a vinculo matrimonii*, pronounced by a foreign court between persons who have contracted marriage in England, and who continue to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause.[2]

Illustrations.

"(1.) A. marries B., a person within the prohibited degrees of affinity, and, during B.'s lifetime, marries C. A. has not committed bigamy.[3]

"(2.) A. marries B., and, during B.'s lifetime, goes through a form of marriage with C., a person within the prohibited degrees of affinity. A. has committed bigamy.[4]

"(3.) A. marries B. in Ireland, and, during B.'s lifetime, goes through a form of marriage with C. in Ireland, which is invalid because both A. and C. are Protestants, and the marriage is performed by a Roman Catholic priest. A. commits bigamy.[5]

"(4.) A., married to B., marries C., in B.'s lifetime, by banns. B. (the woman) being married, for purposes of concealment, under a false name. A. has committed bigamy.[6]

"(5.) A., married to B., marries C., in B.'s lifetime, in the colony of Victoria. In order to show that A. committed bigamy, it must be proved that the form by which he was married was one recognized as a regular form of marriage by the law in force in Victoria.[7]

[1] R. v. Curgerwen, L. R. 1 C. C. R. 1.

[2] R. v. Lolley, R. & R. 237. The decision does not refer to domicil, but this qualification appears, from later cases, to be required. All the cases on this subject are collected in 2 Sm. L. C. 839–45. The question as to the exact time at which a person can be said to be divorced may arise. In 1 Hale, P. C. 694, a case is mentioned in which a person marrying after sentence of divorce, but pending an appeal, was held to be within a similar proviso in 1 Ja. c. 11. In R. v. Hale, tried at the Leeds Summer Assizes, 1875, a woman pleaded guilty to a charge of bigamy before Lindley, J., she having married after the decree *nisi* was pronounced, but before it became absolute, which it afterwards did. The judge's attention, however, was not directed to the passage in Hale.

[3] R. v. Chadwick, 11 Q. B. 205.

[4] R. v. Brawn, 1 C. & K. 144; R. v. Allen, L. R. 1 C. C. R. 367.

[5] R. v. Allen, *ub. sup.* pp. 373–5, disapproving of R. v. Fanning, 17 Ir. C. L. 289.

[6] R. v. Parson, 5 C. & P. 412. In R. v. Rea, the prisoner, at the bigamous marriage (before the registrar), gave a false Christian name, and was held to be rightly convicted.

[7] Burt v. Burt, 29 L. J. (Probate) 133.

the place where the bigamous second marriage is prosecuted. But to this rule there are some marked exceptions. The first is where the parties to such foreign first marriage were, by the law of the place of prosecution,

valid by *lex loci contractus* is valid everywhere.

In art. 258, Steph. Dig. C. L., the law is thus further stated: —

"Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy."[1]

This question is discussed in future sections of the text. Infra, §§ 1687–8.

Lord Macaulay, in his Report on the Indian Code, says: —

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcast from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

"It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case, the man can hardly be said to have injured any individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress, calling that mistress by his own name, introducing her into every society as his wife, and procuring for her the consideration of a wife from all his acquaintance. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only party injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

"The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is

[1] R. v. Brawn, 1 C. & K. 144.

incapable of marrying. In such case the first marriage will be adjudged void by the *judex fori*, and the second marriage will

intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals, and bigamy which produces no suffering to individuals at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished with great severity."

In Reynolds *v.* U. S. 98 U. S. 145, Waite, C. J., said:—

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, almost exclusively a feature of the life of Asiatic and African people. At common law the second marriage was always void (2 Kent's Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because, upon the separation of the ecclesiastical courts from the civil, the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

"By the statute of 1 James I. chapter 11, the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period reënacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that, on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth.' 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."

be ruled not to be bigamous. The second is where the first marriage was not solemnized by forms which the law of the place of the second marriage holds to belong to the essence of marriage; when a similar result will be reached.[1]

§ 1684. Yet the converse of the last proposition is by no means universally true. A marriage which the law of the place of solemnization may hold, on grounds of purely local and arbitrary policy, to be invalid, may nevertheless be adjudged valid by the courts of the party's domicil.[2]

But not so as to converse.

II. EFFECT OF TIME AND PLACE OF SECOND MARRIAGE.

§ 1685. By the statute of James, the trial could be had only in the place in which the second marriage was solemnized, for the old common law reason that the *locus delicti commissi* has sole jurisdiction of the offence.[3] A man, therefore, could go abroad and marry a second wife, his first still living in England, and bring with impunity the second wife to the very place where the first resided. To meet this was passed the 9 Geo. 4, c. 31, s. 22, which provides that in case of a bigamous second marriage, the offence may be dealt with, where the offender is a British subject, "in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county."[4] In some of the United States a similar statute has been enacted; in others a "continuance" in a bigamous state is made indictable, no matter where the second marriage was solemnized.[5] But when the act of mar-

Offence indictable in place of arrest.

[1] Infra, § 1698; Wh. Confl. of L. §§ 160–5. See supra, § 271.

[2] Wh. Confl. of L. §§ 169–181; though see Weinberg *v.* State, 25 Wis. 370; Bird *v.* Com. 21 Grat. 800; and fully infra, § 1698; supra, § 271.

[3] 1 Hale, 693; 1 East P. C. 466; People *v.* Mosher, 2 Parker C. R. 195; Finney *v.* State, 3 Head, 544.

[4] For a conviction under this statute see R. *v.* Topping, 7 Cox C. C. 103; Dears. 647.

[5] State *v.* Palmer, 18 Vt. 570; Com. *v.* Bradley, 2 Cush. 553; Finney *v.* State, 3 Head, 544; State *v.* Johnson, 12 Minn. 476. See Scoggins *v.* State, 32 Ark. 205.

In New York, trial may be in place of bigamous marriage; Collins *v.* People, 4 Thomp. & C. 77; 1 Hun, 610; or in county of arrest. People *v.* Mosher, 2 Parker C. R. 195; Ah King *v.* People, 5 Hun, 297.

In Arkansas, it is held that the legislature has no constitutional power to make the offence triable elsewhere than at the place of the bigamous marriage. Walls *v.* State, 32 Ark. 565.

In Alabama the venue must be the place of bigamous marriage. Baggs *v.* State, 55 Ala. 108.

This topic is discussed supra, §§ 284 *et seq.*

riage is made the subject of indictment, then at common law the place of such commission has jurisdiction.[1]

Unless the offence be made thus continuous, the statute of limitations begins to run from the date of the second marriage.[2]

III. THIRD MARRIAGE DURING SECOND BIGAMOUS MARRIAGE, BUT AFTER DEATH OF FIRST WIFE.

Third marriage after second void marriage may not be bigamy.

§ 1686. Supposing there is a second and bigamous marriage, during which the first wife dies, and the man then marries a third time, is the third marriage bigamous? Technically it is not in cases where the second marriage was void, for in such case the third marriage was valid.[3] But if the defendant, after the death of his first wife, acknowledged the second marriage, and recognized the second wife as his legal wife, this, according to the common law view of marriage elsewhere vindicated,[4] would constitute such a marriage as would make the third marriage bigamous.[5] Of course this does not hold in a trial where the *lex fori* treats a consensual marriage as invalid,[6] or where the indictment does not aver a valid marriage existing at the time of the alleged bigamy.[7]

IV. ACCESSARIES.

If a misdemeanor, all concerned are principals.

§ 1687. To bigamy, as to all other offences, applies the law of principal and accessary, as hereinbefore expressed.[8] Where the offence is a felony, then one present, aiding and abetting, is a principal in the second degree;[9] and those promoting, without being present, are accessaries before the fact. Where the offence is a misdemeanor, all concerned are principals.[10]

[1] Brewer *v.* State, 59 Ala. 101.

[2] Gise *v.* Com. 81 Penn. St. 428; Scoggins *v.* State, 32 Ark. 205. See Brewer *v.* State, 59 Ala. 101.

[3] 1 Hale, 693; 1 East P. C. 466; People *v.* Mosher, 2 Parker C. R. 195; State *v.* Moore, 3 West. L. J. 134. See State *v.* Palmer, 18 Vt. 570.

[4] Infra, §§ 1697–8, 1702.

[5] See Patterson *v.* Gaines, 6 How. 550; Hayes *v.* People, 5 Parker C. R. 325; 25 N. Y. 390. Thus, cohabitation, subsequent to emancipation, by an emancipated slave, with a woman to whom he was invalidly married prior to emancipation, validates the invalid prior marriage. McReynolds *v.* State, 5 Cold. 18; Hampton *v.* State, 45 Ala. 82; though see Williams *v.* State, 44 Ala. 24.

[6] Denison *v.* Denison, 35 Md. 361.

[7] Hayes *v.* People, 25 N. Y. 390.

[8] R. *v.* Brown, 1 C. & K. 144.

[9] Supra, § 211; Boggus *v.* State, 34 Ga. 275.

[10] See fully supra, §§ 206, 223.

§ 1688. If this view be correct, a person who, knowing the fact,[1] marries another who has another husband or wife is principal in the bigamy. We must admit however, on this point, a probability of the same conflict of opinion as exists on the question whether a person having carnal intercourse with an adulterer is guilty of adultery.[2] But it has been held that a person thus marrying another who has a former husband or wife is not indictable, unless it be proved that there was knowledge of the incapacity of the other party to the marriage.[3]

Hence person marrying bigamous person is principal.

V. WHEN SECOND MARRIAGE WAS ON INDEPENDENT GROUNDS VOID OR VOIDABLE.

§ 1689. The offence consisting in entrapping another into marital intercourse on a false plea, it is no defence that the second marriage was void on other grounds than that of bigamy; as where the second wife was incompetent to marry,[4] or where the second marriage was within the prohibited degrees,[5] and *a fortiori* where the second marriage is simply voidable, or technically defective.[6]

No defence that bigamous marriage was voidable.

VI. WHERE THE FIRST MARRIAGE WAS VOIDABLE OR VOID.

§ 1690. Though the first marriage be contracted under disabilities or impediments which render it *voidable*, yet a second marriage whilst the former is in fact subsisting comes within the statute, for the first, in judgment of law, is a marriage until avoided.[7] But should the first marriage be contracted under disabilities or incapacities which render it void *ab initio*, or be for other reasons void, the case is otherwise.[8]

Nor that first marriage was voidable.

[1] That this is necessary see supra, §§ 214, 231.

[2] See infra, §§ 1717 *et seq.*

[3] Arnold *v.* State, 53 Ga. 574.

[4] People *v.* Brown, 34 Mich. 339.

[5] R. *v.* Allen, L. R. 1 C. C. 367; 26 Law J. 664, overruling R. *v.* Fanning, 10 Cox C. C. 411 (Irish Q. B.); R. *v.* Brawn, 1 Cox C. C. 313; 1 C. & K. 144. Supra, § 1682 note.

[6] R. *v.* Penson, 5 C. & P. 412; Hayes *v.* People, 5 Parker C. R. 325; S. C., 25 N. Y. 390; Robinson *v.* Com. 6 Bush, 309.

[7] 1 East P. C. 466.

[8] 1 Russ. on Cr. 290; R. *v.* Chadwick, 11 Q. B. 205. Supra, § 1686.

Thus in Ohio a marriage contracted by parties, either of whom is under the age of consent, and not confirmed by cohabitation after arriving at that age, will not subject a party to punishment for bigamy, for contracting a subsequent marriage, while the first husband or wife is still living; Shaf-

VII. PARTIES BEYOND SEAS, OR ABSENT.

§ 1691. It was held that the first exception, in the old statute, relieving "any person or persons, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together," applied, though the party marrying have notice that the other is living.[1] Now, however, by 9 Geo. 4, if the party knows that the other is alive, the exception does not relieve.[2] And this distinction is generally accepted in recent statutes.[3] To be in another State of the American Union is equivalent, it is said, to being beyond seas.[4]

Exception of beyond seas does not apply to cases where offender knows of continuous life of absentee.

§ 1692. The second exception, that the statute shall not extend to any person or persons "whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years together, in any place within the State of domicil or elsewhere, the one of them not knowing the other to be living within that time," according to its express words, only applies when the party marrying again has no knowledge that the former husband or wife is alive. The mode of proving this exception is hereafter distinctively discussed.[5] When there is no local law, these exceptions are presumed to be part of the common law of the United States.[6] In Mississippi the term is five years.[7] In

Exception as to other absence only applies to cases where there is no knowledge of such life.

her *v.* State, 20 Ohio, 1; and, generally, if a boy under fourteen, or a girl under twelve, contract matrimony, it is void, unless both parties consent to confirm the marriage after the minor arrives at the age of consent. Co. Lit. 79. See R. *v.* Gordon, R. & R. 48.

On the other hand, in conformity with the first proposition of this section, in South Carolina, where a marriage of a nephew to an aunt is valid, if the nephew, after such marriage, marry during the life of the first wife, he is indictable for bigamy. State *v.* Barefoot, 2 Rich. 209.

[1] 1 Hale, 693; 1 East P. C. 466. See R. *v.* Turner, 9 Cox C. C. 145; Gibson *v.* State, 38 Miss. 313.

[2] R. *v.* Turner, 9 Cox C. C. 145. See R. *v.* Briggs, 7 Cox C. C. 175; D. & B. 98; Com. *v.* Thompson, 6 Allen, 591.

[3] See Com. *v.* Johnson, 10 Allen, 196.

[4] Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373; Murray *v.* Baker, 3 Wheat. 541; Bank of Alex. *v.* Dyer, 14 Pet. 141; *aliter* in North Carolina: Whitlock *v.* Walton, 2 Murph. 23; Earle *v.* Dickson, 1 Dev. 16. See these cases discussed in Davis *v.* Briggs, Sup. Ct. U. S. 1879.

[5] Infra, § 1708.

[6] Barber *v.* State, Sup. Ct. Md. 1879; Eubanks *v.* Banks, 34 Ga. 407; Wh. Confl. of Laws, § 133.

[7] Gibson *v.* State, 38 Miss. 313.

Pennsylvania "if any husband or wife, upon any false rumor, in appearance well founded, of the death of the other (when such other has been absent for two whole years)," shall marry again, this is not bigamy.[1] Under this statute, the rumor must not be vague or fleeting, but must be circumstantial, as to place, time, and mode of death.[2]

Exception does not apply to party deserted.

§ 1693. The phrase in the Massachusetts statute, which excepts cases where the absent party "voluntarily withdrew," does not release the party deserting; it only applies to the party deserted.[3]

VIII. CONSUMMATION NOT NECESSARY.

§ 1694. Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity.[4]

IX. INTERMEDIATE DIVORCE.

Valid divorce from first marriage is a defence.

§ 1695. If a divorce be such as by the *lex fori* entitles the defendant to marry again, then he cannot be convicted of bigamy.[5] But this is a matter the *lex fori* alone must decide.[6] When a man, for instance, is indicted in Pennsylvania for marrying a second time in that State, the first wife being alive, it is no defence to the indictment that the defendant was divorced from the first wife in Indiana, if the Indiana divorce is not valid by Pennsylvania law.[7] As a principle of international law, to give validity to such a divorce, the complainant, at least, must be domiciled in the divorcing State;[8]

[1] Revised Act, Bill I. § 34 (reënacting Colonial Act of 1705, as modified in 1790 and 1815).

[2] Com. *v.* Smith, Whart. on Hom. App.; 1 Wh. Dig. 826.

[3] Com. *v.* Thompson, 11 Allen, 23.

[4] Gise *v.* Com. 81 Penn. St. 428; State *v.* Patterson, 2 Ired. 346.

[5] Lolley's case, 2 Cl. & F. 567 n.; R. & R. 237; State *v.* Weatherby, 43 Me. 258; People *v.* Hovey, 5 Barb. 117.

[6] See, as to Massachusetts practice, Com. *v.* Richardson, 126 Mass. 34.

[7] Wh. Confl. of L. § 224.

[8] People *v.* Dawell, 25 Mich. 247. See Barber *v.* Root, 10 Mass. 260; Smith *v.* Smith, 13 Gray, 209; Shannon *v.* Shannon, 4 Allen, 134; Jackson *v.* Jackson, 1 Johns. 424; Borden *v.* Fitch, 15 Johns. 121; Parish *v.* Parish, 32 Ga. 653; though see Kinnier *v.* Kinnier, 45 N. Y. 535.

and there must be due personal notice, if possible, to the defendant. And in Pennsylvania, where the complainant has deserted the defendant, and gone to a foreign domicil, the divorce must be sued in the defendant's domicil.[1]

Clearly a divorce *subsequent* to the second marriage does not purge the bigamy.[2]

The burden of proving the divorce is on the defendant.[3]

Honest belief in a divorce no defence.

§ 1695 *a*. As has already been seen, an honest but erroneous belief in a divorce is no defence.[4]

X. EVIDENCE.

1. *Proof of Marriage.*

In bigamy prior marriage has to be proved beyond reasonable doubt.

§ 1696. Before discussing the question of proof of marriage, it is desirable to recall the fact that the issue in bigamy is different from the issue in other cases in which marriage is sought to be sustained. An emigrant, for instance, comes from Europe to this country with a wife whom he professes to have married in his domicil of origin. He rears children whom he acknowledges, and who claim after his death to inherit his estate. Here, the fact of marriage being conceded, come in two important considerations to sustain the legitimacy of the children. The first is that all acts are presumed to be regular until the contrary appears; and

[1] Colvin *v.* Reed, 55 Penn. St. 375; Reel *v.* Elder, 62 Penn. St. 308; Wh. Confl. of L. §§ 224 *et seq.*

[2] Baker *v.* People, 2 Hill (N. Y.), 325.

[3] Com. *v.* Boyer, 7 Allen, 306. See Whart. Crim. Ev. §§ 319 *et seq.*

[4] Supra, § 88; State *v.* Goodenow, 65 Me. 30; Davis *v.* Com. 13 Bush, 318; Hood *v.* Hood, 56 Ind. 263. In State *v.* Whitcomb, Sup. Ct. Iowa, 1879, 13 West. Jur. 502, the evidence was that the defendant, in 1872, procured a decree of divorce from his wife, Roana Whitcomb, and, in 1873, was married to another woman. Afterward, at the suit of the said Roana, the decree divorcing her from defendant was set aside, on the ground of fraud practised by defendant in procuring it, and for want of jurisdiction of the court by which it was granted. Defendant was indicted for the crime of adultery in unlawfully cohabiting with the second wife, was convicted, and appealed. It was held that the decree of divorce having been adjudged void was so from the beginning, and afforded no protection to defendant even for acts done before it was set aside; and that evidence of the good faith with which defendant contracted the second marriage was properly excluded.

though this is not a presumption of law but a rule for the regulation of the burden of proof, it leads to a judgment, in case of equipoise, in favor of regularity. The second, which is also a rule for the adjustment of the burden of proof, is that when the evidence is equally balanced, the courts on all questions of legitimacy, will favor the hypothesis of matrimony.[1]

Suppose, however, the emigrant in question has come to this country without a wife; marries here; establishes a home and family; and then is arrested here on the charge of bigamy, based on an alleged marriage in his native land. Here the prosecution, instead of being aided by rules which in a doubtful case would turn the scales in its favor, has to encounter considerations which in a doubtful case will turn the scales against it. The defendant's second marriage is not contested, and is looked on with peculiar favor by the judicial polity of a country such as this, which seeks to encourage family growth.[2] But what is much more important, the fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim, that the charge of guilt, to justify a conviction, must be made out beyond reasonable doubt. Hence, as presently more fully seen, we find courts which are ready, when a marriage is to be adjudicated on its civil relations, to regard the husband's own admissions as proof of the fact, shrinking from this conclusion, when the object is to sustain a criminal prosecution against him for bigamy. Confessions are only authoritative, it is well argued, when there is clear proof of the *corpus delicti*;[3] and here the *corpus delicti* is the alleged first marriage, which must be "clearly proved," independently of the defendant's confession. Now, in view of the issue being criminal, we can easily understand how a court should say, as some courts have said: "The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and therefore, in view of the maxim, '*locus regit actum*,' we must hold that any other proof of the fact of marriage is but secondary, and is not to be

[1] See Patterson *v.* Gaines, 6 How. U. S. 550; Shafer *v.* State, 20 Ohio, 1. Compare supra, §§ 271, 1685, and Whart. Cr. Ev. §§ 827, 828, as to presumptions of marriage and legitimacy.

[2] See Wh. Confl. of L. § 150.

[3] Infra, § 1700. See Wh. Cr. Ev. §§ 624–633; and see R. *v.* Flaherty, 2 C. & K. 782.

received." Had the first wife been brought to this country, and here acknowledged, the case would have been different. But when the prosecution rests simply on a technical first marriage, not followed by cohabitation in this country, it is not inconsistent in courts which recognize the validity of a consensual marriage to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond reasonable doubt, be proved by the record if there be such; and that secondary evidence should only be received when the prescriptions of the *lex loci contractus* are peculiarly onerous, or when the primary evidence cannot be obtained. What are the modes of proving a record, or registry of marriage, when this is insisted on, is elsewhere fully discussed.[1]

[1] Whart. Crim. Ev. §§ 169 *et seq.* See People *v.* Humphrey, 7 Johns. 314; Weinberg *v.* State, 25 Wis. 270; Bird *v.* Com. 21 Grat. 800; Squire *v.* State, 46 Ind. 458; Com. *v.* Jackson, 11 Bush, 679; Harris *v.* Cooper, 31 Up. Can. (Q. B.) 182, and infra, § 1700. In those countries where a contract in writing is by the law of the country made essential to the marriage, it should, as a rule, be produced. 1 Camp. 61.

In England, the register of the parish is admissible for the same purpose. 2 Bacon's Ab. Ev. F.; Gilb. Ev. 72; 1 Greenleaf on Ev. §§ 484, 493, 544, 545, though the original record is not necessary. Sayer *v.* Glossop, 2 Exch. 409; 2 C. & K. 694.

In New Hampshire, a copy of the record of the marriage from the clerk's office, duly certified, with proof of the identity of the party, is proper evidence. State *v.* Wallace, 9 N. H. 515.

In Illinois, it is competent, on a trial for bigamy, to prove the first marriage, or either marriage, by producing a copy of the marriage license, with the certificate of the justice, indorsed on the license, that he had solemnized the marriage, and a certificate of the clerk of the county commissioners' court of the county that the same was a true copy, transcribed from the original on file in his office. Jackson *v.* People, 2 Scam. 231. Mere reputation is not enough. Whart. Crim. Ev. § 170. "There must be strict proof of the fact" of marriage or cohabitation, which implies marriage. Thornton, J., in Miner *v.* People, 58 Ill. 59; citing Harman *v.* Harman, 16 Ill. 85. Compare Westfield *v.* Warren, 3 Halst. 249; Buchanan *v.* State, 55 Ala. 154.

In Vermont, where it was proved that parties appeared before a magistrate, or one acting as such, in New York, and declared their consent to a marriage, and this was followed by cohabitation and recognition of each other as man and wife, it was held to be sufficient proof *primâ facie* of such marriage. State *v.* Rood, 12 Vt. 396.

It will be seen in the next section that mere consent is sufficient, by the common law of Christendom, to establish marriage. See Glasson, Mariage Civil, Paris, 1879; London Law Mag. 1878, 236. And, so far as concerns the United States, this may be viewed as judicially determined. Patterson *v.* Gaines, 6 How. 550; Hayes

§ 1697. Marriage is not merely a contract, but is an institution of Christendom, internationally recognized in all Christian States. But while this is the case, each State, in determining the constituents of marriage, is governed by its distinctive policy. As establishing this position, the following survey of the law may be not irrelevant: —

Consensual marriage valid.

The common law of marriage in the English settled portions of the United States is the common law of England as it was at the time of the settlement of the American colonies. We have, therefore, first to inquire, what was at that time the English common law as to marriage. Did that law validate consensual marriages, contracted without any ecclesiastical or secular sanction?

The common law of England on the subject of marriage, we have first to remark, is the canon law as it obtained in England at the time of the Reformation, and as it remained until altered by legislation in the reign of George II., under the auspices of Lord Hardwicke. And the canon law as to marriage at the time of the Reformation is the canon law of the Catholic Church as it was before the rupture, and as it remained in the Roman Catholic branch until modified by the Council of Trent. In order, therefore, to get at our common law as to marriage, on this interesting issue, we have to inquire what was the canon law of the undivided Catholic Church, at and before the Reformation.

What this canon law was is a question as to which there is not much doubt. If it appeared that there was a marriage agreed to and consummated by competent parties, the church sustained the marriage, even though there was no ecclesiastical benediction; and in this the State followed the Church. It is true that the church recommended a *benedictio sacerdotalis in ecclesia*, or ecclesiastical benediction; and it is true, also, that various local councils made provision for the publishing of banns. But neither banns nor benedictions were the conditions precedent of marriage. A marriage without either, though reprobated as *matrimonium clandestinum*, subjecting the parties under certain circumstances to ecclesiastical censure, was, notwithstanding, a

v. People, 5 Parker, C. R. 325; 25 N. 126. See Denison *v.* Denison, 35 Md. Y. 390; Hutchins *v.* Kimmell, 31 Mich. 361, and cases cited to § 1700, note.

legal marriage. Even a marriage in secret, of which none but the parties were at the time cognizant, was regarded, if satisfactorily proved by the acknowledgments and conduct of the parties, as creating all the incidents of marriage, both as to property and as to offspring. Cap. 30. x. de sponsal. et mat. "The essence of the sacrament of matrimony," said Peter Lombard, "is not the performance of marriage by the priest, but the *consensus* of husband and wife." Dist. xxvii. c. Or, to adopt the language of an authoritative German commentator, made still more authoritative by its indorsement by an eminent American divine, "The scholastics generally held that the will of the contracting parties constitutes the marriage; they complete the sacrament. Secret marriages, though forbidden, are valid. In none of the ancient rituals is there a sacramental form of marriage to be spoken by the priest." [1] The same conclusion is stated by Lingard, whose weight on the Roman Catholic side is as great as is that of Hagenbach and Smith on the Protestant side. We may, therefore, regard it as settled that theologians concur in the validity of consensual marriages by the old canon law, although to such marriage neither consent of parents nor guardians, nor the benediction of the church, nor sanction by civil officers, were given. In fact, while there were evils in sanctioning all consensual marriages, the old canonists, as well as the old jurists, agreed that these evils were not so great as were the evils of validating only such marriages as were solemnized in a particular way. The first alternative might lead occasionally to hasty and improvident unions. The second would certainly lead to wrong being done to many innocent persons, to the abandonment of women and the bastardizing of children through the neglect or fraud of others. The duty of the State, it was insisted, is to encourage matrimony, as the essential basis of society, not to discourage it by artificial restrictions, thereby fostering the establishment of illicit sexual relations. And so far as to consensual marriages being hasty and improvident, this danger would be diminished, so it was said, if it was known that such marriages were recognized as binding. And it was retorted that improvidence, if not haste, often characterized marriages solemnized with the benediction of both State and Church. The statute

[1] Hagenbach's History of Doctrine, by Prof. Smith, ii. § 20.

2 & 3 Edw. VI. c. 23, goes a great way by implication to show that by the common law the essence of marriage consists in the executed contract, — *sponsalia de praesenti;* and that when this exists, either party may be compelled to submit to an ecclesiastical solemnization. That statute provides that "when any cause or contract of marriage should be pretended to have been made, it shall be lawful to the king's ecclesiastical judge to hear and examine the same; *and having the said contract sufficiently and lawfully proved before him, to give sentence for matrimony, commanding solemnization, cohabitation, consummation and tractation, as in times past, before the said statute* (that of 32 Henry VIII.), the king's ecclesiastical judge, by the king's ecclesiastical laws, might have done."[1]

Did the decree of the Council of Trent in this respect change the canon law so as to affect those portions of the United States which, at the time of the action of the council, were subject to Roman Catholic princes? We must remember, in answering this question that the decrees of the council are not, by their own limitation, binding in any country in which they are not technically "published;" and we have a series of rulings of the Supreme Court of Louisiana to the effect that in the great territory acquired by the United States from France and Spain, no such publication was ever made. Even in France, Pothier tells us, the decree of the council was treated by the secular courts as a clerical usurpation, having no local authority.[2] In Italy the same judicial results have been reached.[3] And even where the decrees of the council are published they bind only persons in union with the Roman See. In the Sussex Peerage case, before the English House of Lords, in 1844, when the question of the validity of the marriage of the Duke of Sussex to Lady Augusta Murray, in the city of Rome, by a Protestant minister, came up for adjudication, it was expressly stated by Cardinal Wiseman, under oath, that the marriage in the eye of the Church of Rome

[1] The fact that the law lords were equally divided on this point in R. *v.* Millis, 10 Cl. & F. 534, appears superficially to throw doubt on the conclusion stated in the text. That it does not have this effect I have shown at large in another work (Whart. Confl. of Laws, § 172), in an argument which it would occupy too much space to reproduce.

[2] Pothier, Traité de Mariage, part 4, c. i. § 4.

[3] Lawrence, Étude sur le Mariage, p. 10; Glasson, Mariage Civil, Paris, 1879.

was valid. Lord Campbell's comments on this evidence are direct to the point before us. "The evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at Rome of English Protestants, contracted according to the laws of their own church, would be recognized as a marriage by the Roman law, and therefore would be a marriage all over the world." "I own that that evidence surprised me. I had imagined that it was impossible there could be a valid marriage at Rome between Protestants, by a Protestant clergyman, such as the Roman law would recognize. As the evidence stands at your lordships' bar, it would appear, however, that the Roman law . . . . would treat it as a marriage valid by the universal law of the church before the date of the decree of the council; and it would appear that the decree of the Council of Trent respecting marriages was not meant to apply to Protestants, who could not conform to it."

The action of the Council of Trent was followed by a series of secular edicts and legislative acts, on the Continent of Europe, the motives being partly religious and partly political. On the one side, Protestant States were determined not to be overawed by Rome, and they hastened, when there was an established church, to make the assent of the local parish minister essential to marriage. On the other side, the desire to check the overgrowth of population led to measures that would prevent marriage from being too easy. The religious limitation is now almost universally removed by the enforcement of civil marriages; but the secular limitations remain, and are in some respects very inconsistent with the policy of encouragement of marriage which prevails in the United States. In England, Lord Hardwicke's Act, passed in 1753, which is in most respects still in force, established a series of requisites as to time, place, and office, the omission of any of which is fatal. The French Code requires the assent of parents; and the same restriction exists in other continental States. In Austria, as it is stated in a late report of a committee of the English House of Commons, the minimum age is fourteen years; in Russia and Saxony, it is eighteen years for men and sixteen for women; in France, Belgium, and Italy, eighteen for men and fifteen for women; in Saxe Coburg Gotha, no man is permitted to marry until the age

of twenty-one years. The new proposed German Code makes the minimum twenty years for men and sixteen for women; and the same limit prevails in several Swiss cantons. But, independently of this restriction, the consent of parents or guardians, in several German States, is necessary in the case of men under twenty-five years, and of women under twenty-one years. And marriages repugnant to these conditions are nullities.

How far such restrictions on domiciled subjects will be regarded as extra-territorially effective is illustrated in an interesting English case,[1] decided in March, 1877, and reported in the London Law Times for July 21, 1877. In this case, which was a petition for a decree of nullity of marriage, and which was undefended, the petitioner, who styled herself "Clara Maxima Pacheco Pereiva Pamplona da Cuntra Sottomayer," was the daughter of Gonçalo de Sottomayer, a Portuguese of wealth, who resided with his family in Portugal, as late as 1858. In that year, his health failing, he moved with his wife, and his only child, the petitioner, to London, she being then eight years old. When in London, as had been previously the case in Portugal, Mr. and Mrs. Sottomayer occupied the same house with her brother, Mr. De Barros, and his family. Mr. Sottomayer becoming so imbecile as to be incapable of business, his wife and her brother entered into a partnership with a Portuguese house, which in 1866 became bankrupt. Mrs. Sottomayer, under the impression that by a marriage of her daughter to a son of Mr. De Barros an ostensible party for the protection of the family estates might be found, obtained the consent of Mr. De Barros and his son to the marriage. In Portugal the marriage would have been void, as the parties were first cousins. The petitioner, Miss Sottomayer, who, with the other members of her family retained her Portuguese domicil, appears to have at first vehemently resisted the marriage, but afterwards yielded to her mother's entreaties, and the parties were duly married at a registry office in London, on June 21, 1866, she being then fourteen years and five months old, and he being sixteen years old. The young couple returned to the house where they had previously resided, but never lived together as man and wife. In 1874, the

[1] Sottomayer *v.* De Barros, decided by Sir R. Phillimore in the Divorce Division, 36 L. T. R. 746; L. R. 2 P. D. 81.

husband becoming a bankrupt, Mr. Sottomayer's estate, partly in his son-in-law's hands, was again imperilled. At the first crisis, it was thought that the estate could be rescued by the daughter's marriage. Now it was to be rescued by her divorce. On November 18, 1874, she filed the petition before us, on the ground, first, that the parties were domiciled at the time in Portugal, by whose laws the marriage would have been void; and, secondly, that the marriage was entered into by her ignorantly, and was induced by fraudulent representations. Sir Robert Phillimore did not hesitate to say, in giving judgment, that the marriage was one "which the court would not be reluctant to pronounce invalid," if there were legal grounds for such a conclusion; but while thus expressing his sympathy with the petitioner, he held that the Portuguese law restricting matrimonial capacity could not be regarded, by an English court, as restraining marriages of Portuguese in England. "This marriage," he argued, "cannot be pronounced invalid, because it is viewed as incestuous according to the general law of Christendom. It is not a marriage between persons in the direct lineal line of consanguinity, or in the collateral line within the degree of brother and sister, both which classes of marriage are by the usage and practice of Christian States, and the general concurrence of Christian law and authority, considered as incestuous, unnatural, and destructive of civilized life." The Portuguese law, vacating the marriages of first cousins, was a law restraining the right of marriage; and it was therefore held that an English judge would not be a party to enforce it against Portuguese subjects marrying in England. The principle, therefore, is, that local restrictions on marriage, not resting on natural law, when imposed by one State, will not be enforced by another State where the solemnization took place, with whose policy they conflict.

On an appeal from Sir R. Phillimore's decision, which was heard before James, Baggallay, and Cotton, L. JJ., November 26, 1878, the case was remitted to ascertain the real facts, James, L. J., however, intimating that if both parties were domiciled at the time of the marriage in Portugal, the Portuguese law should prevail.[1] At a subsequent hearing before Sir James Hannen, the proposition was laid down that where of the two contract-

[1] Sottomayer *v.* De Barros, L. R. 3 P. D. (C. A.) 1.

ing parties to a marriage in England one is there domiciled and the other in a foreign country, and neither of the parties is subject to any incapacity recognized by the laws of England, the marriage is valid, even though the party having the foreign domicil be subject to a personal incapacity recognized by the laws of the country in which such party is domiciled.[1] In the course of his opinion it was said by Sir J. Hannen: "Numerous examples might be suggested of the injustice which might be worked to our own subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicil of one of the parties. In his excellent treatise on 'Domicil,' Mr. Dicey says that 'a marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though imposed by the law of his or her domicil, is of a kind to which our courts refuse recognition.' But on what principle are our courts to refuse recognition if not on the basis of our own laws? If this guide alone be not taken, it will be open to every judge to indulge his own feelings as to what prohibitions of foreign countries on the capacity to contract a marriage are reasonable. What have the English tribunals to do with what may be thought in other countries on such a subject?"

The marriage of Jerome Bonaparte to Miss Patterson, also, though invalid in France, would unquestionably have been held valid in the United States, had it been here litigated; and it was expressly sanctioned by the Papal court.

To the same effect may be cited a leading English case, already incidentally noticed.[2] In that case, which was argued before the Court of Divorce, the parties were French subjects, domiciled in France, and came to England for the purpose of contracting a marriage, which, for want of consent of parents, would have been void by French law if contracted in Paris. They were married in England by license, and immediately returned to France. The marriage was annulled in France, as in fraud of French law. It was, however, sustained in England, where a petition was filed for a decree of nullity, and where Sir C. Creswell declared for the validity of the marriage with the concurrence of the entire court. "It is very remarkable," he

[1] Sottomayer v. De Barros, 41 L. T. 281.

[2] Simonin v. Mallack, 2 Sw. & Tr. 67.

said, "that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice in any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold the marriage void because the parties to the contract were the domiciled subjects of another country where such marriage would not be allowed."

Lex fori determines as to requisites.

§ 1698. The following summary may be here given, reserving the specific examination of the authorities to the second (forthcoming) edition of my book on Conflict of Laws:

1. When a marriage by competent parties is proved to have been solemnized abroad, the presumption is that it was in accordance with the *lex loci contractus*.

2. The old common law of England, adopting in this respect the canon law, validates marriages contracted by competent parties irrespective of ecclesiastical benediction; and this law was brought to the United States by the English colonists, and became part of the common law of the English settled States.

3. Each sovereignty will maintain its distinctive policy as to marriage. France, for instance, as in Jerome Bonaparte's case, may decline to accept an American marriage as changing the *status* of one of her domiciled subjects. On the other hand, in the United States, we would hold the marriage binding, when validly solemnized within our borders, by parties whom we regard competent. This is now settled in England to be the case when it is only by the law of the domicil of one of them that the marriage is invalid. But on reason and on authority we must hold with Sir J. Hannen,[1] that even though by the court of the domicil of both parties the marriage is invalid, it would still be sustained by the courts of the State where the marriage is solemnized, where by the laws of that State the parties would have been capable of marriage if subjects.

Each sovereignty applying its distinctive policy, as has been said, to its subjects, the courts of domicil, should the parties return to it after contracting a marriage abroad, would hold the marriage invalid in all cases in which its own prohibition is based

[1] Sottomayer *v.* De Barros, 41 L. T. 281.

on national policy, or on national conception of morals, and not on matters of form. We may illustrate this by the English rulings as to the marriage of a man with his sister-in-law, and by our own rulings in cases of marriages of negroes with whites. In some States these marriages are void. There can be no question that domiciled citizens of such States, marrying in England in defiance of this prohibition, would be regarded in England as validly married. There is no doubt, as we shall hereafter see, that should they return after the marriage to their domicil, the courts of that domicil would hold the marriage invalid.

Nor does it follow that because a State requires certain conditions to validate marriages within its borders, the marriage of foreigners within such borders, without complying with such conditions, would be held invalid by the courts of the domicil of the parties so marrying. I express this opinion with great deference to the arguments in which the contrary conclusion is ably maintained by several eminent jurists. My reasons are threefold: *First.* In marriage, as has been said, each sovereignty is governed, as to matters involving state policy or morals, by its distinctive standards. *Secondly.* We have American rulings to this effect, holding that American citizens marrying abroad, though without complying with requisites established by the law of the place of solemnization, will be regarded as lawfully married by the courts of their domicil if such marriage would have been valid if solemnized at such domicil. The examination of the recent rulings to this effect I must remand to the second edition of my book on Conflict of Laws. *Thirdly.* In France, if not in Germany, it is held that in such cases the *lex domicilii* is to control, and that if the marriage of Americans in Paris, for instance, is in conformity with the law of their domicil, though not in conformity with the law of France, it would be held good in France. If good in France, it would be regarded, even by those who insist upon the ubiquity of the *lex loci contractus*, as good in the United States.

4. What has been said applies to marriages by persons abroad, on the eve and in expectation of making their matrimonial domicil in the United States. The expressions in the first edition of my book on Conflict of Laws, pressing the rule further, I desire to recall. Except in the case of persons having their matrimo-

nial domicil in the United States, the law of the place of the solemnization of a marriage is to be regarded by us as determining its validity.

Internationally marriage may be proved by parol.

§ 1699. Where the *lex fori* simply prescribes certain formalities as the sole evidence of marriage, then the judge, so far as concerns a domestic marriage, must require that such proof should be given.[1] But when the question is the validity of a foreign marriage, such proof, as relating solely to domestic marriages, cannot be exacted. By international law, marriages may be proved by parol.[2]

Where prior consensual marriage is set up, it should not be rested on mere admissions.

§ 1700. When the *lex fori* recognizes, as is the case in all those jurisdictions in which the English common law continues in force, consensual marriages, the admissions of the parties may be received as tending to establish such marriages, whatever may be the weight to which they may be entitled, provided such admissions have not been extorted by force or fraud.[3] As to the weight to be attached to such admissions, however, the following distinctions are to be kept in mind: —

(1.) *Admissions during Cohabitation.* — When these admissions are part of cohabitation (as where a man living with a woman as man and wife says "this is my wife"), the condition of things under which the admission was made is to be taken into consideration. "Cohabitation as man and wife" may take place in a country where such cohabitation does not necessarily mean marriage according to the English common law; or it may be the subterfuge of an adulterer, seeking in this way to shelter himself and his paramour from immediate scandal. On the other hand, an admission concomitant with cohabitation for any long continued period, in a country where monogamous marriages alone are tolerated, and in a community which resents any invasions of this rule, is entitled to great weight.

(2.) *Admissions when Cohabitation has ceased.* — These are to be closely scanned, and should not be regarded as sufficient to sus-

[1] See Whart. Cr. Ev. § 169.

[2] Whart. Crim. Ev. § 170; Com. v. Holt, 121 Mass. 61; Murphy v. State, 50 Ga. 150; State v. Hilton, 3 Rich. 434; Williams v. State, 54 Ala. 131. If the marriage is *primâ facie* regular, it will be presumed that all necessary technical conditions existed. R. v. Creswell, 13 Cox C. C. 126.

[3] See Whart. Crim. Ev. §§ 623 *et seq.*

tain a conviction, without proof of continuous cohabitation, under the circumstances last specified, or of an actual performance of the marriage ceremony. They may have been made: (*a.*) in ignorance of impediments which would have avoided the marriage; or (*b.*) under a mistake of law; or (*c.*) in levity, using the term marriage as a euphemism for a less honorable connection; or (*d.*) for self-serving purposes, or in order to shield a paramour. This does not make such admissions technically inadmissible, but it makes them insufficient, unless corroborated, to sustain a conviction. They may be corroborated by proof of cohabitation under circumstances which make cohabitation strong proof of marriage, or by proof of the performance of the marriage ceremony.

(3.) *Confessions of Guilt.*— Of course these, when deliberately and intelligently made, are strong proof; yet even these may be made under a mistake of facts, or for the purpose of getting rid of the subsequent marriage.[1]

But where the admission is not incidental to cohabitation, and there is no proof of marriage *aliunde*, such admission is not enough to prove marriage.[2]

[1] That admissions are admissible in proof of marriage, when not excluded by the *lex fori*, see R. *v.* Simmonsto, 1 C. & K. 164; Trumman's case, 1 East P. C. 470; R. *v.* Newton, 2 M. & Rob. 503; Cayford's case, 7 Greenl. 57; State *v.* Hodgkins, 19 Me. 155; State *v.* Libbey, 44 Me. 469; Com. *v.* Holt, 121 Mass. 61; State *v.* Lash, 1 Harr. (N. J.) 380; Com. *v.* Murtagh, 1 Ashm. 272; Wolverton *v.* State, 16 Oh. 173; Carmichael *v.* State, 12 Oh. St. 553; State *v.* Seals, 16 Ind. 352; Squire *v.* State, 46 Ind. 459; State *v.* Sanders, 30 Iowa, 582; Warner's case, 2 Va. Cas. 95; Oneale *v.* Com. 17 Grat. 582; State *v.* Hilton, 3 Rich. 434; State *v.* Britton, 4 McCord, 256; Cook *v.* State, 11 Ga. 53; Cameron *v.* State, 14 Ala. 546; Langtry *v.* State, 30 Ala. 536; Williams *v.* State, 54 Ala. 131; Robinson *v.* Com. 6 Bush, 309; Com. *v.* Jackson, 11 Bush, 679; Gorman *v.* State, 23 Tex. 646.

[2] Whart. Crim. Ev. §§ 623 *et seq.*; R. *v.* Flaherty, 2 C. & K. 782; Com. *v.* Littlejohn, 15 Mass. 163; State *v.* Roswell, 6 Conn. 446; Gahagan *v.* People, 1 Parker C. R. 378; Dove *v.* State, 3 Heisk. 348; Weinberg *v.* State, 25 Wis. 370. Compare Com. *v.* Jackson, 11 Bush, 679; Williams *v.* State, 54 Ala. 131. Under Massachusetts statute see Com. *v.* Holt, 121 Mass. 61.

In amplification of the text may be considered the following extracts from an article by me in the Criminal Law Magazine for January, 1880:—

"In the proof of marriage presumptions of law have indulged in their wildest revels. There is scarcely a case in which this proof is considered in which we do not find exhibited to us presumptions entangled with presumptions, presumptions fighting presumptions, presumptions destroyed by presumptions, — sometimes to be again resuscitated, and to come out

§ 1701. It is true that we can conceive of cases in which we may refuse to admit that oppressive local regulations can bind persons marrying in the place of such regulations with the intention of fixing their matrimonial domicil in the United States. But while we may thus

Of foreign marriages registry is best evidence.

the conquerors[1] in an inexplicable warfare. Part of this difficulty arises from the persistence with which the illogical distinction between direct and circumstantial proof is applied to marriage. Record proof of marriage, we are told, is 'direct,' and so is the testimony of eye-witnesses; and this is demonstrative: all other proof is circumstantial. But why is not the testimony of eye-witnesses to marriage subject to the same infirmities as is the testimony of eye-witnesses to everything else? Is not the marriage ceremony often performed under circumstances which make false personation peculiarly easy? Can we forget that at least in one celebrated Scotch case the hypothesis of illegitimacy rested on this very assumption? And does it not happen that in numerous cases one of the parties was not capable of contracting matrimony, so that, as a consequence, the ceremony was a nullity? We have first, impotency, and such near relationship as makes a marriage null, of which we have numerous illustrations in both common law and ecclesiastical practice. Next may be noticed cases when by the *lex domicilii*, or the *lex loci contractus*, one of the parties is disabled on the ground of minority or political restriction. Jerome Bonaparte's Baltimore marriage was solemnized by the full rites of the Roman Catholic Church, and was valid by the law of the State of Maryland; but it was held invalid in France, where Jerome was domiciled, and it certainly must have been regarded as invalid in Würtemberg, a daughter of whose king Jerome married when the Baltimore marriage, if valid, was still in force. George IV., when prince of Wales, was privately married to Mrs. Fitzherbert; but this marriage, even if declared, would have been invalid by English law, since by that law the consent of the crown, not given in this case, is necessary to the validity of the marriage of any of the royal family. For the same reason, the Duke of Sussex's marriage, in the city of Rome, to Lady Augusta Murray, was held invalid in England, in the teeth of the testimony of Cardinal Wiseman that the marriage was valid by canon law, and would be held valid in Rome, where it was solemnized. And to these instances, which may be called exceptional, may be added the large body of cases in which a marriage is pronounced invalid because a prior valid marriage is outstanding. Prosecutions for bigamy are very frequent, yet there is scarcely one prosecution for bigamy which does not assume at least one invalid marriage ceremony. We cannot say, therefore, that a marriage ceremony demonstrates a marriage, or that it is a presumption of law that all persons united in a marriage ceremony are lawfully married. All that we can say is, that it is highly probable, as a presumption of fact, that such is the case.

[1] See, as illustrating this, the cases in which the presumption of innocence is held to overcome the presumption of regularity derived from cohabitation, but in which the latter presumption, being reinforced by the timely appearance on the field of the presumption of legitimacy, revives and overcomes the presumption of innocence.

occasionally dispense with these formalities, we must, nevertheless, insist, when a foreign marriage is made the basis of a crim-

"It is in respect to admissions and cohabitation, however, that we have the wildest *mêlée* of presumptions of law. Before we undertake to consider these we must notice that it is now settled by a great preponderance of authority that to prove a marriage, even in prosecutions for bigamy, it is admissible to put in evidence the admission of the defendant.[1] In both civil and criminal cases, also, it is admissible, in order to prove marriage, to introduce evidence of marital cohabitation, which may be regarded as evidence that the parties tacitly admitted themselves to be man and wife. But why is this? Does admitting a marriage demonstrate a marriage? So far from this being the case, we can conceive of multitudes of instances in which a marriage is admitted under a mistake of law, or, in face of a consciousness that there has been no real marriage, merely for purposes of temporary convenience. The circumstances of the case may be such as to deprive such admissions of any weight. An adulterer, eloping with his paramour, may register their names in a hotel as Mr. and Mrs. ——; but this would be no ground for drawing an inference of a marriage, so as to sustain a conviction against him for bigamy, because the inference of marriage drawn from such an entry is overcome by the inference that no person would, with an elopement, with all its dangers, already on his hands, expose himself to an indictment for bigamy. Or the admissions may be made in a country, such as Australia is depicted by Mr. Trollope, in his novel of John Calderwood, where it is usual for men to call their temporary female companions by their own names, and where this is regarded as indicating nothing in the way of an acknowledgment of marriage. Or the admission may be by a Mormon, who has already been married several times, and who, in admitting a marriage, admits something very different from what is considered a marriage among ourselves. Admission and cohabitation as man and wife may constitute abundant evidence of marriage in a country where the marriage tie is respected, where consensual marriages, without any distinctive civil or ecclesiastical rite, are held valid, and where the cohabitation is kept up for a series of years, undisturbed by the assertion of any inconsistent relationship, and fitting in as an acknowledged ingredient of the society in which the parties live. On the other hand, there are cases when we must say that from the cohabitation of parties as man and wife marriage cannot logically be inferred; cases in which the cohabitation, as in the case just put, is that of an adulterer eloping with his paramour from a marriage tie acknowledged on all sides to be still binding; or in which such cohabitation is in a country where it is not regarded as an admission of marriage; or in which, during the cohabitation, one of the

[1] R. v. Simmonsto, 1 C. & K. 164; R. v. Newton, 2 M. & Rob. 503; R. v. Upton, 1 C. & K. 55; Cayford's case, 7 Greenl. (Me.) 57; State v. Hodgkins, 19 Me. 155; State v. Libbey, 44 Me. 469; State v. Lash, 1 Harr. (N. J.) 380; Com. v. Murtagh, 1 Ashm. (Pa.) 272; Wolverton v. State, 16 Ohio, 173; Carmichael v. State, 12 Ohio St. 553; Jackson v. People, 2 Scam. (Ill.) 231; Squire v. State, 46 Ind. 458; State v. Sanders, 30 Iowa, 582; State v. Hilton, 3 Rich. (S. C.) 434; State v. Britton, 4 McCord (S. C.), 256.

inal prosecution in our own land, that such foreign marriage should be proved by showing that in such marriage there was a

parties to it solemnly and publicly, in conformity with the marriage rite in popular use, marries another person. It is the last case that arises most frequently, and of which an instance will be presently given. What are we to infer in such a case? The inference, the answer is, is one of inductive reasoning. It is governed by law, indeed, but by the law of logic, based on social facts; not by the law of technical jurisprudence.

"Not so, however, have our judges always spoken. A case presenting the phase of facts last mentioned arose recently in Maryland.[1] Andrew Jones cohabited with Henrietta Atkins, as his wife, from 1819 to 1832. From this union sprang Henry Jones, the plaintiff, born in 1823. In 1819, Andrew, who, we gather from the report, was a colored person, was married, by what is called 'regular ceremony,' to Anne Smith, who died in 1844. In 1851 he was married, by what is also called 'regular ceremony,' to Frances Moore. He appears, therefore, to have kept up two establishments — one based on cohabitation and admission alone, the other on 'regular ceremony.' Now, what is the conclusion in such a case? It is a conclusion that can in no sense be called a presumption of law. A presumption of law is uniform, and applies equally, as a condition precedent, to all cases. The conclusion before us is one dependent upon special facts, varying with each case as it arises. Did the fact of Jones cohabiting with Henrietta Atkins (or 'Hennie,' as she is called), and calling her Mrs. Jones, amount to an admission from which a consensual marriage could be proved? Were not, at that time, such cohabitations usual among Jones's race, and would it be proper, as against any strong counter-inferences, to infer from them a marriage? As counter-inferences in this particular case, we have two successive 'regular' marriages to other women by Jones while his cohabitation with Henrietta was outstanding. The fact that he solemnized such marriages — the fact that Henrietta did not prosecute him for bigamy — shows that the cohabitation he continued with her could not be regarded as an admission of consensual marriage. The court came to the same conclusion; but their reasoning is embarrassed by the use of the term 'presumption,' and by treating this as a presumption made by law, and not a mere logical inference. A similar objection applies to other rulings, right in result but wrong in reasoning.[2] There is, in such cases, no battle of presumptions, over which presides the court, awarding the palm of victory to whichever of the warring presumptions is *a priori* thought the strongest. We have no right to say: 'It is a presumption of law that cohabitation as man and wife means marriage, and that the marriage is regular; and it is a presumption of law that a man will not do an act that will expose him to the penitentiary; and it is a rule of law that the second of these presumptions is stronger than the other, and that, when they collide, the first is to give way.' What are here called presumptions of law are only inferences, and there is no rule of law that one is to necessarily give

[1] Jones v. Jones, 45 Md. 159; aff. 48 Md. 391; S. C., 20 Alb. L. J. 289.

[2] Senser v. Bower, 1 Penn. Rep. 450; Clayton v. Wardell, 5 Barb. (N. Y.) 214; S. C., 4 N. Y. 230.

bonâ fide matrimonial contract by parties capable of contracting, followed by cohabitation. To establish the contract, the foreign

way to the other. Suppose that in the case before us Andrew Jones had lived for twenty years publicly with Henrietta Atkins as man and wife; suppose that their married relations had been recognized by their family and friends; suppose that at the end of twenty years Jones, in a different neighborhood, where his prior relations were not known, clandestinely married another woman; who would maintain that 'because no man is to be supposed at law to commit a crime,' therefore the prior marriage, inferred from long public cohabitation, is to be set aside, and that the subsequently clandestinely solemnized marriage is to be preferred? The fact is, that when we come to the merits of a case, and when the question of the burden of proof has been finally disposed of, the only operative presumption that exists is that of innocence, which requires each ingredient of proof to be made out beyond reasonable doubt. All other presumptions are presumptions of fact, or, what is the same thing, logical inferences, which are to be determined specially on the concrete case. The law to be applied to them is that of sound inductive reasoning, attaching to each fact the value belonging to it in the particular case, not that of technical scholastic jurisprudence, attaching to such fact an *a priori* arbitrary valuation.

"It may be said that to thus do away with presumptions of law, and to rely in their place on logical inferences, involves a radical change in our jurisprudence, and that it gives us a standard which is elastic and varying in the place of one that is uniform and absolute. To this it may be replied, —

"1. A uniform and absolute standard that is false is far worse than a standard that is true, but, at the same time, elastic and varying. The market price of corn varies with supply and demand, and this price, elastic and fluctuating as it is, constitutes its true value. To fix for corn an unvarying price by statute would be to express for it a false value, and would produce monstrous inconvenience and derangement. So with regard to 'presumptions.' To say that a presumption derived from marriage is absolute and unvarying is to say what is practically untrue. To say that the inference varies with the facts is to say what is true, and enables justice to be fairly administered.

"2. We thus recognize the coördination of reason with fact. Even as to facts which are part of divine revelation, and which are verified by the imprint of divinity, this coördination is established by Hooker in that great treatise which is worthy of the study of the lawyer as well as of the theologian. There is no fact, no matter how high may be its attestation, that must not be verified satisfactorily to reason, interpreted satisfactorily to reason, applied satisfactorily by reason. By reason, in other words, must its existence be proved, its meaning elicited, and its inferences directed. No fact can, consistently with truth, have an arbitrary and unvarying meaning, because there is no fact which does not present itself on each new appearance with peculiar combinations, by which the inferences that are to be drawn from it are distinctively shaped. Uniform, indeed, are the great principles of law. But the way in which they operate upon each case must be determined by reason acting on such case as it occurs."

registry, or a duly certified copy, sustained by proof of the foreign law, is the best evidence,[1] if a registry is required by the foreign law.[2] For this, however, the testimony of witnesses to the fact may be substituted, supposing the registry or copy cannot be obtained.[3] It must, at the same time, be kept in mind that as a consensual marriage is, by the common law of Christendom, valid,[4] proof of such marriage, by admissions and conduct (*e. g.* cohabitation and recognition), is sufficient at common law, when there is no conflicting statute of the *lex loci contractus*, to establish the marriage.

A foreign ecclesiastic is competent to prove the marriage law of his country;[5] but not a layman;[6] nor even a lawyer, unless a practitioner in the country whose law is to be proved.[7]

[1] In State *v.* Dooris, 40 Conn. 145, a document purporting to be a copy of an entry in an Irish registry was rejected for reasons thus stated by Park, J.:—

"We think the document which purports to be a copy of the marriage record of the accused in Ireland was improperly received by the court as evidence tending to prove the facts stated in it. The document is not authenticated in any respect whatsoever. It purports to be a copy of the entry number twenty-six in the Marriage Register Book, in the office of the superintendent registrar of births, deaths, and marriages for the district of Mohill, and is signed by Thomas Woodward in his official capacity as such registrar. But it does not appear in the case that the law of Ireland required the registration of marriages; nor does it appear that Woodward was the superintendent registrar at the time the certificate was given, if there was such record; neither does it appear that his signature is genuine, if he was such an officer. Indeed, nothing appears tending to authenticate the instrument in any way. For aught that appears it may have been a forgery, got up by some designing person for the occasion." Compare Squire *v.* State, 46 Ind. 459.

That a non-expert cannot prove a foreign law see cases cited infra; Wh. on Ev. §§ 305–8.

[2] See Bird *v.* Com. 21 Grat. 800.

[3] R. *v.* Manwaring, Dears. & B. 132; 7 Cox C. C. 192; R. *v.* Cradock, 3 F. & F. 837; R. *v.* Hawes, 2 Cox C. C. 432; 1 Den. C. C. 270; State *v.* Kean, 10 N. H. 347; State *v.* Clark, 54 N. H. 456; Com. *v.* Putnam, 1 Pick. 136; People *v.* Clark, 64 N. Y. 456; Warner *v.* Com. 2 Va. Cas. 95; Wolverton *v.* State, 16 Ohio, 173; Murphy *v.* State, 50 Ga. 150; Arnold *v.* State, 53 Ga. 574; Brown *v.* State, 52 Ala. 338; Whart. Crim. Ev. § 170. As to other witnesses see infra, § 1710.

[4] See Whart. on Cr. Ev. §§ 169, 170.

[5] Sussex Peerage case, 11 Cl. & F. 84; State *v.* Abbey, 29 Vt. 60; Am. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; Bird *v.* Com. 21 Grat. 800. That he may prove the marriage see infra, § 1710.

[6] R. *v.* Povey, Dears. 32; 6 Cox C. C. 83.

[7] Bonelli's case, L. R. 1 P. D. 69; Cartwright *v.* Cartwright, 26 W. R. 684. Infra, § 1710.

§ 1702. As has been already stated, a marriage which is at its solemnization invalid (*e. g.* where at the time of solemnization it was bigamous, or where, by the *lex loci contractus*, the parties were incapable of contracting) may, after the impediments have ceased to exist, be ratified (though not retrospectively) by the parties living together as man and wife, and acknowledging each other as such.[1] But this only attains where the *lex fori* acknowledges consensual marriages as valid. And under no circumstances can mere cohabitation, without acknowledgment, have such validating power.[2]

Prior invalid marriage may be ratified.

2. *Proof of Death or Divorce of First Husband or Wife.*

§ 1703. First must we remember, when we approach this point, that presumptions of fact (or inferences, as we may properly call them, from matters of notoriety) are proofs; and are proofs sufficient, in default of other evidence, to carry a case.[3] Keeping this in mind, the proof of the death of a former husband or wife may be discussed as follows: —

§ 1704. A party who marries within the time limited by the statute does so, so far as this exception is concerned, at his own risk. No inference of death, no matter how strong, will be a defence to him if the other party turns up alive before the period fixed by the statute has arrived.

Death, if occurring within seven years, must be substantively proved.

§ 1705. Even an honest belief in the death of the other party,

[1] See cases cited supra, § 1686; McReynolds *v.* State, 5 Cold. 18.

[2] Williams *v.* State, 44 Ala. 24. Supra, § 1700.

Thompson *v.* Thompson, 114 Mass. 566, was a petition for a decree of nullity of a pretended marriage between the petitioner and the respondent. When the respondent married the petitioner, or went through the form of marriage, he had a wife living who had obtained a divorce from him. After the pretended marriage with the petitioner, he filed his petition for leave to marry again, and some months after it was granted; after which the petitioner continued to live with him, and they cohabited as husband and wife. The respondent contended that the subsequent cohabitation and acknowledgment as husband and wife was a good marriage at common law, and further, that if the ceremony prescribed by our statute is essential to a valid marriage, such ceremony had been performed while the respondent was under a disability, that the disability was afterwards removed, and the ceremony then took effect. The court granted a decree of nullity on the ground that the parties were never legally married.

[3] Whart. Crim. Evid. §§ 7 *et seq.*, 809.

will not, as we have seen, avail as a defence.[1] Hence on an indictment for bigamy, the death of the husband, if claimed to have occurred within seven years from his absence, must be proved as any other fact, aside from the legal presumptions created by the exception to the statute. If the husband died before the second marriage, this is a defence, though the wife did not know of his death. If he did not die before the second marriage (the seven years not having run), then the case is bigamy, though the wife believed him dead. "Men readily

Honest belief no defence.

[1] R. *v.* Gibbons, 12 Cox C. C. 237; Com. *v.* Mash, 7 Met. 472.

The question is discussed at large supra, § 88, where numerous authorities bearing on it are examined. See *contra*, Squire *v.* State, 46 Ind. 459.

The English Commissioners of 1879 thus speak: —

"The existing statute as to bigamy is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the *bonâ fide* and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of. We have thought it important that the law should be certain, and have accordingly framed the clause so as to leave no doubt what the law would be. In doing so, we have adopted the construction which has been more generally put on the existing statute. No doubt the conviction of a man marrying again within the seven years under the honest belief that his wife was dead may be regarded as a hard case; but the hardship may at present be mitigated by the infliction of a nominal punishment, and will be capable of still further mitigation if section 13 of the Draft Code becomes law. On the other hand, care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril.

"Among the suggestions furnished to us was one that clause 216 might subject a Hindoo coming to England to a prosecution for having a plurality of wives in his own country. So far as this point is concerned, the clause is taken from the Act of 1861, which reënacted in terms the Act of 1828. We have merely altered the wording so as to make it harmonize with the other sections of the Draft Code by changing 'elsewhere than in England or Ireland' into 'any part of the world.' During the half century which has elapsed since the first of these statutes were passed, no attempt has ever been made to apply them to such a case as the one suggested, — for the reason, we presume, that 'marriage' in these statutes means the union for life of one man with one woman to the exclusion of all others, as is well expressed by Lord Penzance in Hyde *v.* Hyde, 35 Law J. Prob. 57. Whatever may be the ceremony by which a polygamist adopts a woman as one of his wives, the relation which it creates is essentially different from that which our criminal legislation contemplates by the word 'marriage.'" Draft Commission, p. 25. See Sir J. Stephen in Nineteenth Century, Jan. 1880.

believe what they wish to be true," is a maxim of the old jurists. To sustain a second marriage, and to vacate a first, because one of the parties believed the other to be dead, would make the existence of the marital relation determinable, not by certain extrinsic facts, easily capable of forensic ascertainment and proof, but by the subjective condition of individuals. To avoid this, the statutes have made the dissolution of marriage, whether by death or divorce, dependent, not upon the personal belief of parties, but upon certain objective facts easily capable of accurate judicial cognizance. Only on proof of such facts can marriage be treated as so dissolved as to permit of second marriages.[1]

Presumption of continuance of life depends upon circumstances.

§ 1706. The indictment must aver, and the prosecution must prove, that the first husband was alive at the time of the second marriage. Of course, when there is proof that he was alive at such period, the question is one simply of identity. But if the prosecution traces his life down to a specific period (within seven years) before the second marriage, and there rests, questions of conflicting presumptions of fact may arise, as to which, the jury, under the advice of the court, are to decide. That a man who was alive and well yesterday is alive to-day is a presumption of fact we may unhesitatingly adopt, and which can only be overcome, as a process of inferential reasoning, by positive evidence of intermediate death. That a man who was alive and well last year is alive to-day is a presumption of fact more attenuated, it is true, but at the same time enough to justify a jury in finding a verdict of continued life. How peculiarly this is a presumption of fact is illustrated by the circumstance, that if the party in question was alive a year ago, but is declared by competent expert testimony to be at that time laboring under a mortal disease in which immediate death was probable, the burden, as a matter of ordinary reasoning, shifts on those maintaining continuance of life. The inference, however, it must be again stated, is one of fact, to be adjusted by the jury, under advice of the

[1] As to inadequacy of "honest belief" in parallel cases see Thompson v. Thompson, 114 Mass. 566; State v. Whitcomb, supra, § 1695 *a*; and see particularly supra, §§ 87–8. What has been said does not apply to the *particeps criminis* who marries the bigamous person. As to such *particeps criminis* the *scienter* must be proved. Arnold v. State, 53 Ga. 574. Supra, § 1688.

court.[1] The only presumption of death that the law (independently of the seven years of absence of the bigamy statutes) regards as binding in law (*presumtio juris*), as distinguished from inferences of fact, is, that after seventy years from birth an absent person is dead.[2] Within this period, the presumption that a particular person is dead, made from the length of his absence, is a mere inference of fact, to be drawn generally from all the evidence of the particular case. In civil issues, the courts will adopt the analogy of the bigamy statutes, and will advise the jury that when a person has not been heard of for more than seven years, this throws upon the opposite side the burden of proving that such person is still alive, and in default of such proof he may be inferred to be dead.[3] In bigamy prosecutions this is exacted by the exceptions of the statutes. Of course, when the disappearance in a bigamy prosecution falls within the seven years, there is technical evidence on which a conviction may be had. But it must be remembered that this evidence, in proportion as the period of unexplained absence increases, is susceptible of being overcome by countervailing proof. Of such countervailing proof the presumption of the defendant's innocence is an available item. Hence we can suppose cases of unexplained absence of less than seven years, in which the inference of continued life has become so faint (by sickness or otherwise) as to be cancelled by the presumption of innocence.[4]

[1] R. *v.* Lumley, L. R. 1 C. C. 196. See Squire *v.* State, 46 Ind. 459, where the court announces, as a matter of law, that the presumption of continuance of the wife's life, who was last heard of two years before the defendant's second marriage, is "neutralized" by the presumption of innocence. But, as is seen in the text, this, as a matter of law, cannot be sustained. At the most, the presumption of continuance is one purely of fact. Whart. Crim. Ev. § 810.

[2] See Rivier, in Holzendorff's Encycl. ii. 262; Tenge, Vermuthung des Todes, Civ. Archiv. xlv.

[3] Webster *v.* Birchmore, 13 Ves. 362; Lloyd *v.* Deakin, 4 B. & Al. 433; Nepean *v.* Knight, 2 M. & W. 894; Bailey *v.* Hammond, 7 Ves. 590; In re Phene, L. R. 5 Ch. App. 139; Com. *v.* Harman, 4 Barr, 269.

[4] Best on Evidence (1870), § 409. See R. *v.* Twyning, 2 B. & A. 386; R. *v.* Harborne, 2 Ad. & El. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party.* There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within

§ 1707. But the seven years having expired, the period being calculated from the time when the party, whose death is presumed, separated from the other, how is the party who marries a second time to avail himself of the exceptions of the statute? Here one or two subordinate questions emerge.

§ 1708. The burden after the seven years, of proving knowledge that the absent party was still alive at the time of the second marriage, is on the prosecution. In other words, suppose, after her husband's seven years' absence, a wife marries again, and is prosecuted for bigamy; what is to be the course of trial? Can the prosecution rest, after proving that the husband was alive at the time of the second marriage? This would be bad law, as

After seven years, burden is on prosecution to prove knowledge by defendant.

a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in R. *v.* Twyning, against proof that the defendant had been heard of alive one year previous to the marriage. To the same effect is Lapsley *v.* Grierson, 1 H. L. Cas. 498. And see, as to such presumptions generally, Whart. Crim. Ev. §§ 810 *et seq.*

That nature is uniform in her operations is also assumed by us, and on this assumption business depends. The probability of the inference to be drawn from such uniformity rests, as we have already seen, upon the number of exceptions to which a general rule is, in actual operation, shown to be subject. We know of no instance in history in which day has not succeeded night; and therefore we infer, as a matter of certainty, that night will be succeeded by morning. The proportion of fair days to cloudy days in June is about three to one, and therefore we infer that it is three to one that some one designated day next June will be fair. On the other hand, taking a series of years in mass, we find that in these years there is an average rain-fall to a specific amount; and we infer that in each successive year there will be approximately the same average. It is on this reasoning that the courts admit in evidence tabulated statements of human life, based upon accepted scientific calculations, such as the Carlisle Tables. Whart. on Ev. § 667; Whart. Crim. Ev. §§ 539, 824. These tables are not admissible for the purpose of showing that a particular person will die on a particular day, any more than a tabulated statement of rain-fall in preceding years will be admissible to enable us to determine whether it will rain to-morrow. But such statements are admissible, when duly verified, to show what are the gradual processes by which generation succeeds generation, and what, viewing mankind in the abstract, is the value of individual lives at specific periods.

it would throw on the defendant the task of proving a negative, namely, "that she did not know" her husband to be alive at the time of her second marriage. Hence, in such a case, the burden is on the prosecution to put in evidence facts which would justify the inference that the defendant *did* know of her husband's continued life; and in default of such proof, there must be an acquittal.[1] Other matters material to the defence, when set up in confession or avoidance, the burden is on the defendant to prove.[2] The question of notice, in such cases, is for the jury.[3] But it is not enough to impute notice, that if the party had used great diligence, knowledge of the continued life of the absent party would have been obtained.[4]

3. *Witnesses.*

When first marriage is proved second wife is a witness.

§ 1709. When the first marriage is proved to the satisfaction of the court, the second husband (or wife, as the case may be) is an admissible witness either for or against the defendant.[5] The first wife (or husband), however, is clearly inadmissible for the prosecution.[6] And it has been ruled in Canada that she is inadmissible for the defence to prove that her marriage was invalid.[7] This, however, is founded on a *petitio principii*. The question is whether the first marriage

[1] R. *v.* Dane, 1 F. & F. 323; R. *v.* Briggs, 7 Cox C. C. 195; Dears. & B. 98; R. *v.* Jones, C. & M. 614; R. *v.* Curgerwen, L. R. 1 C. C. 1; 10 Cox C. C. 152. See R. *v.* Heaton, 3 F. & F. 819; Barber *v.* State, S. C. Md. 1879.

In Briggs's case the woman was tried for bigamy, and the evidence was that her first husband had been absent from her for more than seven years. The jury found that they had no evidence that at the time of the second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held upon this finding that the conviction could not be supported.

[2] Fleming *v.* People, 3 Parker C. R. 352; 27 N. Y. 329. See Noble *v.* State, 22 Oh. St. 541.

[3] R. *v.* Cross, 1 F. & F. 510; R. *v.* Dane, 1 F. & F. 323; R. *v.* Ellis, 1 F. & F. 309; R. *v.* Jones, 21 L. T. (N. S.) 396. See Noble *v.* State, 22 Oh. St. 541.

[4] R. *v.* Briggs, *ut supra;* Whart. Crim. Ev. § 811.

[5] Whart. Cr. Ev. § 397; 1 Hale, 693; 1 Hawk. c. 42, s. 8; R. *v.* Jones, C. & M. 614; State *v.* Patterson, 2 Ired. 346; Finney *v.* State, 3 Head, 544; State *v.* Johnson, 12 Minn. 476; R. *v.* Madden, 14 Up. Can. (Q. B.) 588.

[6] Peat's case, 2 Lew. C. C. 111, 288; Williams *v.* State, 44 Ala. 24; R. *v.* Bienvenu, 15 Lower Can. J. 181.

[7] R. *v.* Madden, 14 Up. Can. (Q. B.) 588; R. *v.* Tubbee, 1 Up. Can. (P. R.) 103.

is valid. If so, she is not a witness, but she is a witness if such marriage is invalid. For the court to refuse to admit her, when called by the defence to disprove the marriage, is to prejudge the question in issue. That she cannot be called to sustain the marriage is clear, for she is excluded by the very hypothesis she is called to support. If she claims to be the first wife, on her own showing she is inadmissible. If she denies that she was married to the defendant, then she should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.[1] Otherwise material testimony might be excluded on a hypothesis not only artificial but false.

§ 1710. As has been already seen, the testimony of a witness present at the marriage is admissible and adequate proof, unless the law requires official evidence.[2] When the marriage is extra-territorial, the officiating clergyman, according to American cases, may not only prove the marriage, but the foreign law under which it was solemnized.[3] But unless a witness be an expert, he cannot prove the foreign law.[4] In domestic marriages, the fact that a justice of the peace or clergyman performed the ceremony is proof that he professed and was generally understood to have the authority to do so.[5]

Other witnesses admissible to prove marriage.

XI. INDICTMENT.[6]

§ 1711. The indictment must show by facts or averment that the second marriage was unlawful. Even an indictment for polygamy under the statute of Vermont, which alleges that both marriages were had in another State, and that the respondent has unlawfully continued with

Second marriage must be averred to be unlawful.

[1] Peat's case, 2 Lew. C. C. 111, 288; R. v. Wakefield, Ibid. 279; which cases, however, only intimate such a course, without positively sanctioning it. See Whart. Crim. Ev. § 397.

[2] Supra, § 1701.

[3] State v. Abbey, 29 Vt. 60; Bird v. Com. 21 Grat. 800; State v. Goodrich, 14 W. Va. 851.

[4] R. v. Povey, 6 Cox C. C. 83; S. P., R. v. Smith, 14 Up. Can. (Q. B.) 565; and cases cited supra, § 1701. See Wh. Confl. of L. § 775, and Sussex Peerage case, there cited. And see fully Whart. on Ev. § 800.

[5] State v. Abbey, 29 Vt. 60; Bird v. Com. 21 Grat. 800; Whart. Cr. Ev. §§ 164, 833. Supra, §§ 1570, 1617.

[6] For forms of indictment see Wh. Prec. 985 *et seq.*

(992.) Bigamy. Where the first marriage took place in another county of Ohio.

(993.) Bigamy in North Carolina.

(994.) Polygamy under Rev. Stat. Vermont, where both marriages were in other States than that in which the offence is indicted.

his second wife in Vermont, must allege the second marriage was unlawful in the State where it was contracted.[1] Yet where the unlawfulness consists in the want of some international requisite, of which the trial court would take notice, unlawfulness in the place of marriage need not, it is submitted, be averred.

In Massachusetts, under the statute for continuing to cohabit in that State with a second wife, the defendant having a former wife living, it is a sufficient statement of the time when the offence was committed to allege that the second marriage was on a certain day, and that the defendant "afterwards did cohabit and continue to cohabit with said S. J., at L., in said county, for a long space of time, to wit, for the space of six months."[2]

Where an indictment, under the Massachusetts statute, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she, the said A., being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A.;" and it was proved that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B.; it was ruled that there was a variance between the allegations and the proof.[3]

It is sufficient to aver that the first wife was alive at the time of the second marriage, without alleging that the first marriage still subsists.[4]

(995.) Adultery in Massachusetts, under Rev. Stats. 130, § 1, against both parties jointly.

(996.) Adultery by married men with married women, in Massachusetts.

(997.) Adultery in Pennsylvania, against the man.

(998.) Same against the woman.

(999.) Living in a state of adultery, under Ohio statute. A married woman deserting her husband, &c.

(1000.) Against an uncle and niece for an incestuous marriage, as a joint offence, in Virginia.

(1001.) Adultery in North Carolina, against both parties jointly.

(1002.) Fornication and bastardy in South Carolina against the man.

(1003.) Same in Pennsylvania.

(1004.) Same against the woman.

[1] State *v.* Palmer, 18 Vt. 570; but see *contra*, State *v.* Johnson, 12 Minn. 476.

[2] Com. *v.* Bradley, 2 Cush. 553.

[3] Com. *v.* Richardson, 126 Mass. 34.

[4] Murray *v.* R. 7 Q. B. 700; State *v.* Norman, 2 Dev. 222.

Variances as to second marriage are fatal.

§ 1712. A variance in setting out the second wife's name is fatal; and so is a variance in any material averment as to the second marriage.[1]

Exceptions in statute need not be negatived.

§ 1713. The exceptions in the statute, when not part of the description of the offence, need not be negatived,[2] nor is it necessary to allege that the defendant knew at the time of his second marriage that his former wife was then living, or that she was not beyond seas, or to deny her continuous absence for seven years prior to the second marriage.[3]

First marriage must be averred.

§ 1714. It has been held that the time of the first marriage need not be specially averred,[4] and that it is enough if a prior existing marriage be stated. But if an averment be attempted, and the date be left blank, this is fatal.[5]

Unless the place of marriage is other than that of the place of arrest,[6] it is not necessary to aver the place of the first marriage.[7]

In Indiana it is said to be unnecessary to set out the maiden name of the first wife,[8] and the argument in this, as well as in the cases cited in Kentucky and North Carolina, goes to the effect that it is enough to aver that the defendant, at the time of the second marriage, had a first wife to whom he had been lawfully married. There are precedents for both modes of stating

[1] R. *v.* Deeley, 4 C. & P. 579; 1 Mood. C. C. 303. But this is amendable under 14 & 15 Victoria.

[2] Murray *v.* R. 7 Q. B. 700; State *v.* Abbey, 29 Vt. 60; Stanglein *v.* State, 17 Oh. St. 453; State *v.* Williams, 20 Iowa, 98; State *v.* Johnson, 12 Minn. 476; State *v.* Loftin, 2 Dev. & Bat. 31. It is otherwise where the exception describes the offence in the enacting clause. Whart. Cr. Pl. & Pr. § 238; Fleming *v.* People, 27 N. Y. 329.

[3] Barber *v.* State, S. C. Md. 1879, citing Bode *v.* State, 7 Gill, 326.

[4] State *v.* Bray, 13 Iredell, 289; Hutchins *v.* State, 28 Ind. 34; *contra*, State *v.* La Bore, 26 Vt. 765; Davis *v.* Com. 13 Bush, 318, overruling Com. *v.* Whaley, 6 Bush, 266. In New York see Sauser *v.* People, 15 N. Y. Sup. Ct. 302. Unless bigamy is made a continuous offence, the statute of limitations begins to run at the date of the bigamous marriage. Scroggins *v.* State, 32 Ark. 205; Gise *v.* Com. 81 Penn. St. 428. Supra, § 1685.

[5] State *v.* La Bore, 26 Vt. 765.

[6] That in this case there must be special averment of the place of marriage and the place of arrest see R. *v.* Whiley, 2 Mood. C. C. 186; State *v.* La Bore, 26 Vt. 765; Davis *v.* Com. 13 Bush, 318; Sauser *v.* People, 15 N. Y. Sup. Ct. 302.

[7] State *v.* Bray, *ut supra*; Hutchins *v.* State, *ut supra*.

[8] Hutchins *v.* State, 28 Ind. 34. See also Com. *v.* Whaley, 6 Bush, 266.

the first marriage;[1] but if we lean on the analogy of indictments for receiving stolen goods, we should hold that the more general statement is enough. If we are forced to state in detail the marital relations of the parties, it would be necessary to go still further and aver that the first wife or husband of the defendant was capable of consenting to marriage, and was not bound by other matrimonial ties. As, however, the first marriage in all its relations is simply matter of inducement, it is enough to state it in general terms, without specifying the details. If these are needed for justice, they can be supplied by a bill of particulars.[2] Where, however, the details of the first marriage are given, a variance in the name is fatal.[3]

XII. RELIGIOUS PRIVILEGE NO DEFENCE.

§ 1715. It is no defence that polygamy is a religious privilege, sanctioned by local usage.[4]

[1] Whart. Prec. 985–999.

[2] *Contra*, State *v.* La Bore, supra.

[3] R. *v.* Gooding, C. & M. 297.

[4] U. S. *v.* Reynolds, 1 Utah T. 226; aff. S. C. U. S. 98 U. S. 145. See supra, §§ 84–8, and Bankus *v.* State, 4 Ind. 114; State *v.* Pearce, 2 Blackf. 318; State *v.* Fore, 1 Ired. 378. As to conscientious convictions as a defence see supra, §§ 88, 336.

CHAPTER XXXI.

ADULTERY.

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I. DEFINITION.

§ 1717. ADULTERY is not cognizable penally by the English common law, its punishment being reserved in England to the ecclesiastical courts. As, however, in those portions of the United States which accept the English common law, the ecclesiastical law is considered, so far as concerns the definition of the offence, to be in force, we must begin by inquiring what the ecclesiastical law in this respect prescribes. And this inquiry is doubly pertinent, because not only does this portion of the English ecclesiastical law form part of our own common law, but the component elements of the ecclesiastical law — the Roman and the canon law — form

Ecclesiastical law in this respect part of American common law.

the old common law of marriage in those parts of the United States which were originally territories of France and Spain.[1]

§ 1718. Adultery, by the Roman law was confined to illicit sexual intercourse with a married woman, the woman and her paramour being principals in the offence. A married man, who had illicit intercourse with an unmarried woman, was not guilty of this specific crime. Two reasons were assigned for this limitation: *first*, the exclusive rights of the husband, as head of the family, were thus distinctively asserted; *secondly*, the line of descent from father to child was thus signally guarded. The old law authorized the husband to kill the adulterer caught in the act, and to punish at his discretion, as head of the family, the wife. But the growing license of the empire required more definite legislation; and this was supplied by the *Lex Julia de adulteris*. By this famous statute the adulteress and her paramour were, on conviction, to be transported to separate islands, so as to be permanently separated: "Dummodo in diversas insulas relegantur." The adulteress was fined half of her Dos, and one third of her remaining estate; the paramour one half of his entire estate.[2] And the husband was obliged, on discovery, to prosecute, on pain of being convicted as an accomplice.[3] By an edict of Constantine, an adulteress was to be confined for life in a convent, and the adulterer (*i. e.* the man married or unmarried who had sexual intercourse with a married woman) was amenable to capital punishment. "Sacrilegos nuptiarum gladio puniri jubemus."[4] For such adultery was an invasion of a fundamental sanction of the Roman law, the absolute supremacy of the husband and father in his own home. It was a species of high treason, and was to be punished as such.

By Roman law, adultery is illicit intercourse with married woman.

§ 1719. But Christianity, speaking through the canon law, materially modified this feature of Roman jurisprudence. On the one side, the autocratic power of the *paterfamilias* was greatly reduced; on the other side, the sanctity of the marriage vow was greatly enhanced.

By ecclesiastical law it is a sexual violation of the marriage relation.

[1] See Wh. Confl. of L. §§ 171–3. Supra, § 20.

[2] "Adulteris vero viris dimidiam bonorum partem auferri." Paull. Rec. sent. ii. 26. 14.

[3] L. 2. § 2. D. h. t.—Nov. 134, cap. 9.

[4] L. 10. Cod. ad leg. Jul. § 1.

Marriage, as a solemn tie, binding as long as life lasts, was regarded as the true *principium urbis, et quasi seminarium reipublicae.* Hence the offence was committed by a sexual violation of the marriage vow, be the offender male or female. The married man having sexual intercourse with a woman other than his wife was as guilty of adultery as a married woman having sexual intercourse with another than her husband. "*Christiana religio adulteriam in utroque sexu pari ratione condemnat.*"[1] Adultery, according to the definition thus established, is sexual connection between a man and a woman, one of whom is lawfully married to a third person; and the offence is the same whether the married person in the adulterous connection is a man or a woman. The Roman law being in this respect superseded, this definition was accepted by every Christian State at the time of the colonization of America; and is no doubt part of the common law brought with them by the colonists of all Christian nationalities. That it corresponds with a sound judicial philosophy is illustrated by the fact that it is incorporated in the codes of the principal continental European States.[2]

§ 1720. Such was the common law brought with them by the American colonists; but while some of the States, as they established their independent jurisprudences, held that the offence was cognizable at common law by the criminal courts;[3] others, adhering to colonial precedents, were inclined to retain the procedure in tribunals distinctively ecclesiastical.[4] In those States, however, which hold the offence is not cognizable by the common law courts, the subject has been generally covered by legislation. And as in many cases this legislation consists simply in making "adultery" penal, the question has constantly arisen, What is adultery? Unfortunately, in seeking for the international common law on this point, the courts have gone back sometimes to the old Roman law, sometimes to the Jewish, both of which were superseded by the canon law, which, as we have seen, at the time of

In the United States definition varies with local statutes.

[1] Causs. 32. qu. 5. can. 23.

[2] See Berner, Lehrbuch, 473.

[3] *N. Hampshire:* State *v.* Wallace, 9 N. H. 515; *Connecticut:* State *v.* Avery, 7 Conn. 267; *N. Carolina:* State *v.* Cox, N. C. T. R. 165.

[4] *Vermont:* State *v.* Cooper, 16 Vt. 551; *S. Carolina:* State *v.* Brunson, 2 Bailey, 149; *Virginia:* Anderson *v.* Com. 5 Rand. 627; Com. *v.* Isaacs, 5 Rand. 634.

the colonization of America, was in this respect the common law of Christendom. But whatever may have been the sources of authority, we find, in the United States, the following definitions propounded: *First*, that which has just been stated, that *adultery consists in the sexual connection between a man and a woman, of whom one is lawfully married to a third person.* In such case both participants are guilty of adultery.[1]

Second, that it consists in sexual connection by a married person with one who is not such married person's husband or wife.[2]

Third, that it consists in sexual intercourse with a married woman by one not her husband, in which case both the married woman and her paramour are guilty; this being the view of the Roman law.[3]

The reasoning resorted to in this line of cases is that of the old Roman jurists, that the offence is in part the interference with the husband's and father's autocracy, and in part the pollution of the channel of descent.[4]

When statute makes "adultery" alone indictable, it includes both sexes.

§ 1721. Where there is a positive local statute defining adultery, of course such statutory definition must be accepted. But when "adultery" simply is made indictable, then it must be remembered that, as just stated, the term is to be taken in the sense accepted at the time of the settlement of America, and for many centuries internationally received, namely: sexual connection by a man and a woman one of whom is lawfully married to a third

[1] Weatherby *v.* State, 43 Me. 258; State *v.* Hinton, 6 Ala. 864; State *v.* Wilson, 22 Iowa, 364; though see State *v.* Hutchinson, 36 Me. 261.

[2] Com. *v.* Lafferty, 6 Grat. 672; Cook *v.* State, 11 Ga. 53; Miner *v.* State, 58 Ill. 59. Such is the rule in Pennsylvania both at common law and by statute. Helfrich *v.* Com. 33 Penn. St. 68; Rev. Act, Bill I. §§ 36, 38. This was the old colonial rule as stated in Resp. *v.* Roberts, 2 Dall. 124; Com. *v.* Kilwell, 1 Crumrine, 255; Com. *v.* Wentz, 1 Ashm. 269; and see Hunter *v.* U. S. 1 Pinn. (Wis.) 91. Of the offence thus restricted, an unmarried person cannot be guilty, either as principal or accessary. Smith *v.* Com. 54 Penn. St. 209.

[3] State *v.* Wallace, 9 N. H. 515; State *v.* Armstrong, 4 Minn. 335; State *v.* Lash, 1 Harr. 380; State *v.* Pearce, 2 Blackf. 318. In Massachusetts this is specially directed by statute. Gen. Stat. c. 165, § 3. Com. *v.* Elwell, 2 Met. 190; Com. *v.* Reardon, 6 Cush. 78. But in this State, a married man is also guilty of adultery in having connection with an unmarried woman.

[4] See remarks of Galbraith, J., 4 Am. Law Reg. 209; and of Lewis, C. J., Lewis C. L. 41.

person. And this definition alone meets the full evil, which is the contempt cast on the marriage state, and the misery and demoralization produced in families by marital disloyalty of either father or mother. Nor is it easy to see how this definition can be escaped except by positive legislative exclusion. If an adulteress is a principal in her own adultery, her paramour is a principal in the second degree. Of course when, as in Pennsylvania, the offence is limited by statute to married persons, this reasoning fails. But otherwise we must hold, on both reason and authority, that both parties to an adulterous connection are indictable as principals.

§ 1721 *a*. The offence of "living in adultery" is constituted by living together adulterously for a single day.[1] But a single act does not make out the offence.[2] There must be living for some appreciable time in an adulterous connection.

"Living in adultery" implies continuous living.

II. DEFENCES.

§ 1722. As in bigamy, and with the same limitations,[3] it is a defence that the party whose alleged marriage gives the offence its distinct type was duly divorced from the alleged marriage. Whether such divorce dissolves the prior marriage tie it is for the *lex fori* to decide.[4] And a mere honest belief in a divorce is no defence.[5]

Divorce is a defence.

§ 1723. Here let it be remembered, that the statutes making exceptions in cases of bigamy are not, as a rule, applicable in letter to adultery. They are, however, ap-

But not desertion.

[1] Hall *v.* State, 53 Ala. 463. See State *v.* Way, 5 Neb. 283. Parks *v.* State, 4 Tex. Ap. 134.

[2] State *v.* Crowner, 56 Mo. 147; People *v.* Gates, 46 Cal. 53; Richardson *v.* State, 37 Tex. 346. Infra, § 1747.

[3] Supra, § 1695.

[4] State *v.* Weatherby, 43 Me. 258. Where a husband obtained a divorce for utter and wilful desertion by the wife, for five years consecutively, without his consent, and the wife afterwards went into another State, and was there married to another man, with whom she returned to Massachusetts, and there lived and cohabited, it was held, in that State, that if the wife was guilty of any offence under the Mass. Rev. Stat. c. 1, § 130, she was indictable under the second section, for unlawful cohabitation, and not under the fourth section, for lewd and lascivious behavior. Com. *v.* Hunt, 4 Cush. 49. That divorce of non-residents is invalid see Hood *v.* Hood, 56 Ind. 263.

[5] Infra, § 1726.

plicable in principle; though seven years' absence is only a defence when there are grounds to reasonably infer death.[1]

Nor want of consent in participant.

§ 1724. In other joint offences, it is necessary to prove the concurrence of participants. This, however, is not necessarily the case in adultery, of which a person may be guilty who commits the offence by force;[2] though if the case prove rape there may be a merger.[3] But force is a defence when set up by a party ravished, if charged with adultery.

Nor local or foreign custom.

§ 1725. Local customs form no defence.[4] Nor can domiciled subjects of a foreign power set up the laws of their domicil as a justification for adultery committed on our soil.[5]

Nor "honest belief" or "ignorance."

§ 1726. It has been seen that an "honest belief" that an illicit act is lawful is, in general, no defence to an indictment for such act.[6] In prosecutions for adultery, it is peculiarly important to keep this principle in mind, since it is on the plea of alleged "honest disbelief" in the existence of the marriage vow that the various systems of free love are defended; and if such plea were allowed, these systems would be established by law. Hence ignorance on the part of the man that the woman was married has been considered to be no defence to an indictment of adultery against him;[7] and it is held no defence that he believed the woman's husband to be dead,[8] or divorced.[9] That ignorance that the other party was married is no defence to one knowingly having illicit connection with such party, we may infer from the rule, heretofore stated, that a party undertaking to do an unlawful act is liable, when he executes this act deliberately, for any probable incidents of such act.[10] But this does not apply to cases where the intent was lawful, as where a married woman has intercourse with a

[1] Com. *v.* Thompson, 6 Allen, 591; S. C., 11 Allen, 23.

[2] State *v.* Sanders, 30 Iowa, 582.

[3] See Wh. Cr. Pl. & Pr. § 464; Com. *v.* Parr, 5 W. & S. 345; State *v.* Lewis, 48 Iowa, 578. Infra, § 1764. But see supra, § 1344.

[4] Bankus *v.* State, 4 Ind. 114. Charge of Drummond, J., as to Mormon laws, cited 6th ed. of this work, § 2656. See also supra, § 88.

[5] Wh. Confl. of L. §§ 133–65.

[6] Supra, §§ 84, 88, 1704.

[7] Com. *v.* Elwell, 2 Met. 190.

[8] Com. *v.* Thompson, 6 Allen, 591; 11 Allen. 23. Supra, § 88.

[9] Supra, § 1695 *a*.

[10] Supra, §§ 88, 120.

stranger, believing him to be her husband, which act has not the evil intent necessary to adultery.

§ 1727. Hence, also, morganatic, left handed, or "sealing" marriages are no defence, if they are invalid by the *lex delicti commissi*, however binding the parties may believe them to be.[1]

Nor illusory marriage of defendant.

III. INDICTMENT.

§ 1728. The allegation of marriage is essential, and has been already discussed.[2] It is sufficient, in several jurisdictions, to aver a lawful marriage on the part of the married defendant;[3] but in any view the adulterer must be averred to be married to a person other than the paramour.[4]

Allegation of marriage is essential.

Berner, *ut supra;* Reynolds *v.* U. S. 98 U. S. 145; State *v.* Fore, 1 Ired. 378; State *v.* Pearce, 2 Blackf. 318.

[2] Supra, § 1714.

[3] See Com. *v.* Moore, 6 Met. 243; Com. *v.* Thompson, 2 Cush. 551, where the first wife was alleged to be unknown. Wh. Prec. 995. In Com. *v.* Corson, 2 Parsons, 475, it was said that the name of the husband of the woman with whom the defendant committed adultery must be set forth; but the better opinion is to the contrary. Supra, § 1714. To this effect may be construed the ruling in Helfrich *v.* Com. 33 Penn. St. 68.

[4] Com. *v.* Moore, 6 Met. 243. The following are the cases in detail: In Maine, an indictment found October, 1852, charging that the defendant "at Avon, on the 25th March, 1851, did commit the crime of adultery with one E. W., the wife of one S. H. W., she, the said E. W., being a married woman, and the lawful wife of said S. H. W.," was held insufficient. State *v.* Thurstin, 35 Me. 205. The ground taken was the want of an averment of time to the fact of E. W. being married. Subsequently, however, an indictment was sustained in the same State which averred that the defendant, "being then and there a married man, and having a lawful wife alive, did commit the crime of adultery with L. H., the wife of one M. H., by having carnal knowledge of the body of her, the said L. H." State *v.* Hutchinson, 36 Me. 261. An indictment which alleges that P. M., on a certain day, and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of the said S., she, the said M. S., then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show with certainty that M. S. was not the wife of P. M. Com. *v.* Moore, 6 Met. 243. Where, however, there was a distinct averment that the defendant, R., committed adultery with C. A. S., "then the lawful wife of P. J. S.," this was held enough. Com. *v.* Reardon, 6 Cush. 78. The indictment may charge the offence to be "with a certain woman whose name is to said jurors unknown," the defendant being then and there a married man, and then and there having a lawful wife alive, other than said woman whose name to said jurors is unknown as aforesaid. Com. *v.* Tompson, 2 Cush.

"Commit adultery" a sufficient description.

§ 1729. The allegation of sexual intercourse has been held to be laid sufficiently by the words "did commit adultery." [1]

Defendants may be joined.

§ 1730. The weight of authority is that the two participants in adultery may be joined in the indictment,[2] or may be tried singly. And one may be convicted and punished without any conviction of the other.[3]

Scienter unnecessary.

§ 1731. It is not necessary to aver a knowledge by either party that the other was married.[4]

IV. EVIDENCE.

Marriage must be proved as in bigamy.

§ 1732. The evidence of marriage in case of adultery is the same as in bigamy, and, in this respect, has already been discussed.[5]

Adultery to be inferentially proved.

§ 1733. There has been some difference of opinion as to the extent to which evidence of improper familiarity, other than that charged in the indictment, is admissible. On the one hand, it is clear that in all cases, whether civil

551. Where the indictment is against a married man, for adultery, it has been held sufficient to state that the defendant having a wife, M. A. H., in full life, did commit adultery with one M. M., without otherwise alleging carnal knowledge, and without averring that M. M. was not his wife. Helfrich *v.* Com. 33 Penn. St. 68. If one of the persons charged with the offence of adultery is known by the name charged in the indictment, the other is not entitled to an acquittal by showing that it is not the true name. State *v.* Glaze, 3 Ala. 283. See other cases of indictment, State *v.* Bridgman, 49 Vt. 202; State *v.* Tally, 74 N. C. 322.

[1] Helfrich *v.* Com. 33 Penn. St. 68; State *v.* Hinton, 6 Ala. 864; Maull *v.* State, 37 Ala. 160. And compare State *v.* Thurstin, 35 Me. 205; State *v.* Bridgman, 49 Vt. 202; State *v.* Tally, 74 N. C. 322; but see infra, § 1753.

[2] State *v.* Bartlett, 53 Me. 446; Com. *v.* Elwell, 2 Met. 190; Com *v.* Thompson, 99 Mass. 444; Maull *v.* State, 37 Ala. 160; Spencer *v.* State, 31 Tex. 64. In Delany *v.* People, 10 Mich. 241, it was ruled, that as the offence of lascivious cohabitation must be necessarily joint, so the two defendants must necessarily be joined in the indictment. But although this may be so under the Michigan statute, it does not hold at common law.

[3] State *v.* Parham, 5 Jones (N. C.), 416. Supra, § 1721.

[4] Com. *v.* Elwell, 2 Met. 190; Wh. Cr. Pl. & Pr. § 164. Infra, § 1752.

[5] Supra, §§ 1696 *et seq.* To the effect that confessions are admissible see Com. *v.* Holt, 121 Mass. 61; Wolverton *v.* State, 16 Ohio, 173; State *v.* Hilton, 3 Rich. 434; Cook *v.* State, 11 Ga. 53; Cameron *v.* State, 14 Ala. 546; State *v.* Sanders, 30 Iowa, 582. See Whart. Cr. Ev. § 637. That the proof should be exact see State *v.* Bowe, 61 Me. 171.

or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts between the parties anterior to that period may be adduced, in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony,[1] and if treated as an offence, would be barred by the statute of limitations.[2] In point of fact, as evidence of adultery is necessarily circumstantial,[3] it is difficult to see how evidence of prior improper familiarities can be rejected.[4] On the other hand, evidence of improper conduct by the defendant with other parties than the one charged in the indictment is inadmissible,[5] and evidence of guilt with the same party *subsequent* to the finding of the indictment is inadmissible, unless to corroborate facts proved to have taken place *before*,[6] or to prove a system of adulterous intercourse between the parties.[7] But evidence of a propensity to commit the particular offence is inadmissible.[8] Suspicions of the wife,[9] and rumors in the neighborhood,[10] are both inadmissible.

On an indictment against an unmarried woman, evidence is inadmissible to show that she had been delivered of a child which might have been begotten about the time of the offence charged.[11]

[1] Whart. Crim. Ev. § 35; State *v.* Wallace, 9 N. H. 515; State *v.* Marvin, 35 N. H. 22; People *v.* Jenness, 5 Mich. 305.

[2] Whart. Crim. Ev. §§ 33–9; Com. *v.* Pierce, 11 Gray, 447; Lawson *v.* State, 20 Ala. 66.

[3] State *v.* Way, 5 Neb. 283; State *v.* Bridgman, 49 Vt. 202.

[4] Whart. Crim. Ev. §§ 33–9; Com. *v.* Call, 21 Pick. 509; Com. *v.* Horton, 2 Gray, 354; Com. *v.* Nichols, 114 Mass. 285; Com. *v.* Bowers, 121 Mass. 45; Searls *v.* People, 13 Ill. 597; Alsabrooke *v.* State, 52 Ala. 24; Richardson *v.* State, 34 Tex. 142. Com. *v.* Thrasher, 11 Gray, 450, holding that evidence of prior adultery is inadmissible, is justly overruled in Thayer *v.* Thayer, 101 Mass. 111. See State *v.* Wallace, 9 N. H. 515. *Contra*, as to incest, Lovell *v.* State, 12 Ind. 18.

[5] State *v.* Bates, 10 Conn. 372.

[6] State *v.* Bridgman, 49 Vt. 202; Com. *v.* Horton, 2 Gray, 354; Com. *v.* Pierce, 11 Gray, 447; and the doctrine enlarged in Thayer *v.* Thayer, 101 Mass. 111; Com. *v.* Bowers, 121 Mass. 45; State *v.* Crowley, 13 Ala. 172. See Whart. Crim. Ev. §§ 33–9.

[7] Boddy *v.* Boddy, 30 L. J. Pr. & Mat. 23; State *v.* Bridgman, 49 Vt. 202; Thayer *v.* Thayer, 101 Mass. 111; Lovell *v.* State, 12 Ind. 18; State *v.* Way, 5 Neb. 283.

[8] See Whart. Cr. Ev. § 35. In Blackman *v.* State, 36 Ala. 295, the unchaste character of one of defendants was held admissible. But this is not safe law.

[9] State *v.* Crowley, 13 Ala. 172.

[10] Belcher *v.* State, 8 Humph. 63.

[11] Com. *v.* O'Connor, 107 Mass. 219.

When the charge is notorious cohabitation in adultery, proof of a single act is insufficient to convict.[1] When this is the statutory charge, notoriety may become a necessary ingredient of proof.[2]

Confessions admissible.

§ 1734. Where a man and woman are jointly indicted, and tried for living together in adultery, the confessions of the one party are evidence against such party;[3] but not after the relation has ceased, against the alleged paramour.[4] Nor can there be a joint conviction upon one act of adultery confessed by one party, coupled with another act confessed by the other party.[5] And on the general question of such confessions we must keep in mind the rules heretofore expressed as to the unreliability of confessions as proof of guilt.[6] To prosecutions for adultery these rules are peculiarly applicable. Confessions, in such cases, may be made not merely under a mistake of fact as to the *status* of the parties, but may be self-serving, as where their object is to help out a divorce procedure. A man, to enable a divorce to be procured against him by his wife, "confesses" adultery. He is subsequently indicted for adultery, and the confession is put in evidence against him. But if the confession, as self-serving, would not be ground for the divorce, it is not, for the same reason, sufficient to sustain a conviction for adultery. The same criticism is applicable to bragging confessions.[7] The miscreants who "confessed" to illicit intercourse with the wife of James II., when Duke of York, were guilty of a conspiracy to slander; but they could not have been convicted of adultery, an offence which they did not commit, a conviction for which would have disgraced not merely themselves but their intended victim. To support convictions in such cases on "confessions" would establish by record slanders which would destroy the character of the person slandered.[8]

[1] Supra, § 1721 *a*; infra, § 1747. As to whether an infant can be produced in court to prove similarity see Whart. Crim. Ev. § 313. Infra, § 1744.

[2] Infra, § 1747.

[3] Lawson *v.* State, 20 Ala. 66. See, however, the cautions given supra, § 1696.

[4] Com. *v.* Thompson, 99 Mass. 444; Spencer *v.* State, 31 Tex. 64; Whart. Crim. Ev. §§ 390 *et seq.*

[5] Com. *v.* Cobb, 14 Gray, 57; Whart. Cr. Pl. & Pr. § 314.

[6] Infra, § 1900; Whart. Crim. Ev. §§ 623 *et seq.*

[7] Whart. Crim. Ev. § 627.

[8] See cases cited in Wh. on Ev. 2d ed. § 1220.

§ 1735. The party with whom the defendant is alleged to have committed the offence is a competent witness for the defence.[1]

Paramour a witness for defence.

§ 1736. Neither husband nor wife can be a witness at common law for or against the other in prosecutions of this class.[2] The effect of statutes on this point is considered in another work.[3]

But husband and wife not witnesses at common law as to each other.

V. VERDICT.

§ 1737. On an indictment for adultery, there is authority to the effect that there may, if the marriage be disproved, be a conviction of fornication, when the latter offence is locally indictable.[4] But the safer course is to place the two offences in separate counts.

May be conviction of minor offence.

VI. ATTEMPTS AND SOLICITATIONS.

§ 1738. The law of attempts has been discussed in a prior chapter, to which the reader is referred.[5] Solicitation of another to commit adultery may be an offence at common law in those States where both parties may be convicted of the adulterous act,[6] though, unless there is something more than mere invitation, this may be doubted.[7] But it is otherwise where the statute defining the offence makes the party soliciting incapable of committing the offence.[8] As he could not be convicted as an accessary before the fact, so he cannot be convicted of attempting to be an adulterer himself. The woman's will is interposed between his intent and the act; and hence, on the principles previously developed,[9] he cannot be convicted of the mere solicitation.

Attempt to commit offence indictable.

[1] State *v.* Crowley, 13 Ala. 172.

[2] Whart. Crim. Ev. §§ 390 *et seq.*; State *v.* Burlingham, 15 Me. 104; Com. *v.* Jailer, 1 Grant (Penn.), 218; State *v.* Armstrong, 4 Minn. 335; State *v.* Berlin, 42 Mo. 572. As to peculiar Iowa statute see State *v.* Dingee, 17 Iowa, 232.

[3] Whart. Crim. Ev. § 400.

[4] Whart. Crim. Pl. & Pr. §§ 736 *et seq.*; Resp. *v.* Roberts, 2 Dall. 124; 1 Yeates, 6; Dinkey *v.* Com. 19 Penn. St. 126; State *v.* Cowell, 4 Ired. 231; *contra*, State *v.* Pearce, 2 Blackf. 318; Smitherman *v.* State, 27 Ala. 23; though see State *v.* Hinton, 6 Ala. 864.

[5] Supra, §§ 173 *et seq.*

[6] State *v.* Avery, 7 Conn. 267.

[7] Supra, § 179.

[8] Smith *v.* Com. 54 Penn. St. 209.

[9] Supra, § 179.

CHAPTER XXXII.

FORNICATION.

I. Nature of Offence.
Fornication not a misdemeanor at common law, § 1741.
II. Indictment.
Indictment must conform to statute, § 1742.
III. Evidence.
Facts of case must be made out, § 1744.
IV. Verdict.
May be conviction of, under indictment for adultery, § 1745.
If rape be proved, offence merges, § 1746.

I. NATURE OF OFFENCE.

Not a misdemeanor at common law.

§ 1741. It is not proposed to treat, in this place, of the proceedings established by the statutes of the several States in cases of bastardy. They partake essentially of the character of civil process, and though in one or two instances they assume the shape of prosecutions, they cannot be regarded as among the subjects of criminal action. Fornication, as an individual offence, however, has been said to be a misdemeanor at common law;[1] and though the better opinion would seem to be, that unless the offence partakes of the nature of public and offensive lewdness, it is not at common law indictable,[2] yet the question has been put to rest, in most of the States, by express statutory prescription. The nature of the evidence in cases of sexual intercourse has been already noticed under the head of adultery.[3]

[1] State *v.* Cox, N. C. Term R. 165. See supra, § 1717.

[2] R. *v.* Pierson, 2 Salk. 382; State *v.* Cooper, 16 Vt. 551; Smith *v.* Minor, Coxe's R. 16; Anderson *v.* Com. 5 Rand. 627; Com. *v.* Isaacs, 5 Rand. 634; Com. *v.* Jones, 2 Grat. 555; State *v.* Brunson, 2 Bailey, 149; State *v.* Moore, 1 Swan, 136; Brooks *v.* State, 2 Yerger, 482; State *v.* Smith, 32 Tex. 167. See Crouse *v.* State, 16 Ark. 566.

[3] Supra, § 1733. For definition see Hood *v.* State, 56 Ind. 263.

The North German Code has struck a line in this respect which is well worthy of notice. Declining to make fornication the subject of general prosecution, it specifies the following instances when unchastity, or at-

II. INDICTMENT.

§ 1742. As the offence is usually statutory, the indictment must introduce the statutory requisites. The participants, as in adultery, may be jointly indicted.[1]

Indictment must conform to statute.

The fact that the defendants are not married to each other need not, as a general rule, be averred, when the statutory term "fornication" is used;[2] and the precedents in use mostly rest on this view.[3] In Massachusetts, however, and in those States in which fornication has a special penalty when committed with single women, implying that there is a class of fornication not so limited, it is necessary to aver that the parties were single and unmarried.[4] Wherever, in other words, fornication is used as a *nomen generalissimum* to cover sexual intercourse with both unmarried and married, and when different penalties are assigned to the two cases, then the indictment must either negative or affirm marriage. But this is not the case where the term is used to designate sexual intercourse by an unmarried person.

III. EVIDENCE.

§ 1744. The prosecution must show as part of its case that the parties were not married to each other.[5]

Facts of case must be made out.

How illicit intercourse is to be established has been already discussed.[6] Resemblance of an infant to the alleged father cannot be proved by inspection.[7]

tempts at unchastity, are to be punished:—

1. When there is an abuse of a situation of trust or power (*e. g.* guardians, pastors, teachers, tutors, physicians, superintendents or attendants in hospitals and asylums).

2. When a woman is seduced under promise of marriage.

3. When a girl under sixteen, with or without promise of marriage, is seduced. Berner, Lehrbuch, &c. § 186.

[1] Supra, § 1730.

[2] State *v.* Gooch, 7 Blackf. 468.

[3] Whar. Prec. *in loco.*

[4] Com. *v.* Murphy, 2 Allen, 163.

[5] Territory *v.* Whitcomb, 1 Mont. 359.

[6] Supra, § 1733.

Evidence that the complainant, in a bastardy process, had criminal intercourse with a man, other than the respondent, less than seven and a half months before the birth of her child, is inadmissible, in the absence of evidence that the birth was premature. Ronan *v.* Dugan, 126 Mass. 176.

[7] Keniston *v.* Rowe, 16 Me. 38; Risk *v.* State, 19 Ind. 152; State *v.* Danforth, 48 Iowa, 43.

IV. VERDICT.

May be convict n of under indictment for adultery.

§ 1745. As already seen, it has been held in some jurisdictions that on an indictment for adultery there can be a conviction of fornication,[1] though this, on principle, is at common law open to doubt, as the offences differ not so much in degree as in kind.

If case is rape offence merges.

§ 1746. Where the doctrine of merger obtains, the defendant, in a prosecution for fornication, must be acquitted if rape be proved.[2]

[1] Supra, § 1737.

[2] Supra, § 1344; Wh. Cr. Pl. & Pr. § 464; Com. v. Parr, 5 W. & S. 345, cited supra, § 554; State v. Lewis, 48 Iowa, 578. Supra, §§ 1344, 1724.

CHAPTER XXXIII.

ILLICIT COHABITATION: INCEST: "MISCEGENATION."

I. ILLICIT COHABITATION.
Single act does not prove offence, § 1747.
Statutes must be followed in indictment, § 1748.
Proof is inferential, § 1748 *a*.
II. INCEST.
Is an offence at common law, § 1749.
Constituents of offence must be made out, § 1750.
May be conviction of an indictment for major offence, § 1751.
Scienter is essential, § 1752.
Relationship provable by admissions, § 1753.
III. "MISCEGENATION."
Offence is statutory, § 1754.

I. ILLICIT COHABITATION.

§ 1747. STATUTES exist in many States making specifically indictable illicit cohabitation. In some aspects (*e. g.* when the offence is a common scandal) such cohabitation is a nuisance, and may be indicted as such.[1] But there may be cases of "illicit cohabitation," or "living in adultery," which are not nuisances, and which distinctively fall within the range of the statutes now before us. In such cases the evidence necessary to support a prosecution must be something more than that of a single act of adultery or fornication. A deliberate continuance in a state of adultery or fornication, though only for a short time, must be shown.[2] But living together

Single act does not prove offence.

[1] See supra, § 1446.

[2] Com. *v.* Calef, 10 Mass. 153; Searls *v.* People, 13 Ill. 597; Miner *v.* People, 58 Ill. 59; State *v.* Gartrell, 14 Ind. 280; State *v.* Marvin, 12 Iowa, 499; McLeland *v.* State, 25 Ga. 477; State *v.* Glaze, 9 Ala. 283; Smith *v.* State, 39 Ala. 554; Quartemas *v.* State, 48 Ala. 269; State *v.* Crowner, 56 Mo. 147; Richardson *v.* State, 37 Tex. 346; State *v.* Moore, 1 Swan, 136; People *v.* Gates, 46 Cal. 52.

For other cases see State *v.* Lyerly, 7 Jones (N. C.), 158; Wasden *v.* State, 18 Ga. 264; Maull *v.* State, 37 Ala. 160; State *v.* Byron, 20 Mo. 210; and cases cited supra, § 1721 *a*.

Something more than occasional illicit intercourse must be shown. Com. *v.* Catlin, 1 Mass. 8. But exposing the person indecently to one woman is "open lascivious behavior." State *v.* Millard, 18 Vt. 574. That there can be no conviction of "living together

adulterously for a single day is "living together in adultery."[1] And when the statute uses the term "notorious," notoriety must be proved.[2]

Statutes must be followed in indictment.

§ 1748. Of the indictments for this class of cases, the statutes being so various, it is only possible at present to observe that to them the ordinary rules of statutory indictments must be applied.[3] One distinctive feature may here be noticed, — that a *continuando*, though proper, is not generally essential.[4]

The question of joinder of defendants is the same as in adultery, and has been already noticed.[5]

Evidence inferential.

§ 1748 *a*. The evidence, in cases of this class, is of the same character as that by which adultery is established.[6] Unless "reputation" is made by statute an element of the offence, proof of such reputation is inadmissible.[7] Confessions are admissible in such cases, subject to the cautions already expressed.

in fornication" "under an indictment for living together in adultery," has been held in Smitherman *v.* State, 27 Ala. 23. See supra, § 1745. Under a statute prohibiting lewdly, &c., "cohabiting *together*," "together" is essential to the offence. Delaney *v.* People, 10 Mich. 241; State *v.* Byron, 20 Mo. 210. The sexes of the participants need not be specifically averred. McLeod *v.* State, 35 Ala. 395. "Lewdness," under the statute, does not by itself require the elements of publicity and notoriety. Com. *v.* Lambert, 12 Allen, 177.

[1] Hall *v.* State, 53 Ala. 463. See State *v.* Way, 5 Neb. 283.

[2] Wright *v.* State, 5 Blackf. 358; People *v.* Gates, 46 Cal. 52; State *v.* Crowner, 56 Mo. 147. In this case Vories, J., said: "The defendants in this case are charged with living in a state of open and notorious adultery. The offence consists of an open and notorious living or cohabiting together: occasional illicit intercourse will not constitute the offence. The statute was intended to provide against persons who, in defiance of morality and of the good or well being of society, should openly live together; they must reside publicly in the face of society as if the conjugal relation existed between them; their illicit intercourse must be habitual. Wright *v.* State, 5 Blackf. 358; Searls *v.* People, 13 Ill. 597; State *v.* Gartrell, 14 Ind. 280; State *v.* Marvin, 12 Iowa, 499; Hinson *v.* State, 7 Mo. 244; Dameron *v.* State, 8 Mo. 494."

[3] Supra, § 1730; Whart. Cr. Pl. & Pr. §§ 220 *et seq.*

[4] State *v.* Glaze, 9 Ala. 283; Hinson *v.* State, 7 Mo. 244. See Com. *v.* Wood, 4 Gray, 11.

[5] Supra, § 1730.

[6] Supra, § 1733.

[7] Buttram *v.* State, 4 Cold. 171.

II. INCEST.

§ 1749. Incest, on the principles already stated in respect to adulterery, is a common law offence in the United States;[1] though, for the reason that the subject is generally absorbed by statute,[2] no decision as to its common law character can be cited.[3]

Is an offence at common law.

§ 1750. In Ohio, *emissio seminis* was once essential to constitute the offence;[4] but this ruling was peculiar to that State, and by statute this is no longer essential. Elsewhere the mere fact of marriage is adequate to sustain the indictment, without proof of carnal knowledge.[5]

Constituents of offence must be made out.

The *lex fori* is the arbiter of the question of relationship.[6]

The relation of step-father and step-daughter, under the Ohio statute has been ruled not to exist after the termination, by death or divorce, of the marriage relation between the step-father and the step-daughter's mother.[7]

§ 1751. Under the Massachusetts statutes authorizing the conviction of a minor offence on an indictment for a major, a defendant may be convicted of incest on an indictment for rape, the indictment containing the proper averments.[8]

May be conviction of an indictment for major offence.

§ 1752. The *scienter*, when required by statute, is necessary to the indictment.[9] It is sufficient, however, with this, when re-

[1] See *contra*, State *v.* Keesler, 78 N. C. 469; State *v.* Smith, 30 La. An. 846.

[2] U. S. *v.* Hiler, 1 Morris, 330; Com. *v.* Goodhue, 2 Met. 193; Howard *v.* State, 11 Oh. St. 328; Cook *v.* State, 11 Ga. 53; People *v.* Murray, 14 Cal. 159.

[3] The grounds for the signal punishment of incest are the following:—

1. Physically nature requires, for proper human development, that children should be propagated by parents of separate families.

2. A sexual connection between persons of the same family has in it a *horror naturalis* incompatible with a permanent and peaceful union.

3. If sexual intercourse between children of the same family be not denounced as highly penal, and stigmatized with the severest reprobation, it would be slid into in early youth, and society destroyed in its nursery. See Berner, § 173.

[4] Noble *v.* State, 22 Oh. St. 541.

[5] State *v.* Schaunhurst, 34 Iowa, 547.

[6] Wh. Confl. of L. § 136.

[7] Noble *v.* State, 22 Oh. St. 541.

[8] Com. *v.* Goodhue, 2 Met. 193.

[9] Williams *v.* State, 2 Ind. 439; Baumer *v.* State, 49 Ind. 544. But "knowingly" is enough, unless the

quired, to aver the relationship of the parties.[1] It is not necessary to aver or prove the marriage by which that relationship was created.[2]

Scienter is essential.

Relationship provable by admission.

§ 1753. The defendant's admission of relationship with the person with whom he holds incestuous intercourse is sufficient proof of such relationship.[3]

III. "MISCEGENATION."

Offence is statutory.

§ 1754. The intermarriage of persons belonging to the black and white races was, until the late civil war, forbidden in most of the United States,[4] and in several States the prohibition continues. Whether such statutes conflict with the recent amendments to the federal Constitution has been questioned. In Tennessee and Virginia the negative has been held.[5]

statute prescribe the *scienter*. State *v.* Bullinger, 54 Mo. 142. See Hicks *v.* People, 10 Mich. 395. And as to *scienter* generally see supra, § 1731; Whart. Cr. Pl. & Pr. § 164; Morgan *v.* State, 11 Ala. 289.

[1] Williams *v.* State, 2 Ind. 439.

[2] Noble *v.* State, 22 Oh. St. 541. See State *v.* Schaunhurst, 34 Iowa, 547; People *v.* Jenness, 5 Mich. 305. In Ohio the offence cannot be laid continuously. See Barnhouse *v.* State, 31 Oh. St. 39.

[3] Bergen *v.* People, 17 Ill. 426. See Whart. Cr. Ev. §§ 623 *et seq.*

[4] See Bishop on Mar. & Div. c. xvii.; Wh. Confl. of L. § 159.

[5] Kinney's case, 30 Grat. 658; Lonas *v.* State, 3 Heisk. 287. In this case Sneed, J., said: —

"Such, also, were the laws of the British colonies in this country, reenacted after the separation by the thirteen States. In Massachusetts, the Colonial Act of 1707, entitled 'An act for the better preventing of a spurious and mixed issue,' was reënacted under the state government in 1786, forbidding the intermarriage of the black and white races, and degrading the unhappy issue of such marriage with the stain of bastardy. And long after the abolition of slavery in that State, in the carefully revised Code of 1836, this 'mark of degradation,' says Taney, C. J., 'was again impressed upon the race.' 19 How. 413. And such, indeed, we believe, was the law of every State. The Congress has the same right to regulate this relation in the District of Columbia and in the Territories, that the States have within their own jurisdictions; and this power is at this moment being exercised in Utah, in the suppression of polygamy. We are of opinion that the late amendments to the Constitution of the United States, and the laws enacted for their enforcement, do not interfere with the rights of the States, as enjoyed since the foundation of the government, to interdict improper marriages; and that the Act of 1870, c. 39, which forbids the intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive, and their living together as man and wife, in this State, is a valid and constitutional enactment."

CHAPTER XXXIV.

SEDUCTION.

Statutory requisites must be followed, § 1756.
Prior chaste character is essential to offence, § 1757.
Promise of marriage must be proved, § 1758.
Consent no defence, § 1759.
Subsequent marriage a defence, § 1760.
Ignorance no defence, § 1761.
Indictment must follow statute, § 1762.
Prosecutrix as a witness must be corroborated, § 1763.
May be conviction of minor offence, § 1764.

§ 1756. THE statutes relating to seduction are so numerous and divergent that any attempt to draw from them a consistent and uniform definition of the offence would be futile. We must content ourselves, therefore, with a brief discussion of some of its chief statutory ingredients. "Abduction," it should be remembered, has been already discussed.[1]

Statutory requisites must be followed.

Under some of the statutes, it is indictable to seduce or inveigle a girl from persons having charge of her.[2] These are de-

[1] Supra, § 586. The California Penal Code, § 266, does not cover the technical offence of seduction. People *v.* Roderigas, 49 Cal. 9.

The Roman law made penal the seduction of widows as well as virgins. *Stuprum*, which it interdicted, included in its widest sense every *turpitudo;* in a narrower sense, every *coitus illicitus;* in a sense still more contracted, unchastity. Seduction of women of chastity was made highly penal. "Sed eadem lege Julia etiam strupri flagitium punitur, cum quis sine vi vel virginem vel viduam honeste viventem strupraverit. Poenam autem lex irrogat peccatoribus, si honesti sunt, publicationem partis dimidiae bonorum; si humiles, corporis coërcitionem cum relegatione." 4 Inst. de publ. jud. 4. 18. The canon law, in addition, in case of the seduction of a virgin by an unmarried man, required him to endow and marry her. C. i. x. de adult. 5. 16. At all events, there must be the endowment, if the marriage was refused. Hence the famous maxim, which worked its way into the ethics of subsequent generations, "Duc aut dota."

[2] Sir J. Stephen thus recapitulates the decisions under the English statute (Dig. C. L. art. 263): —

"(1.) A. and B., two girls under sixteen, run away from home together. Neither abducts the other. R. *v.*

fined to be persons in actual charge, as heads of the family with whom the girl resides, excluding, of course, special and temporary guardians, such as transient school-mistresses.[1]

Meadows, 1 Car. & Kir. 399, as explained by note to R. *v.* Kipps, 4 Cox C. C. 168; and R. *v.* Mankletow, Dears. C. C. 162.

"(2.) A. persuades B., a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A. has abducted B. R. *v.* Timmins, Bell, 276.

"(3.) A., a lady, persuades B., a girl under sixteen, to leave her father's house, and come to A.'s house for a short time, for the purpose of going to the play with her. A. has not abducted B. Founded on a *dictum* of Compton, J., in R. *v.* Timmins.

"(4.) A., a girl under sixteen, asks B., by whom she had been seduced, to elope with her, which he does. B. commits abduction. R. *v.* Biswell, 2 Cox C. C. 259; and see R. *v.* Robins, 1 C. & K. 456.

"(5.) A. induces B. to permit his daughter, C., to go away by falsely pretending that he (A.) will find a place for C. A. abducts C. R. *v.* Hopkins, Car. & Mar. 254.

"(6.) A. takes B., a girl under sixteen, out of her father's possession, believing her, upon good grounds, to be eighteen. A. has abducted B. R. *v.* Prince, L. R. 2 C. C. R. 154.

"(7.) A. meets B., a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces her, takes her back to the place where he found her, and there leaves her. She returns home. A. was not aware at the time that B. had a father or mother living. A. has not abducted B. R. *v.* Hibbert, L. R. 1 C. C. R. 184."

The following is condensed from Roscoe's Cr. Ev. pp. 262 *et seq.* :—

"Even under the old statute of Hen. 7, which did not contain the words 'or detain,' detaining a person who originally came with her own consent, was considered to be within the statute. R. *v.* Brown, 1 Ventr. 243; Hawk. P. C. b. 1, c. 41, s. 7; 1 East P. C. 454; 1 Russ. by Greav. 703.

"In 24 & 25 Vict. c. 100, s. 55, which applies to girls under sixteen years of age, the words are, 'whosoever shall take or cause to be taken out of the possession and against the will of her father or mother,' &c. Here also any violation of the girl's will is unnecessary. Thus it is said, by Herbert, C. J., that the statute of 4 & 5 P. & M., which was to the same effect, was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement. Hicks *v.* Gore, 3 Mod. 84. So upon the same statute it was held that it is no excuse that the defendant, being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the girl secretly to elope and marry him, if it appear that it was against the consent of the father. R. *v.* Twisleton, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432; Hawk. P. C. b. 1, c. 41, s. 10; 1 Russ. by Greav. 712. If the same latitude of construction were applied to s. 53, which relates to women of any age, it might be rather dangerous. It has been argued that though

[1] R. *v.* Meadows, 1 C. & K. 399; State *v.* Ruhl, 8 Iowa, 447.

"Taking" includes receiving the girl, as she elopes not merely from her guardians' residence,[1] but from their constructive pos-

by the statute a taking by force is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, and that the word *take* in itself imports the use of some coercion. But this view has not been adopted; thus where A. went in the night to the house of B. and placed a ladder against the window, and held it for F., the daughter of B., to descend, which she did, and then eloped with A.; F. being a girl fifteen years old; this was held to be a 'taking' of F. out of the possession of her father within the statute, although F. had herself proposed to A. to bring the ladder and elope with him. R. *v.* Robins, 1 C. & K. 456. So in R. *v.* Mankletow, 1 Dears. C. C. R. 159; 22 L. J. M. C. 115, where the prisoner, intending to emigrate to America, had privately persuaded a girl between twelve and thirteen years of age to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two travelled up to London together; this was held to be a 'taking.' Jervis, C. J., in delivering judgment in this case, said: 'There can be no question upon the facts stated in this case, that when the prisoner met the girl at the appointed place, there was then a taking of her. The statute was framed for the protection of parents;' and see R. *v.* Booth, 12 Cox C. C. 231. In R. *v.* Handley, 1 F. & F. 648, Wightman, J., said, 'a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute.' See, too, R. *v.* Robb, 4 F. & F. 59.

"A man is not, it seems, bound to return a girl under sixteen to her father's custody, when she has left home without any inducement and came to him. If, however, he has ever held out any inducement to her to leave, and if, when she has left, he avails himself of her having left to induce her to continue out of her father's custody, this is within the statute, whatever his wishes may have been as to the particular time of her leaving. R. *v.* Olifier, 10 Cox C. C. 402.

"In R. *v.* Green, 3 F. & F. 274, the prisoners found the girl in the street by herself and invited her to go with them, giving her drink which made her dizzy. Green then had intercourse with her in an empty house, where he kept her with him all night. Martin, B., directed an acquittal, on the ground that the girl was not taken out of the possession of any one. It must, however, be observed, that in this case no evidence appears to have been given as to the purpose for which the girl had left home. In R. *v.* Olifier, 10 Cox C. C. 402, Bramwell, B., ruled that when a girl leaves her father of her own accord, without any inducement on the man's part, the man is not bound to restore her to her father. But it seems there must be no intention to return on her

[1] R. *v.* Robb, 4 F. & F. 59; R. *v.* Robins, 1 C. & K. 456; R. *v.* Kipps, 4 Cox C. C. 167; R. *v.* Mankletow, 6 Cox C. C. 143; Dears. C. C. 159, modifying R. *v.* Meadows, 1 C. & K. 399.

session.[1] It need only be for a few hours, if there be any immoral use made of the time.[2] At the same time, if the girl be left by her parents in the street without any visible tutelage exercised over her, the seducing her away is not such a "taking" as to satisfy the statutes.[3] And if she is taken under an honest claim of right, the statute, as in analogous cases in larceny, does not apply.[4]

Prior chaste character essential to offence.

§ 1757. To the offence of seduction, under the statutes of several States, chaste character in the person alleged to be seduced is necessary, and may be inferred from the general evidence offered by the prosecution, when not expressly testified to as an independent ingredient of its case.[5] The defence, on the other hand, may prove single acts of unchastity on the part of the woman, or lewd and wanton acts, though not amounting to unchastity;[6] or, following the analogy of rape, may show general bad character for chastity.[7] But if,

part, for if there be an intention to return the girl is still in the constructive custody of her father. Per Willes, J., R. *v.* Mycock, 12 Cox C. C. 28.

"Where a girl lived with her father, and left home to go to a Sunday-school, and the prisoner met her and seduced her and then brought her back, not knowing who she was or whether she had a father, but not believing she was a girl of the town; it was held that, as there was no evidence to show that the prisoner had reason to know that the girl was under her father's protection, the conviction was wrong. R. *v.* Hibbert, L. R. 1 C. C. R. 184; 38 L. J. M. C. 61. See R. *v.* Burrell, L. & C. 354.

"The burden is on the defendant to prove that the father consented. R. *v.* Handley, 1 F. & F. 648."

[1] See cases cited note 1, p. 513; R. *v.* Olifier, 10 Cox C. C. 402.

[2] R. *v.* Baillie, 8 Cox C. C. 238; R. *v.* Timmins, Bell C. C. 276; 8 Cox C. C. 401. As to how far "going" is "inveigling," or "taking," see Carpenter *v.* People, 8 Barb. 603; People *v.* Parshell, 6 Parker C. R. 129.

[3] R. *v.* Burrell, L. & C. 354; 9 Cox C. C. 368; R. *v.* Green, 3 F. & F. 274; R. *v.* Hibbert, 11 Cox C. C. 246; L. R. 1 C. C. 184.

[4] R. *v.* Tinkler, 1 F. & F. 513. Supra, § 887; infra, § 1759.

[5] Safford *v.* People, 1 Parker C. R. 474; West *v.* State, 1 Wis. 209; Cook *v.* People, 2 Thomp. & C. 404; People *v.* Roderigas, 49 Cal. 9. Under Michigan statute, see People *v.* Brewer, 27 Mich. 134, infra. In Iowa it is said that chaste character is presumed and need not be proved. State *v.* Higdon, 32 Iowa, 262; State *v.* Wells, 48 Iowa, 671. In Georgia the term is "virtuous," as to which see Wood *v.* State, 48 Ga. 192.

[6] People *v.* McArdle, 5 Parker C. R. 180; State *v.* Shean, 32 Iowa, 88. See Kenyon *v.* People, 26 N. Y. 203; S. C., 5 Parker C. R. 254. *Contra*, under Ohio statute, Bowers *v.* State, 29 Oh. St. 542. See, under Michigan statute, People *v.* Brewer, 27 Mich. 134; People *v.* Clark, 33 Mich. 112.

[7] Bowers *v.* State, 29 Oh. St. 542;

since a prior act of unchastity, she has reformed, she regains the protection of the statute. For it would be inhuman and perilous to assume that women, once fallen, but reformed, are to be afterwards exposed, without redress, to a seducer's arts. The policy of the law in such cases is to reclaim and guard.[1] Hence, proof of reputation must be limited to a period before the alleged seduction.[2] And rebutting evidence, to prove modesty and gen-

though see *contra*, Kenyon *v.* People, supra.

[1] Carpenter *v.* People, 8 Barb. 603; Kenyon *v.* People, 26 N. Y. 203; Boyce *v.* People, 55 N. Y. 644; Com. *v.* McCarty, 4 Penn. L. J. 136; 2 Clark (Pa.), 351; Boak *v.* State, 5 Iowa, 430; State *v.* Carron, 18 Iowa, 372; People *v.* Millspaugh, 11 Mich. 278. Supra, § 568.

[2] Ibid.

In People *v.* Brewer, 27 Mich. 134, we have the following from Cooley, J.: —

"The defendant was convicted on an information charging him with having seduced and debauched one Josephine Burch. The first error assigned relates to the refusal of the court to allow the defendant to give evidence that the reputation of the complaining witness for morality and virtue in the neighborhood where she resided was bad. Questions were put to several witnesses for the avowed purpose of drawing out such evidence, but in every instance the time inquired about was the time of the trial. It does not, therefore, become necessary for us to consider whether the woman's reputation at the time or previous to the alleged offence could be proved or not, as it is manifest that her reputation in that regard would be injuriously affected by the offence itself when made known; so that if the bad reputation could be made use of by the defence, the very crime would become the means of protecting the criminal, and the more notorious the seduction the more certain would be the immunity from punishment.

"The next exception relates to the exclusion of evidence to show that the prosecuting witness had admitted sexual intercourse with another person than the defendant. It was not claimed that such evidence was admissible to establish the fact, but it was insisted that such talk by her would show she was not a pure-minded woman, but was inclined to lewdness. The evidence, however, was not offered in connection with other proofs to show a habit of lewd talk and conversation, but for the inferences which might be drawn from the single fact of the admission, that she was not at the time in the path of virtue. For this purpose we think it was inadmissible. It might, without doubt, have been used as impeaching testimony after the proper foundation had been laid for its introduction, but not as proof of a substantive fact.

"The defendant put a witness upon the stand and inquired of him if he had ever had sexual intercourse with Miss Burch. The witness declined to answer, for the reason that it might tend to criminate him, and the court held that he had a right so to decline. Another witness was then asked the same question, who also declined to answer. The counsel for defendant then inquired for what reason he declined. But the judge said he had already passed upon that, and refused

eral chastity, may in such cases be received.[1] The question of character is of course for the jury.[2] The prosecutrix may be

to require an answer. As a perfectly valid reason for the refusal was manifest, we think no error was committed to defendant's prejudice.

"To another witness the question was put whether, previous to the time of the alleged offence, he did not have sexual intercourse with the complaining witness, and the court was asked to compel him to answer, because at the time of the trial any prosecution against him would be barred by the statute of limitations. This would be so if he were charged with seduction, and had not been previously complained of, but not if he were charged with rape. As an affirmative answer might form a link in the chain of testimony to convict him of either offence, no error was committed in the ruling, especially as the court could not know whether the witness had previously been complained of or not.

"It is also assigned for error that the court, at the request of the counsel for the People, gave to the jury the following instruction: 'When a witness is placed upon the stand and declines answering a question put to him on the claim of privilege, the jury are to draw no inference that the fact inquired after is true or exists; it stands in all respects as if the question had not been asked; that in this case, where the question asked of the witnesses was to the effect of their having had illicit sexual intercourse with the complaining witness, to which they declined to answer, the jury are not to infer that they did have such sexual intercourse with her, and their declining to answer is no evidence whatever of the fact of such sexual intercourse; that no presumptions are raised that the witness had had sexual intercourse, and the case, so far as those questions and answers are concerned, should stand in the minds of the jury the same as if the questions had not been asked, or the same as if answered in the negative.' This instruction, standing by itself, would have been clearly erroneous, inasmuch as it did not leave the case to stand as if no such questions had been put, but gave the refusal to answer the effect of positive evidence that the fact inquired about did not exist. No mischief would be done even then unless there was evidence in the case from which the contrary inference might be drawn; but in this case it is claimed there was such evidence.

"From the record, however, it would seem that acceding to the request in this form must have been an inadvertence, for the judge proceeded to lay down the law to the jury very clearly and very fairly. 'Young men,' he said, 'are put upon the stand and asked if they had intercourse with the girl, and these young men decline to answer on the ground that the answer would tend to criminate them. From this you cannot infer that they had intercourse with the girl. It is a failure of proof as to the witnesses. The court held that the witnesses should not be obliged to answer these questions as to the fact of intercourse, and they did not answer. You are not at liberty to suppose, imagine, or infer what would have been the answer to these questions if they had been given. You must act upon the evidence in the case, and not upon what you suppose or imagine might have been put into the case.' This is perfectly clear

[1] State *v.* Shean, 32 Iowa, 88.

[2] State *v.* Carron, 18 Iowa, 372.

cross-examined as to her chastity when this is material to the issue.[1]

§ 1758. The "promise of marriage," which under the statutes is an ingredient of the offence, must be a promise in the nature of a deceit.[2] It need not be technically valid, and it is no defence that the defendant was married, and could not make such a promise.[3] If, however, the girl knew of such marriage, and was old enough to understand its bearings, the promise is not one on which she can sustain a prosecution.[4] If the promise was the consideration of the seduction, it sustains the prosecution; otherwise not.[5] Deceit is an essential ingredient to the promise.[6]

Promise of marriage must be proved.

and perfectly correct, and must have relieved the minds of the jury of any erroneous impressions they might have received from the judge's assent to the previous request, especially as where a written request is thus acceded to, and the same ground is then fully occupied by the judge with instructions in his own language, the latter will always be most likely to receive the strict attention and be impressed upon the minds of the jury.

"The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately, in our own country, an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it. Crozier *v.* People, 1 Park. C. R. 457; People *v.* Kenyon, 5 Park. C. R. 254; Kenyon *v.* People, 26 N. Y. 204; Andre *v.* State, 5 Iowa, 389; People *v.* Millspaugh, 11 Mich. 278. The case of West *v.* State, 1 Wis. 207, which seems to hold otherwise, was decided upon the phraseology of the Wisconsin statute, which was thought to make the 'previous chaste character' of the person seduced an ingredient in the offence, to be made out by proofs. Our statute is very simple, and merely provides that 'If any man shall seduce and debauch any unmarried woman he shall be punished,'" &c.

[1] State *v.* Sutherland, 30 Iowa, 570; but see Wh. Crim. Ev. § 463. Comp. Armstrong *v.* People 70 N. Y. 38.

[2] See People *v.* Clark, 33 Mich. 112; Lewis *v.* People, 37 Mich. 518.

[3] People *v.* Alger, 1 Parker C. R. 333; Crozier *v.* People, Ibid. 453; Safford *v.* People, Ibid. 474.

[4] Ibid; Wood *v.* State, 48 Ga. 192. And see further, under Georgia statute, Wilson *v.* State, 58 Ga. 328.

[5] Kenyon *v.* People, 26 N. Y. 203. In Boyce *v.* People, 55 N. Y. 644, it was said that where the seduction was accomplished under a conditional

[6] State *v.* Crawford, 34 Iowa, 40.

§ 1759. Of course, as it is one of the points in the prosecution's case that the girl consented, consent, if seduction be proved, is no defence.[1] Under the English and other statutes, however, making the taking away from parents or persons in charge a part of the case, it is a defence to prove that the parent or guardian consented to the act, the burden of proving this being on the defendant.[2] But such consent is invalid if obtained by fraud.[3]

Consent no defence.

§ 1760. A marriage of the parties, subsequent to the seduction, though followed by the desertion of the husband, is a defence to an indictment for the seduction.[4]

Subsequent marriage a defence.

§ 1761. Under some of the statutes it is essential that the girl seduced should have been under a specified age. Under others, she must have been of prior chaste character. Will proof of an honest belief by the defendant that she was above the limited age be a defence? It has properly been decided that such belief is no defence; and that it is even inadmissible for the defendant to show that he was told by the girl herself that she was above the limited age,[5] or that her appearance was that of a person of greater age.[6] So on the same reasoning a belief that she was unchaste is no defence.[7]

Ignorance no defence.

§ 1762. The indictment must follow the distinctive local statute under which it is drawn.[8]

Indictment must follow statute.

§ 1763. While under the statutes the prosecutrix is a competent witness, her testimony, in most jurisdictions, is insufficient without corroboration; though in

Prosecutrix as a witness

promise of marriage, the fact that after consenting the woman endeavored to induce the defendant to desist at a time when it was too late to withdraw without his permission, promising never to ask him to marry if he would, is no defence.

[1] R. v. Mankletow, Dears. C. C. 159; 6 Cox C. C. 143; R. v. Kipps, 4 Cox C. C. 167. Yet, under 9 Geo. 4, if without any moral influence applied to the girl's will, she volunteers to elope, this is a defence. R. v. Handley, 1 F. & F. 648; R. v. Olifier, 10 Cox C. C. 402.

[2] R. v. Burrell, L. & C. 354; 9 Cox C. C. 368. Such consent may be implied from the parents' bringing up the girl to a loose life. R. v. Primelt, 1 F. & F. 50.

[3] R. v. Hopkins, C. & M. 254. Supra, § 150.

[4] Com. v. Eichar, 4 Clark (Pa.), 326; 1 Am. L. J. 551.

[5] R. v. Booth, 12 Cox C. C. 231; R. v. Robins, 1 C. & K. 456; State v. Ruhl, 8 Iowa, 447. See supra, § 88.

[6] R. v. Mycock, 12 Cox C. C. 28.

[7] See supra, § 88.

[8] See, for cases, State v. Stogdel, 13 Ind. 565; Stinehouse v. State, 47 Ind. 17; West v. State, 1 Wis. 209.

must be corroborated.

some States such corroboration is required only to the promise of marriage. The corroboration must be *aliunde*.[1]

May be conviction of minor offence.

§ 1764. When the statute permits, the defendant may be convicted of fornication, under an indictment for seduction.[2] And the acquittal of seduction under such a statute is a bar to an indictment for fornication.[3] On an indictment for abduction, if there be proper averments, there may be a conviction of assault.[4]

At common law, if the evidence prove a rape, the offence of seduction may merge,[5] though this is open to dispute.[6]

[1] Com. *v.* Walton, 2 Brewst. 487; Com. *v.* McCarty, 2 Clark (Pa.), 351, State *v.* Kingsley, 39 Iowa, 439; State *v.* Wells, 48 Iowa, 671. As to construction of testimony of witness, see State *v.* Haven, 43 Iowa, 181.

As already seen, an infant cannot be brought into court to prove resemblance to the putative father. State *v.* Danforth, 48 Iowa, 43; citing Keniston *v.* Rowe, 16 Me. 38; Risk *v.* State, 19 Ind. 152. See Whart. Crim. Ev. § 313.

Where, on the trial of an indictment under the New York act, the prosecutrix testifies to the promise, intercourse, and other facts essential to constitute the offence, and other testimony tending to support her on such points is given, whether or not she is sufficiently supported to justify a conviction is a question for the jury. Crandall *v.* People, 2 Lansing, 309; Boyce *v.* People, 55 N. Y. 644. As to cross-examination see Armstrong *v.* People, 70 N. Y. 138.

[2] Hopper *v.* State, 54 Ga. 389. And so of adultery in Georgia. Wood *v.* State, 48 Ga. 192; and see Whart. Cr. Pl. & Pr. §§ 736 *et seq.*; Nicholson *v.* Com. Sup. Ct. Penn. 1879.

[3] See State *v.* Bierce, 27 Conn. 319; Dinkey *v.* Com. 17 Penn. St. 126; Nicholson *v.* Com. *ut supra*.

[4] R. *v.* Barratt, 9 C. & P. 387.

[5] State *v.* Lewis, 48 Iowa, 578; Wh. Cr. Pl. & Pr. § 464.

[6] Supra, § 1344.

CHAPTER XXXV.

DUELLING.

I. Requisites of Offence.
- A duel is a concerted fight with deadly weapons for satisfaction of honor, § 1767.
- Sending challenge is a misdemeanor at common law, § 1768.
- By statute specific penalties are inflicted, § 1769.
- The combat must be premeditated, § 1770.
- Deadly weapons must be intended, § 1771.
- Challenge must be for satisfaction of honor, § 1772.
- Persons provoking challenge are indictable at common law, § 1773.
- No defence that duel was to be fought extra-territorially, § 1774.
- All concerned are principals, § 1774 *a*.

II. Indictment.
- Challenge need not be specially pleaded, § 1775.
- Statute must be followed, § 1776.

III. Evidence.
- Challenge may be inferred from facts, § 1777.
- Admissions of seconds are evidence, § 1778.

I. REQUISITES OF OFFENCE.

Duel is a concerted deadly fight for the satisfaction of honor.

§ 1767. A DUEL is a concerted fight between two persons, with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor.[1] To the Romans and Greeks it was unknown, though with them, as with the Jews, the usage existed of committing the settlement of national or tribal quarrels to two champions who were to decide the question in a single fight. To such encounters, as well as to the fights of voluntary champions in public games, the ordinary laws of homicide did not apply: "Quia gloriae causa et virtutis, non iniuriae causa videtur damnum datum." But this was because such contests were engaged in for public purposes and under public sanction. There can be no question that if two individuals, to redress private wrongs

[1] The English Draft Code of 1879 contains the following: —

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment with hard labor, who challenges, or knowingly carries any challenge, to or endeavors by any means to provoke any person to fight a duel, or endeavors to provoke any person to challenge any other person to fight a duel."

or insults, had coolly agreed to fight with deadly weapons, the death of either party, had it resulted, would have been considered murder.

§ 1768. Duels, in their modern sense, took their origin from the chivalric idea inherent in feudalism; an idea which treated knightly honor as a quality so delicate and precious that an insult to it could only be satisfied by an appeal to arms. Naturally, therefore, the feudal jurisprudence treated duelling with indulgence; and hence when we search the old English common law, the only utterances on this point that we can find are ambiguous or apologetic. The canon law, however, spoke with unequivocal sternness. To that law there was no distinction between gentle and simple, between knight and serf; and the condemnation it pronounced on the serf who killed another serf in a vulgar but premeditated fight, it pronounced on the knight who killed another knight in a duel conducted according to all the rules of chivalry. "Detestabilis duellorum usus, fabricante diabolo introductus, et cruenta corporum morte animarum etiam perniciem lucretur."[1] Gradually this principle worked itself from the English ecclesiastical to the English common law courts, till the doctrine was reached, that to send a challenge is a misdemeanor at common law, even though the challenge be declined;[2] and, as already expressed, that killing in a duel is murder; that all persons engaged in preparing the duel, if assisting at the death, are principals; if absent, accessaries before the fact.[3]

Sending challenge a misdemeanor at common law.

§ 1769. But this view, as already seen,[4] it has been found impracticable to carry into uniform practice, even where death results, and where the party who strikes the fatal blow is defendant. Still greater is the difficulty when the seconds are on trial, or when the result was not fatal. Hence

By statute specific penalties inflicted.

[1] Acta conc. Trid. 1562; Decret. de reform. cap. xix. This is but a condensation of the old canon law.

[2] R. v. Langley, 2 Ld. Raymond, 1029; R. v. Phillips, 6 East, 464; R. v. Young, 8 C. & P. 644. See Smith v. State, 1 Stew. 506; State v. Perkins, 6 Blackf. 20.

[3] See supra, § 215. The curious reader, who seeks to examine the history of the law in this connection, will find materials in Quintus, Diss. de Duello, &c. Groning. 1830; Gneist, der Zweikampf, 1848; Pujos, Essai sur la Repression du Duel, Paris, 1863; Sabine's Notes on Duels and Duelling, 1860.

[4] Supra, § 482.

a series of statutes have been passed, assigning specific and graduated punishments to those sending challenges, and those concerned in arranging or abetting duels. It is with these statutes we have at present to do, touching only on certain generic features which are common to all.

The combat must be premeditated.

§ 1770. We must distinguish between the duel and the rencontre, which is a sudden fight, springing up when the parties are in hot blood, and when there is no time to cool between the provocation and the summons to fight and the fight itself. Hence the statutes against challenges, construed strictly, do not apply to fights demanded in hot blood by a party or his friends. Such demands are governed by the rules of the common law, as defined in riotous homicide, or homicide in sudden quarrels.[1] And if no physical injuries ensue, the participants are indictable for affrays or attempts.

Deadly weapons must be intended.

§ 1771. Challenges to fight with weapons not deadly, *e. g.* with fists, do not come under the duelling statutes, though indictable at common law as attempts, or as breaches of the public peace;[2] and so where a challenge is intended as a joke, or where the weapons to be used are intended by the challenging party to be harmless, and are so known to the other parties.[3] Yet if the principals intend to use deadly weapons, it is no defence that the pistols are by a subsequent trick of the seconds, unknown to the principals, loaded only with blank cartridges.[4] But it is not requisite, to constitute the offence, that any special weapons should be used. Hence under this head may be classed what a German expositor[5] styles the "Amerikanische Duell," *i. e.* a drawing lots as to which of two parties shall die, as a satisfaction to the wounded honor of one of them.

So far as concerns the challenge, it is no matter in what terms it is couched. If it is an invitation to fight with deadly weapons, the case is covered by the statute, no matter how artful may be the disguise.[6]

[1] Supra, §§ 396, 455.

[2] Com. *v.* Whitehead, 2 Bost. Law Rep. 148; State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 3 Brev. 243. See Aulger *v.* People, 34 Ill. 486; Com. *v.* Tibbs, 1 Dana, 524.

[3] Com. *v.* Hart, 6 J. J. Marsh. 119.

[4] See supra, §§ 173 *et seq.*

[5] Holzendorff's Encyc. ii. 721.

[6] State *v.* Perkins, 6 Blackf. 20; Com. *v.* Hart, 6 J. J. Marsh. 119;

§ 1772. Suppose, in a foundering boat, a passenger proposes that lots should be drawn as to who should be cast overboard, in order to lighten the boat? This would not be a challenge under the duelling statutes, but excusable at common law.[1] Bnt the term "honor," even when used in statutes, must not be construed too scantly. Wherever one man, except under legal necessity, challenges another to single combat with deadly weapons, to redress any injury, real or fancied, to self, there the case is met.

Challenge must be for satisfaction to honor.

§ 1773. A duellist, desiring himself to escape the penalties of the statutes, who succeeds by skilful insults in provoking another to challenge him, may be responsible at common law. It would be a gross injustice in such a case to punish the challenger, who is really the assailed party, and to let the challenged party, who is really the assailant, go free. Under the statutes, the latter may not be reached;[2] but the common law here, as elsewhere, penetrates to the merits, and holds that he who thus designedly provokes a challenge is guilty of an indictable offence.[3]

Persons provoking challenge are indictable at common law.

Com. *v.* Tibbs, 1 Dana, 524; Com. *v.* Pope, 3 Dana, 418; State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 3 Brev. 243; Herriott *v.* State, 1 McMull. 126; Ivey *v.* State, 12 Ala. 276.

[1] Supra, § 95.

[2] Com. *v.* Tibbs, 1 Dana, 524.

[3] Supra, § 179; 1 Gabbett Crim. Law, 66; 1 Hawk. P. C. ss. 18, 19; 1 Deacon Crim. Law, 219; Boothby Crim. Law (ed. 1854), 60. See R. *v.* Rice, 3 East, 581; R. *v.* Phillips, 6 East, 464; R. *v.* Cuddy, 1 C. & K. 210; R. *v.* Young, 8 C. & P. 644; State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 1 Const. Rep. 107; 3 Brev. 243. That all concerned are liable, see cases just cited, and see Com. *v.* Lambert, 9 Leigh, 603; Cullen *v.* Com. 24 Grat. 624.

"Challenges to break the peace by fighting," says Mr. Talfourd, in his edition of Dickinson's Quarter Sessions (p. 325), "are indictable as misdemeanors, as well in those who send, as those who knowingly carry, them. Upon the same principle, employing words or writings for the purpose of provoking another to send a challenge, where the tendency is direct and manifest, is equally indictable, even though the provocation should fail in its object. And no previous misconduct on the part of the individual challenged or provoked will form a defence against such indictment, so as to entitle the defendant to an acquittal, although it will weigh with the court in determining the sentence. Where, indeed, a party challenged applies to the Court of Queen's Bench for a criminal information, that extraordinary remedy will not be granted, if he shall appear to have given provocation to his adversary, but he will be left to indict at the assizes or session. The punishment, on conviction, is fine and imprison-

§ 1774. Where a challenge is given in one State to fight a duel in another State, the offence of challenging is continuous, and may be tried in either jurisdiction;[1] though if the challenge be in writing, it may be expedient, in the jurisdiction of consummation, to charge the offence as an oral renewal. Clearly a challenge to fight in another State is penally cognizable in the State in which the challenge is issued.[2] Nor is it necessary to prove that the challenge ever reached its destination.[3]

No defence that duel is to be fought extra-territorially.

§ 1774 *a*. All who are concerned in a duel are responsible under the limitations heretofore stated as applying to principal and accessary.[4]

All concerned are responsible.

II. INDICTMENT.

§ 1775. A written letter, if merely the inducement or introduction to an oral communication, conveying a challenge, need not be set forth. Thus where T., in a letter to N., used expressions implying a challenge, and by a postscript referred N., the challenged party, to one H. (the bearer of the letter), if any further arrangements were necessary, it was held that the letter was only evidence of the challenge, and need not be specially pleaded; and that N. might give testimony of the conversation between H., the bearer of the letter, and himself.[5] Even when a statute makes sending a challenge indictable, it has been held not necessary to set out a copy of the challenge;[6] and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the sense, it has been said that such variance after verdict is cured.[7] To set forth the substance is enough.[8]

Challenge need not be specially pleaded.

ment, or both, at the discretion of the court."

[1] See supra, § 288.

[2] R. *v.* Williams, 2 Camp. 506; State *v.* Taylor, 3 Brev. 243; 1 Tr. Const. Rep. 107; Harris *v.* State, 58 Ga. 332; State *v.* Farrier, 1 Hawks, 487. See Ivey *v.* State, 12 Ala. 276.

[3] R. *v.* Williams, supra.

[4] Supra, §§ 215, 482; R. *v.* Taylor, L. R. 2 C. C. 147; Com. *v.* Lambert, 9 Leigh, 603. As to surgeons see Cullen *v.* Com. 24 Grat. 624.

[5] State *v.* Taylor, *ut supra*.

[6] Brown *v.* Com. 2 Va. Cas. 516.

[7] State *v.* Farrier, 1 Hawks, 487. See Heffren *v.* Com. 4 Met. (Ky.) 5; Ivey *v.* State, 12 Ala. 276; Com. *v.* Tibbs, 1 Dana, 524.

[8] Ivey *v.* State, 12 Ala. 276.

§ 1776. Where a statute makes it a misdemeanor to challenge another, the indictment must charge that the defendant challenged; it is not enough that he wrote, sent, and offered a paper he intended as a challenge.[1] Statute must be followed.

Expressing a readiness to accept a challenge does not amount to challenging under the statute.[2]

III. EVIDENCE.

§ 1777. No set phrase is necessary to constitute a challenge to fight with deadly weapons,[3] nor is a writing necessary.[4] Challenge may be inferred from facts.

The note or letter sent by one party to the other, and parol testimony in explanation, are admissible as evidence.[5]

The jury is to decide, under advice of the court, whether, from all the circumstances, there has been a challenge within the statute.[6]

§ 1778. Concert being proved, it need scarcely be added that the admissions of a second are evidence against the principal; and *vice versa*.[7] Admissions of seconds are evidence.

[1] State *v.* Gibbons, 1 South. 40.

[2] Com. *v.* Tibbs, 1 Dana, 524.

An indictment under the Massachusetts Stat. 1849, c. 49, § 1, is sufficient, which alleges that the defendant, at a time and place named, "by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to wit, with one J. S., did meet and engage in a fight with the said J. S.," without further charging what previous appointment or arrangement was made, or when or where, or by whom, or further setting out the defendant's acts. Com. *v.* Welsh, 7 Gray, 324.

[3] See for cases supra, § 1771.

[4] State *v.* Perkins, 6 Blackf. 20. Supra, § 1775.

[5] Supra, § 1775; R. *v.* England, 2 Leach, 767.

[6] Com. *v.* Hart, 6 J. J. Marsh. 119; State *v.* Strickland, 2 N. & McC. 181; Herriott *v.* State, 1 McMull. 126; Gordon *v.* State, 4 Mo. 375.

[7] State *v.* Dupont, 2 McCord, 334; Whar. Crim. Ev. § 698.

BOOK IV.

PART III. — OFFENCES AGAINST GOVERNMENT.

CHAPTER XXXVI.

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I. TREASON AGAINST THE UNITED STATES.

CONSTITUTION AND STATUTES.

§ 1782. "TREASON against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.[1] No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[2] Treason. Definition and proof.

"Every person owing allegiance[3] to the United States, who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."[4]

§ 1783. "Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States."[5] Punishment.

[1] A rebel, being a citizen of the United States, cannot be viewed as an enemy under the Constitution of the United States; and hence a conviction of treason, in promoting a rebellion, cannot, it has been held, be sustained under that branch of the constitutional definition which includes "adhering to their enemies, giving them aid and comfort." But such a rebel may be convicted under the phrase relating to "levying war." U. S. *v.* Greathouse, 2 Abb. U. S. 364 (U. S. Cir. Ct. Cal. 1863; Field and Hoffman, JJ.). See infra, § 1795.

[2] Const. U. S. art. 3, § 3, cl. 1.

[3] See Sprague, J., 23 Law Rep. 705; U. S. *v.* Villato, 2 Dall. 370.

[4] Rev. Stat. § 5331.

Members of Congress guilty of treason are liable to arrest. Const. art. 1, § 6.

[5] Rev. Stat. § 5332.

The questions of confiscation, under this statute, are discussed in Miller *v.* U. S. 11 Wall. 268; Semmes *v.* U. S. 91 U. S. 21; Wallack *v.* Van Riswick, 92 U. S. 202; Windsor *v.* McVeigh, 93 U. S. 274.

§ 1784. "Every person owing allegiance to the United States, having knowledge of the commission of any treason against them, who conceals, and does not as soon as may be disclose and make known the same to the President, or to some judge of the United States, or to the governor, or to some judge or justice of a particular State, is guilty of misprision of treason, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars."[1]

Misprision.

§ 1785. "If two or more persons in any State or territory conspire to overthrow, put down, or to destroy by force, the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof; each of them shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars, or by imprisonment, with or without hard labor, for a period not less than six months nor greater than six years, or by both such fine and imprisonment."[2]

Seditious conspiracy.

§ 1786. "Every person who recruits soldiers or sailors within the United States, to engage in armed hostility against the same, or who opens within the United States a recruiting station for the enlistment of such soldiers or sailors, to serve in any manner in armed hostility against the United States, shall be fined a sum not less than two hundred dollars nor more than one thousand dollars, and imprisoned not less than one year nor more than five years."[3]

Enlisting persons to serve against the United States.

§ 1787. "Every soldier or sailor enlisted or engaged within the United States, with intent to serve in armed hostility against the same, shall be punished by a fine of one hundred dollars, and by imprisonment not less than one nor more than three years."[4]

Punishment of those so enlisting.

[1] Rev. Stat. § 5333.

As to misprision see U. S. *v.* Wiltberger, 5 Wheat. 76; Confiscation cases, 1 Woods, 221; U. S. *v.* Tract of Land, 1 Woods, 475.

[2] Rev. Stat. § 5336.

See Rev. Stat. §§ 5518, 5520; Lange, ex parte, 18 Wall. 163. For revenue cases under this statute see supra, § 1372.

[3] Rev. Stat. § 5337.

[4] Rev. Stat. § 5338.

§ 1788. "Every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment of not more than ten years, or by a fine of not more than ten thousand dollars, or by both of said punishments, and shall moreover be incapable of holding any office under the United States."[1]

Aiding in rebellion.

§ 1789. The Act of January 30, 1799, § 1,[2] makes it an indictable offence for a citizen of the United States to correspond with foreign governments, with intent to influence their controversies with the United States, or to defeat the measures of the government of the United States, and to aid and abet such correspondence. This, however, is not to prohibit application for redress of injuries.[3]

Corresponding with foreign governments.

§ 1790. By the definition of treason in the Constitution, it is limited, as will be perceived, in the first place, to the levying of war against the United States, and secondly, to adhering to the enemies of the United States, giving them aid and comfort.[4]

Treason consists in levying war or in adhering to enemies.

[1] Rev. Stat. 1878, § 5334.

This section repeals the prior acts on the same topic, only so far as concerns the punishment imposed; and after its passage, the death penalty cannot be inflicted on those convicted of engaging in rebellion. "The defendants are therefore, in fact, on trial for treason; and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the State." Field and Hoffman, JJ. Chapman's case, San Francisco, 1863.

[2] Bright. Dig. 203, and found in a condensed shape in Rev. Stat. U. S. § 5335.

[3] This statute has been discussed in a prior chapter. Supra, §§ 274, 284, n.

[4] 2 Federalist, No. 43; 4 Tucker's Black. App. 12; Charge of Judge Wilson, 7 Carey's Am. Museum, 40; 3 Story's Const. Law, § 1794; Charge on Law of Treason, 1 Story R. 614.

Sir J. Stephen (Dig. C. L.), gives the law of treason, as now existing in England, as follows: —

"ARTICLE 51.

"*High Treason by Imagining the Queen's Death.* — Every one commits high treason who forms and displays by any overt act, or by publishing any printing or writing, an intention to kill or destroy the queen, or to do her any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint. 25 Edw. 3, st. 5, c. 2; 36 Geo. 3, c. 7, ss. 1, 6; 57 Geo. 3, c. 6; 11 Vict. c. 12, s. 2.

"ARTICLE 57.

"*When Words are Treason.* — The speaking of words expressive of the

1. *Levying War.*

§ 1791. "The term," said Marshall, C. J., in Burr's case, "is not the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the

Term to be accepted according to its prior judicial meaning.

intentions above mentioned is not an overt act within the meaning of articles 51, 52, and 56. Foster, 200–207.

"The writing of such words is such an overt act.

"The speaking or writing of words accompanied by, or explanatory of, conduct connected with the execution of such intentions, is such an act.

"The speaking of words of advice, consultation, or command, or otherwise connected with the execution of such intentions, is such an act.

"ARTICLE 58.

"*Violating the King's Wife, &c.* — Every one commits high treason who violates (whether by her own consent or not) —

"The wife of a king regnant; or

"That daughter of the king or queen regnant who at the time is his or her eldest daughter, if she never has been married, and (perhaps) if she is a widow, and (probably) if her father or mother is alive; or

"The wife of that son of a king or queen regnant who for the time being is the heir apparent of such king or queen. 25 Edw. 3, st. 5, c. 2, as explained by Hale.

"ARTICLE 59.

"*Killing the Chancellor, &c.* — Every one commits high treason who slays the chancellor, or the treasurer, or the king's justices of the one bench or the other, justices in eyre or justice of assize, and all other justices assigned to hear and determine being in their places doing their offices." "It may be permissible to suggest (as mere matter of curiosity) a doubt whether this would now apply to all the judges of the Supreme Court, or only to those who are not members of the Chancery Division. 25 Edw. 3, st. 5, c. 2. It is enacted by 13 Eliz. c. 2, that every one commits high treason who uses, or puts in use, in any place within this realm, or in any of the queen's dominions, any bull, writing, instrument of absolution or reconciliation, obtained from the bishop of Rome, to those who will be contented to forsake their due obedience to the queen and to yield and subject themselves to the authority of the bishop of Rome, or who willingly receives absolution or reconciliation under any such instrument. This enactment is printed in the Revised Statutes, but by 9 & 10 Vict. c. 59, it is repealed so far only as the same imposes the penalties or punishments therein mentioned. Whether the effect of this is to make the using of such bulls a treason which cannot be punished, I do not know, nor does it much matter. As the 9 & 10 Vict. c. 59, further provides that the repeal of the penalty is not to make the forbidden acts lawful, it is impossible to be quite sure that doing them would not be a statutory misdemeanor. As to which see 6th Rep. C. L. C. pp. 35–41. I know not why 13 Eliz. c. 2, was not repealed simply."

substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the

"ARTICLE 60.

"*Punishment for Treason.* — Every one who is convicted of high treason must be sentenced to be hanged by the neck until he is dead; but her majesty may (if the offender is a man) direct by a warrant, signed by one of her principal secretaries of state, that instead thereof such offender's head shall be severed from his body whilst alive." "For common law judgment see Chitty Crim. Law, 365–6. It was modified by 30 Geo. 3, c. 48, as to women (who before that act were liable to be burnt alive for treason); as to men by 54 Geo. 3, c. 146, and 33 & 34 Vict. c. 23, s. 31. The odd exception made in the parentheses arises thus: The Act 30 Geo. 3, c. 48, applies only to women, and the 54 Geo. 3, c. 146, only to men. The proviso as to beheading occurs in the second only. The Act of 1870 repeals parts of the Acts of 1790 and 1814, but does not extend to the Act of 1790 the proviso contained in the Act of 1814. It would seem, however, that the power exists at common law. See Foster, 269–70. The act (31 Vict. c. 24) for executing sentence of death within jails does not apply to cases of treason. Indeed, ss. 2 and 16 together appear to exclude its operation in such cases. An execution for treason would, therefore, it would seem, have to be public. Sir E. Coke's scriptural reasons for the punishment of treason may be seen in 3d Inst. 211."

To this is appended the following note: —

"This chapter is intended to express, in a consecutive and (as far as is consistent with correctness) in a systematic form, the existing law as to treason and treasonable felonies.

"The arrangement of the chapter depends upon the following analysis: High treason is of six kinds, viz.: (1.) By imagining the king's death. (2.) By levying war. (3.) By adhering to the king's enemies. (4.) By imagining the death of the queen consort, &c. (5.) By violating the queen consort, &c. (6.) By slaying the chancellor, &c. Of these branches of the offence, Nos. 4, 5, and 6 call for no remark. Each of the other three, and more particularly treason by imagining the king's death, and treason by levying war, require some observation. Each of these depends ultimately upon 25 Edw. 3, st. 5, c. 2.

"The important words of this statute are, 'When a man doth compass or imagine the death of our lord the king' . . . . 'and thereof be provably attainted by open deed.'

"By judicial constructions, which are given at length in Coke, Hale, and Foster, these words were stretched so as to include articles 51 and 52, and by the 36 Geo. 3, c. 7, which was rendered perpetual by the 57 Geo. 3, c. 6, these constructions received the sanction of the legislature.

"In 1848, however, the first part of the 57 Geo. 3, c. 6, was repealed, so much only of it being retained as extended the words 'compass or imagine the king's death' to compassing or imagining the infliction on the king of any kind of bodily injury or restraint. The judicial constructions which made compassing and imagining the deposition of the king, compassing and imagining certain forms of levying war against him, and the instigation of foreigners to invade the realm, overt acts of treason, by imagining the king's death, became statutory felonies, but the cases by which these con-

sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context. It is said this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in the instruments of the present day the definitions and the dicta of these authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to much respect." [1]

Yet there is a limitation in these expressions which does not at first sight appear. The old meaning of terms, when used in

structions were established remained untouched. At present, accordingly, all these acts are both treason and felony; treason by judicial constructions put upon the act of 25 Edw. 3 (articles 51–54); and felony by 11 Vict. c. 12 (article 62).

"Treason, by actual levying of war, has been made the subject of judicial constructions nearly as strained as those which have been applied to the other branch of the statute. The whole history of the doctrine is examined in an exhaustive manner in Luder's Considerations on the Law of High Treason, in the article of levying war, which appears to me to show distinctly that article 53 (*c*) rests on very indifferent authority. If it is law, almost every political riot is high treason. Probably one effect of the enactment of the 11 Vict. c. 12, will be to prevent this interpretation of the section from being put forward again. It has, however, been so strongly laid down by Foster and others, that a statement of the law which omitted it would be incomplete.

"I think that article 53 (*b*) rests on far stronger grounds, both of authority and reason, than article 53 (*c*). As for authority, it was recognized and acted on in the case of R. *v.* Frost, in 1840, and in other well-known cases. As for reason, it is obvious that such a rebellion as that which Frost headed was, as far as it went, a civil war."

[1] 2 Burr's Trial, 401; 4 Cranch, 470. See U. S. *v.* Fries, C. C., April, 1800 — Pamph.; Wh. St. Tr. 656.

a new constitution or statute, is to be received when "compatible with the words of the statute." If the statute itself, in its context, makes that allowable which by the old terms was penal, then the old judicial definitions are to be accepted only so far as they apply to that portion of the subject which remains penal. Hence, from the old English definition of "levying war," we must strike out all that relates to offences directed against the sovereign individually; and all, as will presently be seen, that relates to the resistance to laws so far as such resistance is not aimed at the overthrow of the government.

§ 1792. To levying war, war is essential; but if there be an overt act of war, then all subjects contributing to the common design, of which such overt act is part execution, are responsible as principals.

All concerned in making war are principals.

"Taken most literally," said Marshall, C. J., in the Burr trial, "the words 'levying of war' are perhaps of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would be probably a general admission that the terms also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term would be settled by a course of decisions; and it would be affirming boldly to say, that those only who actually constitute a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on an open war against the United States, and subverting their government; the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting offi-

cer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him."[1] And it is generally held that at common law in treason all accessaries before the fact are principals.[2]

But there must be an overt act of war.

§ 1793. All conspirators in treason, therefore, are responsible as principals,[3] and hence are generally responsible for every overt act. But there must be an overt act of war, to constitute such a levying war as to involve the parties in the guilt of principals. A mere counselling of an armed resistance to government, when war has not ensued, in execution of such counsel, cannot be regarded as treason.[4] To this extent, therefore, must we regard the doctrine that in treason all are principals, and that such persons are therefore guilty of treason, as not sanctioned by the Constitution of the United States.[5] Hence mere counsellors of armed resistance to the government are not principals in treason, unless a war results; and even in case of war ensuing, while they may be guilty of a seditious conspiracy for instigating it, they are not guilty of treason, unless the war stand in direct causal connection with their counsels.[6] This position, so far as concerns the United States courts, is settled by the fact that the federal legislature has made such conspiracies a distinct offence with a mitigated penalty. When, however, war results, all conspiring to commit any overt act are guilty of treason, whether present or absent at the overt act.[7]

Number engaged not material.

§ 1794. It has been said that the number of persons assembled is not material; and that a few may complete the offence as well as a thousand.[8] But it stands to reason that to constitute "war" coöperation of many in such force as to deliver battle against the government is essential.

[1] 2 Burr's Trial, 401; 4 Cranch, 470. See supra, §§ 283–7; Fost. 218; 1 Hale, 144; Vaughan's case, 580; 5 St. Tr. 17–39; 2 Salk. 634.

[2] Supra, § 224.

[3] 2 Burr's Tr. *ut supra;* supra, §§ 224, 287; Wh. Confl. of L. §§ 902–30.

[4] See remarks of Sprague, J., 23 Boston Law Rep. 705.

[5] Supra, § 224. This is clearly the effect of the argument of Marshall, C. J., in Burr's case.

[6] Supra, § 152.

[7] Wh. Confl. of L. §§ 902–30; Serg. on Const. c. 32; Bollman, ex parte, 4 Cranch, 75; U. S. *v.* Greathouse, 2 Abb. U. S. 364; People *v.* Lynch, 11 Johns. 553. See on this point Act of March 2, 1867. Supra, § 1356.

[8] 3 Inst. 9.

The mere resistance of a few individuals, or even of a riotous mob, is not "war," though it may amount to a seditious conspiracy under the statute.[1]

§ 1795. Levying of war, according to the old distinction, is direct when the war is levied directly against the government with intent to overthrow it;[2] such, for instance, as attacking the government's forces, holding against it any of its forts or ships, or assaulting the same, or delivering them up to rebels through treachery.[3]

Direct levying of war is an attack on the government's army or forts.

§ 1796. Constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force:[4] as where the object is by force to obtain the repeal of a statute; to obtain the redress of any public grievance, real or pretended;[5] to throw down all enclosures, pull down all bawdy-houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally.[6] In this country this view, so far as concerns resistance to statutes, was at first accepted; and it was held that while to conspire to resist or oppose the execution of any statute of the United States by force is a high misdemeanor, if the parties proceed to carry such an intention into execution by force they are guilty of treason in levying war.[7] It was also held that to march in arms, with a force marshalled and arrayed, committing acts of violence and devastation, in order to compel the resignation of a public officer, and thereby render ineffective an act of Congress, is high treason.[8] In 1851, however, in prosecutions for resisting the

Constructive is where it is intended to effect change in government by force.

[1] Supra, § 1785.

[2] 1 Hale, 131, 132; Sprague, J., 23 Law Rep. 705.

[3] 3 Inst. 10; Fost. 219; 1 Hale, 325, 326.

[4] Foster, 211.

[5] 1 Hawk. c. 17, s. 25; 1 Hale, 153; Foster, 211; 3 Inst. 9, 10; R. *v.* Lord Gordon, 2 Dougl. 590.

[6] Foster, 214; 1 Hale, 132; R. *v.* Bradshaw, Poph. 122; R. *v.* Messenger, Kel. 70, 79.

[7] U. S. *v.* Fries, C. C. Ap. 1800 — Pamph.; Wh. St. Tr. 656; U. S. *v.* Mitchell, 2 Dall. 348; Wh. St. Tr. 182; Sprague, J., 23 Law Rep. 705. Yet the Act of March 2, 1867, treats such executed conspiracy as a misdemeanor.

[8] U. S. *v.* Vigol, 2 Dall. 346; U. S. *v.* Mitchell, 2 Dall. 348; Wh. St. Tr. 182. In this case the indictment was for a participation in the excise insurrection in western Pennsylvania in 1794. The following is part of the charge of Patterson, J.:—

Fugitive Slave Law, this doctrine was much narrowed; and it was virtually held that to make the armed resistance to a public law treason, the intention must be to overthrow the government of the United States.[1] And this view is required by the terms of the Constitution. Breaking down enclosures, or driving off obnoxious persons of a particular class, or resisting a particular statute, may be acts of flagrant guilt, but no one of them is itself levying war against the State.[2]

But war to effect private ends not treason.

§ 1797. It is in any view now agreed that an armed movement for the purpose of throwing down the enclosures of a particular manor, park, or common; or of carrying on a mere quarrel between private persons,[3] or of delivering one or more particular persons out of prison; or, by the demonstration of force, of obtaining a mitigation of the punish-

"The first question to be considered is, what was the general object of the insurrection. If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence in legal estimation is high treason; it is an usurpation of the authority of the government; it is high treason by levying war."

[1] U. S. *v.* Hanway, 2 Wall. Jr. 144; and charges of Grier and Kane, JJ., as published in the 6th ed. of this work, §§ 2726 *et seq.*; and in 5 Clark Penn. L. J. Rep. 55. To the same effect is the argument of Judge Brackenridge (Brack. Misc. 495) and Judge Story (1 Story R. 614). Infra, § 1815. See U. S. *v.* Hoxie, 1 Paine, 265; 1 Curtis's Life, 174. Whether such offence is riot see supra, § 1537.

[2] The federal statutes of 1861-2, though greatly deficient in perspicuity, must be construed as making armed resistance to particular laws not treason, but a high misdemeanor, punishable by fine and imprisonment as therein prescribed. Whether these statutes were meant as substitutes for the Act of 1790, or as supplements, they do not on their face show. The probability is that they were drawn in haste to meet particular emergencies of the civil war. It was felt that to hold all persons engaged in countenancing the rebellion to be guilty of treason, and, upon prosecution and conviction, to sentence them to be hung, would, by making the crime national, prevent it from being punishable. Hence to the death penalty was attached an alternative of fine and imprisonment; and then certain forms of modified treason were detached from the general category, and made subject to a lighter punishment. As adding to this confusion may be noticed the Act of March 2, 1867, which deals with conspiracies against the government as continuing to be conspiracies (*i. e.* misdemeanors), even though followed by overt acts. In such cases, the act permits the venue to be laid in any jurisdiction where an overt act was performed, and makes such conspirator responsible for such act when it results naturally from the conspiracy. All that can now be said on this topic is, that when two or more statutes cover the same subject matter, the last in date is to be followed.

[3] Fost. 210; 1 Hale, 131, 133, 149.

ment of such prisoners;[1] or of holding a house by force against the sheriff and *posse comitatus*,[2] is not treason.[3] The offence must be a levying war with the intent to overthrow the government as such, not merely to resist a particular statute, or to repel a particular officer.[4]

If in the distinction just taken there is a material modification of the old English common law, this is to be attributed, not merely to a more humane criminal policy, but to a more enlightened conception of sovereignty. In the old law every administrative act was the act of the sovereign himself. He was supposed to issue every law that was uttered, whether it were a law for the maintenance of his own distinctive authority, or a law for the collection of revenue, or a law for the suppression of vagrants, or a law for the preservation of game. He was regarded as officially present, not merely at the head of his armies, and at the sessions of his courts, where he was spoken of in the old forms as sitting personally, but he was viewed as incarnate in his constables and his revenue officers. Whoever resisted any law, no matter how little it concerned the distinctive maintenance of sovereignty, resisted the sovereign and was guilty of treason. Whoever attacked a constable or a tax collector attacked the sovereign, and was also guilty of treason. But, independently of the fact that offences, widely differing in motive as well as in mischief, were thus arbitrarily grouped and subjected alike to the most agonizing and far-reaching penalties known to the law, it began to be felt that in a constitutional government, in which legislation is directed to a vast number of topics in no way bound up with the existence of sovereignty as such, and in which legislative functions are vested in local subordinate authorities, there are many laws in which the idea of sovereignty as such is in no

[1] 1 Hale, 134; R. *v.* Frost, 9 C. & P. 129.

[2] 1 Hale, 146; Rawle on Constitution, 305.

[3] Ibid. See also cases of Philadelphia rioters, Wh. on Hom. App.; infra, § 1815; supra, § 1537.

"The expression, to 'levy war against the queen,' does not include any insurrection against any private person for the purpose of inflicting upon him any private wrong, even if such insurrection is conducted in a warlike manner." Steph. Dig. C. L. art. 53.

[4] See § 1798. Sir J. Stephen's Dig. C. L. App. to art. 53, tends to the same conclusion, citing Luder's Considerations on the Law of High Treason.

sense embodied. No one, for instance, would seriously contend that a resistance, however forcible, to laws passed by local subordinate authorities is to be regarded as prompted by a determination to wage war upon the sovereign; so that the action of a party of sportsmen in forcibly resisting a law limiting the shooting of game, or of a party of revellers in assaulting a policeman, is an offence of the same heinousness, and fraught with the same perils to the State, as is an armed attempt to overthrow the common supreme government of the land. And even as to general laws, it cannot but be felt that there is an increasing tendency to such a classification of legislation as will separate statutes distinctively relating to government from statutes relating to matters as to which there may be a wide and even a violent difference of opinion without any breach of loyalty to the government as such. Peculiarly is this the case in those jurisdictions in which the common law has been codified. In such jurisdictions many principles of purely private right, with which the sovereign has nothing to do except as arbiter, have been embodied in statutes; and to attempt a forcible resistance to these statutes would, if the old English rule be carried out, be treason. Yet this is no more treason on principle than it would be treason for a party, without process of law, violently to assert an unfounded claim upon another. To do so may be a riot, but it is not a treasonable act; for an attempt to abate a supposed wrong, or to recover a supposed right, is as consistent with the recognition of a *de facto* sovereign as is the attempt to abate such wrong or to recover such right by process of law. That parties should intervene forcibly to arrest the building of a railroad which they hold to be a nuisance may be a grave offence, though whether it be so is to be determined by the sovereign acting through his courts, and this principle they may at the time admit.[1] That parties should resist forcibly an oppressive municipal or state ordinance which they claim to be unconstitutional may be also a grave offence; but this, too, may be in submission to the common Constitution of the land. It is here that we strike the definition of loyalty to the United States, and in this way determine what is the disloyalty which is essential to treason. Loyalty to the United States is loyalty to the Constitution of the United States. Hence

[1] See supra, §§ 1426, 1540.

to assault the President or other high officer, while an indictable offence, is not treason, unless it be part of a plan to overthrow the constitutional government of the land; nor, unless this plan is formed, and the offence charged be one of its overt acts, is it treason to resist by force the execution of a revenue law, or of a quarantine law, or, as has been seen, of a law for the surrender of fugitives. But it is treason to attempt by force the overthrow of the Constitution; and, consequently, it is treason to attempt by force the overthrow of the authority of any one of the three great departments in which the functions of sovereignty are by the Constitution vested. Hence it would be treason against the United States to attempt by force to overthrow the federal executive, or the federal legislature, or the federal judiciary. But it would not be treason to commit a personal injury on any particular executive, or legislator, or judge, or to resist a decree of court, or a statute, or an executive mandate, not essential to the preservation of sovereignty.[1]

[1] The following passages are extracted from an article by Dr. E. A. Freeman in the Fortnightly Review for December, 1879:—

"I was struck the other day by reading in one of our chief periodicals the following statement: 'Under a republic we may have self-government, but there is no loyalty.' The writer went on to add two other antithetical sentences: 'Under an absolute monarchy we may have loyalty, but there is no self-government. Under a democratic despotism there is neither.' Any one of these three statements might serve as a text for a wide range of political reflections. . . . .

"The statement is a little startling; and yet there is no doubt that it is one which would be very largely accepted. It is quite certain that what a great many people mean by loyalty can have no place in a republic; whether it can have any place in a democratic despotism we may forbear to inquire, till we know better what a democratic despotism is. But some of us may perhaps be inclined to think that the thing which many people call loyalty, and which certainly cannot exist in a republic, is a thing which we might very well do without, whether in republics or in monarchies. But the writer whose words I am quoting is clearly not of this way of thinking. What he means by loyalty is something which is to be wished for under any form of government, but which under some forms of government is not to be had. 'It is the great merit of the English Constitution that it is capable of combining the sentiment of loyalty with the principle of self-government.' The loyalty, then, of which the writer speaks is something which in his view is a good thing, something whose presence is one of the distinguishing virtues of the English Constitution, something whose presence is the redeeming feature of absolute monarchy, — whose absence is the weak side of republicanism, to set against its redeem-

§ 1798. If the other constituents of treason exist, it is enough if an armed force be put in motion. It is not necessary that a battle should be actually fought. We have seen that mere counselling armed resistance to government is not indictable as treason, though undoubtedly

Not necessary to treason that battle should be fought.

ing feature. Of the 'democratic despotic' we need not speak, as that seemingly has no redeeming feature at all. The position is that loyalty, loyalty in a good sense, at all events in what the writer deems a good sense, is impossible in a commonwealth. It is therefore something of which the old heroes of Athens and Rome, the later heroes alike of democratic Uri and of aristocratic Bern, were wholly incapable."

He proceeds to show, in a passage too long to extract, that "loyalty" is derived from "legalitas," and that the original meaning of loyalty is duty to law.

"Now, as was just before said, this change of meaning must have had a cause. And it is not hard to see in the history of the times concerned what that cause is. The change of meaning from legalitas to loyalty was simply the index of a gradual change in men's general sentiments which specially marks what are commonly called the Middle Ages. It marks how the idea of law, the idea of duty towards a community owed by every member of that community, was displaced by the idea of personal obligation owed by one man to another man.

"Montesquieu puts forth a truth when he says that honor is the principle of monarchies — not of mere despotisms, whose principle is fear — while virtue is the principle of commonwealths. Montesquieu's way of putting this truth is not the way in which we should put it nowadays; but he has got hold of the truth none the less. And in this sense we cannot deny that the assertion which we set out by quoting is perfectly true. Loyalty in this sense, loyalty to a personal ruler, loyalty whose source is a formal or implied personal promise of fidelity, cannot in strictness exist in a commonwealth. There is no object in a republican government to which this particular kind of feeling can attach itself. The highest republican standard falls back from loyalty to 'legalitas' in the strictest sense.

ὦ ξεῖν', ἀγγειλον Λακεδαιμονίοις ὅτι τῇδε κείμεθα, τοῖς κείνων πειθόμενοι νομίμοις.

Here it is assumed that the highest praise that can be given to self-devotion even unto death is to mark it simply as obedience to the law.

"But though in this, and in other cases like this, there is no room for loyalty in the strict personal sense, there is room for a feeling of exactly the same kind. To the citizen of a commonwealth his city has often become a kind of personal being — the deification of *Roma* is the most highly developed form of this feeling — a being which can call forth a feeling somewhat different from the simple obedience to law, and which comes much nearer to devotion or loyalty to a personal object. In this sense there may be loyalty, even of the personal kind, in a commonwealth. The commonwealth itself may become the object of the same kind of personal feeling as that which in the other case gathers round the personal sovereign. So there may in the same way be, in a secondary sense, loyalty to a cause, to

indictable as sedition. It has also been seen that the doctrine of constructive treason, so far as it makes armed resistance to exe-

a party, to a political leader, to a military commander, a personal feeling of essentially the same kind as loyalty to a sovereign, and quite distinct from simple obedience to law. But in every such case the feeling is dangerous. There is always the fear lest devotion to a party or to a leader may clash with the higher duty to the commonwealth itself. Not a few rebel leaders, from Sulla and Cæsar onwards, have been the objects of a feeling on the part of their followers which, as far as the feeling itself went, must have been very much the same as that of loyalty to a lawful sovereign. It is essentially the same feeling both in its good and its bad side. Loyalty to a party, a leader, a general, just like loyalty to a king, is a perfectly healthy feeling as long as it is kept in check by the higher principle of obedience to law. As soon as it leads to disobedience to the law of the land, much more when it leads to disobedience to the eternal law of right, it has passed from virtue into vice; loyalty has rebelled against 'legalitas.' . . . .

"But now comes the question, Is all loyalty of this kind? Is loyalty in the sense in which the word is most commonly understood loyalty of this kind? Is it a loyalty of this kind which most people would understand in the position that there can be no loyalty in a commonwealth? We have seen that a feeling essentially the same as loyalty in the better sense may exist in a commonwealth, and that the commonwealth itself may be the object of it. But it is equally true that there is another kind of so-called loyalty which cannot exist in a commonwealth, and of which we may surely say that it is one of the good points of a commonwealth that it cannot exist in it. There is a feeling which very largely exists, which I do not for a moment believe is shared by the writer whose words I have taken as a kind of text, but which would certainly affect the sense in which many people would understand his words. Many people would understand the position that there can be no loyalty in a republic as meaning that there can be no political duty in a republic. It may sound strange; but this is really what many people think. They can conceive no object of political devotion, no object even of political duty, except a personal object. They most likely would not put forth this doctrine in so many words; but it is easy to see, from their way of speaking and thinking, that they practically hold it. They would certainly be amazed at the doctrine that loyalty is possible in a commonwealth, because they are amazed at the doctrine that the opposites of loyalty are possible. They cannot understand that there can be treason or rebellion in a commonwealth. . . . .

"The unlucky truth is that into a large number of minds the great ideas of the law and state do not enter at all. Not a few people seem unable to conceive obedience or attachment to anything but a person. The notion of loyalty to a person seems with them to have wholly displaced the notion of duty to the community. One may be inclined to doubt whether a loyalty of this kind would be likely to bear up against any very strong temptations. It may be that, in any hour of trial, a ruler is like to receive the most really loyal support from those who support him as the lawful chief of the State, drawing all his

cution of a special statute, without the design of overthrowing the government, treason, is now abandoned in the United States, and is made a specific offence under distinct legislation. Treason by levying war, therefore, is now to be viewed as limited to putting in operation an armed force with the intent to overthrow the government. But while this is the case, it is not necessary to constitute treason that the armed force should be led to actual battle. Recruiting soldiers or sailors to serve against the government, being now made an independent misdemeanor, can be no longer prosecuted as treason. But if the soldiers so recruited be organized into an army, — if sailors so enlisted be placed on board an armed vessel, fitted with stores and ammunition, — then it is not necessary that a battle should be fought or even attempted, when the object is to aid an existing rebellion. It is not necessary, in case of a naval attempt, that the vessel should even sail. It is enough, if the vessel be prepared for hostile action against the government, or that the army be put in order, ready to march.[1]

Belligerent insurgents not indictable for treason.

§ 1799. It has been already stated that when a sovereign recognizes any portion of his insurgent subjects as belligerents, he cannot prosecute such subjects for treason, so far as concerns acts done by them in due course of war. When belligerency is admitted, his remedy is war according to the rules of civilized military law; and prisoners taken in such a contest are to have the immunities of prisoners of war.[2] Yet a sovereign may recognize certain parts of his ter-

powers from the law of the State. It is quite certain that a great deal that passes for loyalty nowadays, as it is quite different from lawful obedience to the State and its chief, — 'legalitas' in short, — is also quite different from the cavalier loyalty of the seventeenth century. This last, as I have already said, has a taking and ennobling side to it. A great deal of what is now called loyalty is certainly anything but ennobling, and it is hard to conceive the kind of mind to which it can be taking. The strictly civil notion of lawful obedience to the holder of the highest office in the State — the chivalrous or feudal notion of faithfulness to a personal lord — the religious notion of reverence for the Lord's Anointed — seem all alike to have given way to a feeling which cannot be distinguished from mere grovelling worship of rank."

Compare Freeman's Norman Conquest, v. 381, where the distinction between loyalty to a person and loy alty to a principle is historically traced.

[1] See U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457.

[2] See §§ 283–7; though see *contra*, Hammond *v.* State, 3 Cold. (Tenn.) 129. Compare also the course of the United States government in refer-

ritory in a state of belligerent insurrection, and as to other parts refuse such recognition. If such be the case, and if an insurgent subject intrude upon the territory not in insurrection, and there commit illegal acts, there such illegal acts may be prosecuted as treason in the civil courts.[1] And belligerent rights are not to be extended beyond the field to which they are limited. Thus, letters of marque issued by the late Confederate government were held to constitute no defence, in the United States courts, to an indictment for an act of treason; the reason given being that the government of the United States had not then recognized the Confederate government, or its authority to issue letters of marque; though this conclusion is open to grave doubt.[2] And when war ceases, and the recognition of belligerent rights to insurgents is withdrawn, then such rights can no longer be set up by a defendant charged with treason committed subsequent to such withdrawal. He is no longer to be tried by the rules of war. Military prosecutions, so far as he is concerned, can no longer be instituted against him. He can only be proceeded against by indictment in the usual mode.[3]

§ 1800. Belligerent rights, also, when pleaded in the civil courts as a defence, cannot be set up to protect acts which are outside of legitimate warfare. A civil court cannot convict, it is true, an insurgent for acts done by him as a member of an army recognized by the State as belligerent. But should such insurgent, departing from the usages of civilized warfare, engage in private plunder or other outrages, or should he at sea attempt piracy, then his belligerent rights are no defence. "Jede gewaltthätige Handlung aber," says Berner, one of the most authoritative of jurists,[4] after affirming unequivocally the exemption of belligerent insurgents from liability to the civil courts for military acts, "welche die Grenzen des Kriegsrechtes überschreitet, ist als gemeines Verbrechen

Belligerent rights do not protect illegitimate warfare.

ence to the Modocs, in 1873. See supra, § 890.

[1] U. S. *v.* Greathouse, *ut supra*.

[2] U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457. The defendant, however, in this case took advantage of the amnesty; and the question received no final adjudication. See argument of Nelson, J., on trial of Savannah Pirates, p. 371. But compare, *contra*, articles in Atlantic Monthly, July and August, 1872, by Mr. Bolles, solicitor of the navy department, giving the reasons for not prosecuting Semmes.

[3] See Milligan, ex parte, 4 Wall. 2.

[4] Lehrbuch, &c., 1871, p. 513.

aufzufassen." In other words, outrages by belligerent insurgents which overstep the limits of military law, are to be treated as ordinary crimes. This was the rule adopted by the German governments after the insurrection of 1848. It is substantially that which may be extracted from the rulings of our own courts in relation to the late civil war.

2. *Adhering to the Enemies of the United States; giving them Aid and Comfort.*

Clause does not cover aid or sympathy given to a rebellion.

§ 1801. Although rebels engaged in an armed insurrection against the United States are guilty of treason in levying war against the government, yet they cannot be convicted of "adhering to the enemies" of the United States, unless they unite with and sustain a hostile foreign power. A citizen of the United States engaged in rebellion is a subject still, and not an "enemy," in the sense in which the term is used in the Constitution. For this view there are two reasons: First, to treat subjects as "enemies" (*i. e.* powers warring *ab extra* on the State) is to recognize their independence. Secondly, accepting the term "enemy" in the Constitution as judicially construed in the English courts, we must confine the term to foreign hostile States. To this it may be added that to treat individual rebels as "enemies" of the United States, and to make any aid or comfort to such individuals treason, would be, in case of wide-spread revolts, to destroy the distinctive heinousness of true treason, by involving in it, not merely those who levy war on the State, but the whole community which they may temporarily control or influence.[1]

From the Roman law some instruction on this point may be

[1] See U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457. See supra, § 284. To same effect is Judge Curtis's pamphlet on Executive Power; Curtis's Life, i. 566.

In Carlisle *v.* U. S. 16 Wall. 147, Judge Field, who gave the opinion of the court, speaks of the plaintiffs as giving "aid and comfort to the rebellion," and as thus losing a right to sue before the Court of Claims. But this was not an indictment for treason, but simply a civil suit, construing a special act of Congress. Padelford's case, 9 Wall. 531; Klein's case, 13 Wall. 138; Armstrong's case, 13 Wall. 154.

Sir J. Stephen, on the other hand (Dig. Cr. Law, art. 54), holds that "every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the queen. Rebels may be public enemies within the meaning of this article."

drawn. The *crimen majestatis* was complete when a citizen stirred up a foreign war against Rome;[1] or when he gave aid or information to a foreign power waging war against the republic.[2] An inspection of the authorities will show that the "*hostis*" whom it involved a "*crimen maiestatis*" to aid or comfort was a foreign sovereign. To join in an insurrection fell within the *crimen maiestatis*, but this was by distinct provisions couched in language showing that the distinction between a foreign enemy and an insurgent was regarded as fundamental. The insurgent, for instance, was treated by the Lex Julia as a subject who assailed the integrity of the empire, but he was not a *hostis* or foreign enemy. He was a rebellious child, but he was a child still; and the empire haughtily refused to treat him as in any sense an independent power. "Maiestatis autem crimen illud est," says Ulpian, when commenting on the Lex Julia, "quod adversus populum Romanum vel adversus securitatem eius committitur." To recognize disaffected subjects as a foreign enemy would be to recognize the dismemberment of the State. Hence subjects aiding in a rebellion were prosecuted under one line of laws; subjects aiding foreign sovereigns under another line of laws. This distinction the modern Roman law has deepened. "Hochverrath" is, by the German codes, an offence by itself, and includes what in the American constitutions is called levying war against the State. "Landesverrath" is another offence, and includes what in the American constitutions is called aiding the enemies of the State. But aiding rebels cannot be called "Landesverrath," for the State cannot recognize rebels as foreign enemies without losing its right to prosecute them civilly for treason.

[1] Paull. v. 29. 1: "Cuius opere, consilio, adversus imperatorem vel rempublicam arma mota sunt." L. 1. § 1. D. ad leg. Jul. mai.: "quove quis contra rempublicam arma ferat." L. 3. eod.: "L. XII. Tabb. *iubet eum qui hostem concitaverit — capite puniri.*" L. 4. D. eod.: "*Ulce ex amicis hostes populi Romani fiant, cuiusve dolo malo factum erit, quo rex exterae nationis populo Romano minus obtemperet.*" And again: L. Alam. xxv. "*Si homo aliquis gentem extraneam intra provinciam invitaverit.*"

[2] L. 1. D. h. t.: "quive hostibus populi Romani nuntium litterasve miserit, signumve dederit feceritve dolo malo, quo hostes populi Romani consilio iuventur contra rempublicam." L. 4. eod.: "Cuius dolo malo factum dicetur, quo minus hostes in potestatem populi Romani veniant, cuiusve opere dolo malo hostes populi Romani commeatu, armis, telis, equis, pecunia aliave qua re adiuti erunt."

To prosecute them civilly for treason they must be in some sense its subjects; erring subjects, guilty subjects, but subjects whom it refuses to view as having so far thrown off their allegiance as to relieve them from the duties of loyalty to itself, or itself from the duties of paternal government over them.

Otherwise as to aid given by a subject to a hostile foreign State.

§ 1802. When, however, the attack is from a foreign State, then all voluntary assistance yielded by a citizen to such State warring against the United States, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this clause of the Constitution. Therefore, if the citizens of the United States join foreign powers in acts of hostility against this country,[1] or deliver up its castles, forts, or ships of war to its enemies through treachery, or in combination with them; or join the enemy's forces, although no acts of hostility be committed by them;[2] or raise troops for the enemy;[3] or supply them with money, arms, or intelligence,[4] although such money, intelligence, &c., be intercepted and never reach them; or deliver up prisoners and deserters to the enemy;[5] all these are cases of adhering to the enemies of the United States, and the parties are guilty of high treason under the federal Constitution.

Obedience to *de facto* government is a defence.

§ 1803. In England "no person who attends upon the king and sovereign lord of this land for the time being, in his person, and does him true and faithful service o allegiance in the same, or is in other places by his commandment in his wars, within this land or without, is for any such act guilty of treason (even if the king *de facto* should not be king *de jure*")[6] This principle, *mutatis mutandis*, must be recognized as binding in the United States, the statute being part of the common law accepted by us. And this view is strengthened by the fact that no prosecutions were attempted, at the close of the late civil war, against parties for hostile acts committed in obedience to the *de facto* authorities of the South-

[1] Fost. 219; 3 Inst. 10; 1 Hale, 168.

[2] Fost. 218; R. *v.* Vaughan, 2 Salk. 634; 5 St. Tr. 17.

[3] R. *v.* Harding, 2 Vent. 315.

[4] Fost. 217; Smalley, J., 23 Law Rep. 597; U. S. *v.* Pryor, 3 Wash. C. C. 234.

[5] R. *v.* Gregg, 10 St. Tr. Ap. 77; Fost. 198, 217, 218; R. *v.* Hensey, 1 Burr. 642; 2 Ken. 366; R. *v.* Lord Preston, 4 St. Tr. 409, 455; U. S. *v.* Pryor, supra.

[6] Steph. Dig. Cr. L. art. 55; citing 11 Hen. 7, c. 1.

ern States. And, independently of this statute, it is settled that acts compelled by a government *de facto* cannot be afterwards punished by a government *de jure*, when the government *de facto* is deposed. No matter what may be the shape compulsion takes, if it affect the person, and be yielded to *bonâ fide*, it is a legitimate defence.[1] But mere danger to property, when such danger does not touch the person, is not such compulsion.[2] According to the Court of Claims, neither serving in a home guard,[3] nor serving in a fire patrol liable to be called into military service;[4] nor paying duties on goods running the blockade;[5] nor subscribing to the confederation;[6] when done under compulsion, or in the extreme urgency of the times, amounts to "giving aid and comfort to the rebellion." It is otherwise with investing in the stock of companies engaged in blockade running.[7] Nor is it a defence to an indictment for attempting forcibly to seize provisions, outside of the enemy's lines, for the enemy's use, that the defendant promised, under compulsion, to do so when a prisoner.[8]

Home government may punish for political offences abroad.

§ 1804. A sovereign has, by the rules of international jurisprudence, the right to punish his subjects for political offences assailing his sovereignty committed by them abroad; and jurisdiction of this kind has been expressly assumed by the United States.[9]

And so for intra-territorial offences committed by aliens.

§ 1805. An alien, as has been already noticed, owes a local allegiance to the country of his temporary sojourn, so that he may be indicted for treason either in levying war against the local sovereign, or in aiding such sovereign's enemies.[10] And by this rule he may be in-

[1] R. *v.* Gordon, 1 East P. C. 71; Resp. *v.* Chapman, 1 Dall. 53; Miller *v.* Remp. 2 Dall. 1. See supra, § 95.

[2] R. *v.* McGrowther, 1 East P. C. 71.

[3] Miller's case, 4 Ct. of Cl. 288; Ayer's case, Ibid. 429.

[4] Quinby's case, Ibid. 417.

[5] Ibid.

[6] Padelford's case, 4 Ct. of Cl. 316.

[7] Bate's case, Ibid. 569.

[8] U. S. *v.* Pryor, 3 Wash. C. C. 234.

[9] Supra, §§ 281–2.

On this topic will be found some interesting observations of Woodward, J., in Com. *v.* Kunzmann, 41 Penn. St. 429.

[10] Supra, §§ 281–2; R. *v.* McCafferty, 10 Cox C. C. 603; Guinet's case, Wh. St. Tr. 93; U. S. *v.* Villato, 2 Dall. 370; Quarrier, ex parte, 2 W. Va. 569; Carlisle *v.* U. S. 16 Wall. 147. "By allegiance," says Judge Field, in the Supreme Court of the United States, in October, 1872, "is meant the obligation of fidelity and

dicted, under the Constitution of the United States, for treason in aiding even the sovereign of his allegiance in war against his local sovereign.[1] When the offence consists in furnishing in a foreign land, by persons owing allegiance to such foreign land, materials to carry on a treasonable insurrection in our own land, then such persons, so owing allegiance abroad, are not indictable for treason here.[2] Suppose, however, the alien resides in the country of a rebellion, and gives aid and comfort to the rebellion, not himself engaging in an armed insurrection, is such alien indictable for treason? According to the view hereinbefore expressed, since a "rebel," under the Constitution of the United States, cannot be a foreign enemy, we must hold that an alien cannot be indicted for giving such aid and comfort. But

obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, while domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

"This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States, resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President, in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner born residing in a country owes to that country allegiance and obedience to its laws, so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized States, and nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.' Webster's Works, vol. 6, p. 526." Carlisle *v.* U. S. 16 Wall. 147.

[1] R. *v.* Delamotte, 1 East P. C. 53; Guinet's case, Whart. St. Tr. 93; U. S. *v.* Villato, 2 Dall. 370; Carlisle *v.* U. S. 16 Wall. 147. Supra, § 281.

[2] Wh. Confl. of L. §§ 906-9.

in civil issues, when a claim is made against the government for damages, under the special United States statutes organizing the Court of Claims, an alien who gives such aid and comfort cannot be a plaintiff in that court.

3. *Indictment.*

§ 1806. It is not sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying overt acts of levying war.[1] The indictment need do no more than to specify the substance of the words of writings, when these are laid as overt acts.[2] But it has been held sufficient to lay that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.[3]

Overt acts must be laid in indictment.

Overt acts that are improperly laid, or are not proved, can, after verdict, be discharged as surplusage.[4]

"*Traitorously*" is essential to the offence, but need not be repeated at each overt act.[5]

4. *Evidence.*

§ 1807. Before introducing proof of overt acts, it is proper to show a confederacy in which the defendant participated.[6] But the confederacy may be inferred from a series of mutual dependent overt acts and attempts.[7]

Confederacy must be proved.

§ 1808. To sustain a conviction there must be, under the Constitution, "the testimony of two witnesses to the same overt act," or "a confession in open court." There is a marked distinction on this point between the English law and our own. By the Constitution there must be some one particular act proved by two witnesses. In Eng-

Must be two witnesses to same overt act.

[1] 2 Burr's Trial, 400. See Mulcahy *v.* R., L. R. 3 H. L. 306.

[2] R. *v.* Francia, 6 St. Tr. 58, 73; R. *v.* Preston, 4 St. Tr. 409; R. *v.* Watson, 2 Stark. (N. P.) 116.

[3] Resp. *v.* Carlisle, 1 Dall. 35.

[4] Mulcahy *v.* R., L. R. 3 H. L. 306. Supra, §§ 1381–4. Whart. Crim. Ev. § 131.

[5] Whart. Cr. Pl. & Pr. § 257.

[6] R. *v.* Brittain, 3 Cox C. C. 77; though see, as to order of proof in conspiracy, supra, § 1401.

[7] R. *v.* Frost, 9 C. & P. 129; R. *v.* McCafferty, 1 Ir. R. C. L. 363; 10 Cox C. C. 603. Supra, § 1398.

land, it is enough if two distinct though cognate overt acts, in two distinct counties, be proved each by one witness.[1] And one witness to the whole case will suffice in prosecutions which work no corruption of blood.[2] But in the United States one witness, with corroborating circumstances, is sufficient to justify the finding of a bill.[3]

Confessions admissible as corroboration.

§ 1809. Extra-judicial confessions and declarations may be received as corroboration, when an overt act has been proved by two witnesses;[4] and so may unpublished writings by the defendant.[5] Such writings, when expressive and in pursuance of the common design, are evidence against all the conspirators.[6]

Place of overt act has jurisdiction.

§ 1810. The subject of venue has been already fully discussed.[7] It used to be thought that only a county or district where an overt act was committed had jurisdiction, and that unless the defendant was in such place at the time of the overt act, he could not be there tried. This, however, is now abandoned;[8] and a conspirator can be tried in any place where his co-conspirators perform an overt act. To this effect is the act of Congress of March 2, 1867.[9]

No defence that the defendant believed he was exercising a constitutional right.

§ 1811. A person who has a constitutional or legal right to assert must do so by course of law. If he appeals to war for this purpose, and is unsuccessful, he must abide the consequences; for his belief that he was right is no defence to an indictment for such illegal act.[10]

[1] R. *v.* Jellias, 1 East P. C. 130.

[2] R. *v.* Gahagan, 1 Leach C. C. 42; 1 East P. C. 129.

[3] Marshall, C. J., Burr's Trial, 196; Kane, J., U. S. *v.* Hanway, 2 Wall. Jr. 139; *contra*, Iredell, J., Fries's case, Wh. St. Tr. 480. See R. *v.* McCafferty, 1 Ir. R. C. L. 365; 10 Cox C. C. 603. Whart. Crim. Ev. § 380.

[4] Fries's Trial, 171; Whart. Crim. Ev. § 386.

[5] R. *v.* Lord Preston, 4 St. Tr. 409–440; R. *v.* Layer, 6 St. Tr. 272, 280; R. *v.* Hensey, 1 Burr. 642, 644; Resp. *v.* Carlisle, 1 Dall. 35; Resp. *v.* Malin, 1 Dall. 33; Resp. *v.* Roberts, 1 Dall. 39; Whart. Cr. Ev. § 386.

[6] R. *v.* Stone, 6 T. R. 527; 1 East P. C. 79, 99.

[7] Supra, § 287; Whart. Crim. Ev. § 111.

[8] See Ibid.

[9] See supra, § 1356.

[10] Supra, § 88; infra, § 1835. "It may be," said Durfee, C. J., in the Dorr trial, cited in the 6th ed. of this work, § 2777, "that he (the defendant) really believed himself the governor of the State, and that he acted throughout under that delusion. How-

II. TREASON AGAINST THE PARTICULAR STATES.

§ 1812. Treason is undoubtedly a common law offence in each State, aside from constitutional and statutory provisions,[1] and is recognized as having a substantive and independent existence in that clause of the federal Constitution which provides, that if a person accused of treason in any State shall flee from justice, and shall take refuge in another State, he may, on a proper requisition, be delivered up by the executive of the State to which he has fled.

Such treason is an offence at common law.

§ 1813. During, and immediately after the Revolution, convictions for treason against a State were frequent. In Massachusetts, at the time of Shays's rebellion, there were sixteen capital convictions for the crime, though none of the offenders were executed, and very few subjected to any great length of imprisonment. In Pennsylvania five persons have actually suffered death for the offence; all, however, before the close of the Revolution. It never was doubted that prior to the federal Constitution, and during the confederation, each colony could prosecute for treason against itself.

§ 1814. The offence of adhering and giving aid to the enemies of the United States, it has been declared in New York, is not treason against the People of New York, under the Constitution, and is not cognizable, therefore, in the state court.[2] But the constitutions or statutes of several of the States expressly declare treason against the United States to be cognizable in the State as treason against the State.

Does not necessarily include treason against the United States.

ever this may go to extenuate the offence, it does not take from it its legal guilt. It is no defence to an indictment for the violation of any law, for the defendant to come into court and say, 'I thought that I was exercising a constitutional right, and I claim an acquittal on the ground of mistake.' Were it so, there would be an end to all law and to all government. Courts and juries would have nothing to do but sit in judgment upon indictments in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it, and, according to this doctrine, you must acquit." See also U. S. *v.* Robinson, U. S. Circuit Court, Kansas, 1859, reported in the 6th ed. of this work, vol. iii. p. 319.

[1] Resp. *v.* Chapman, 1 Dall. 53; People *v.* Lynch, 11 Johns. 549; Charge on treason, 1 Story R. 614. See supra, §§ 265, 266.

[2] People *v.* Lynch, 11 Johns. 549.

§ 1815. Every interpretative or constructive levying of war, however general, as is maintained by Judge Tucker, in his valuable note on treason,[1] must be and remain an offence against the State, unless the object of levying war be manifestly for some matter of general concern to the United States; and this view was adopted by Judge Story, in charging a grand jury during the Rhode Island disturbance in 1842.[2] It is not enough, it was maintained, that the offence is of a public nature, or of a great and general concern to the citizens of the Commonwealth; but it must be of a general or public nature and concern as it respects the United States and their jurisdiction, to confer jurisdiction on the United States. Were an armed multitude, it was said, arrayed in order of battle, to enter the city of Richmond, destroy all public records of the State, and commit every other possible outrage, aggravated by every atrocious circumstance imaginable, if their intention in so doing should neither be to subvert the Constitution of the United States, nor to effect any object in relation to the federal government, such conduct, though, in the strictest sense, it might amount to treason against the State of Virginia, could never be treason against the United States.[3] And Judge King, when charging a grand jury in Philadelphia, at the time of the Kensington riots, asserted the same distinction still more emphatically. "Where," he said, "the object of a riotous assembly is to prevent by force and violence the execution of any statute of this Commonwealth, or by force and violence to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law; as burning down all churches or meeting-houses of a particular sect, under color of reforming a public grievance, or to release all prisoners in the public jails, and the like, and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason in levying war against the Commonwealth of Pennsylvania." In holding treason to include attacks upon specific classes of society in a body, this eminent judge here expresses views in conflict with those maintained in a prior section.[4] But supposing the offence to

But does include all common law treason against the government except such as is distinctively aimed at the federal authority.

[1] 4 Tucker's Black. App. 21.
[2] 1 Story R. 614.
[3] 4 Tucker's Black. App. 21.
[4] Supra, § 1796.

be directed against the state government, and to amount to a levying of war, then it is treason against the State and not against the United States.

§ 1816. Where, however, as in case of insurrection or rebellion, any State makes application to the United States for such aid as the Constitution guarantees in such cases, if the opposition should extend to the authority thus interposed, the offence becomes treason against the United States.[1]

Otherwise when United States interposes.

§ 1817. Whether express treason against a State, as distinguished from constructive treason, is not also treason against the United States; and whether, if such be the case, it can be punished in a state court, has been the subject of some difference of opinion. "From the nature of the federal Union," said Mr. Edward Livingston, in his introductory report to the Legislature of Louisiana, "a levy of war against one member of the Union is a levy of war against the whole; therefore, it is concluded that treason against the State being treason against the United States, it is to be punished by their laws and in their courts."[2] On this reasoning, the levying war against Rhode Island, which was punished after the Dorr rebellion in a state court as a state offence, was, if not merged in treason against the Union, at least properly and exclusively cognizable in the federal courts; and such is the position advanced with much subtlety by an ingenious writer in the American Law Magazine.[3] But, as will presently be more fully seen, this view cannot be maintained.

Is not absorbed in treason against the United States.

§ 1818. The course of practice adopted at the time of the formation of the federal Constitution, and pursued to the present day, is to recognize levying war against a state as forming a state offence, cognizable in a state court, and punishable by state authority. Thus in Lynch's case, the Supreme Court of New York, while holding open waging of war against the federal government not to be cognizable in a state court, declared that treason against the State "might be committed by an open and armed opposi-

Covers cases of armed attempts to overthrow state government.

[1] 4 Tucker's Black. App. 22. Supra, §§ 265, 266.

[2] Introductory Report, &c., to Criminal Code, 148.

[3] 4 Am. Law Mag. 318.

tion to the laws of the State, or a combination and forcible attempt to overturn or usurp the government."[1] Such was the law laid down by Durfee, C. J., in Dorr's case,[2] and such is the opinion of Judge Tucker, in his Appendix to Blackstone;[3] of Judge Sergeant, in his Treatise on Constitutional Law;[4] of the late learned Mr. Rawle, in his Essay on the Constitution;[5] and of Judge King, in the opinion above quoted. And the assertion of such jurisdiction in the constitutions or penal codes of by far the greater number of the particular States leaves the question practically beyond doubt.

Analogies from foreign jurisprudence.

§ 1819. From England, in this connection, we can receive no light. The British government is a centralization. Wherever the British flag waves, there the British crown nominally, and the British parliament actually, are supreme. Our government, on the other hand, is a confederation of sovereign States; a confederation, it is true, that cedes to the federal government supremacy within an orbit specifically assigned to it, but which leaves all other powers undisturbed to the States. The late civil war settled that no State has a right to withdraw from this confederation, and it led to an amendment to the Constitution conferring on the federal government certain additional powers tending to the securer extension of citizenship to the negro race. But the late civil war left untouched those important clauses of the Constitution which reserve to the several States the residuum of sovereignty after the powers of the general government are carved out. Hence it is that we are to look to the federal systems of Europe for analogies in respect to this branch of the law. Of these systems the old Germanic Empire; the German Bund of 1830; the North German Confederation; the North German Empire; the Swiss Eidgenossenschaft, present illustrations of greater or less pertinency. But whether, in confederate systems, the bonds of confederacy are loose or close, the result in this respect is the same. Treason to the sovereign of the particular State is, as an offence, as definite and as

[1] People *v.* Lynch, 11 Johns. 549. See 1 Kent's Com. *403, note.

[2] See Pitman's Dorr Trial, and extracts from the same, published in the 6th edition of this work, § 2772. See also Quarrier, ex parte, 2 W. Va. 569.

[3] See supra, §§ 1794 *et seq.*

[4] Sergeant's Constitutional Law, 382.

[5] Rawle on the Constitution, 305.

readily cognizable as is treason to the sovereign of the confederation. By the famous resolution of August 18, 1836, the North German Bund resolved that attempted subversions of its Constitution should be regarded as treason; though it was conceded on all sides that treason to the particular States making up that confederation remained a substantive offence; and no one, in the subsequent prosecutions for treason instituted by Prussia, thought of setting up as a defence that treason to the particular State was absorbed in treason to the federal head. Far closer is the fusion of the States composing the present North German Confederacy; but treasons to the sovereigns of Prussia and of Saxony, so far as such treason is aimed at them in their capacities as heads of their particular States, continue to be cognizable in the Prussian and Saxon courts. Each of the Swiss cantons is accustomed to prosecute for political crimes aimed at it individually; yet the Swiss cantons have enacted that it is also treason to aim at the subversion of the Eidgenossenschaft or Confederate League. The principle is as follows: Wherever a particular State in a confederacy has reserved to it the right of prosecuting, in its own name and as against its own peace and dignity, offences committed within its borders; there it has the juridical right to maintain its integrity by prosecuting for treason subjects who attack its political existence. If we apply this test, there can be no question that the right to prosecute for treason against themselves is reserved to the particular States of the American Union. Each of these, not only by its own constitution and laws, but in accordance with repeated recognitions of the federal Supreme Courts, prosecutes, as against its own peace and dignity, all offences except those aimed specifically at the delegated powers of the federal government.

§ 1820. The law as to pleading and evidence in cases of treason has been stated in the sections relating to treason against the United States. Whether there may be accessaries in such cases has been already discussed.[1]

[1] Supra, §§ 224, 1792.

CHAPTER XXXVII.

OFFENCES AGAINST THE POST-OFFICE.[1]

I. Robbery of Mail.
Robbery of the mail is where a mail carrier is robbed by force, § 1823.
All concerned are principals, § 1824.
"Rob" is used as at common law, § 1825.
And so is "jeopardy," § 1826.
II. Embezzlement from Mail.
Letter must have been obtained from post-office, § 1827.
Decoy letter is within statute, § 1828.
Letter must be traced into defendant's hands, § 1828 *a*.
Sufficient if indictment conform to statute, § 1829.
III. Receiving Embezzled Money, etc.
Offence analogous to receiving stolen goods, § 1830.
IV. Posting Indecent Matter.
Posting indecent matter indictable, § 1831.

I. ROBBERY OF MAIL.

Robbery of the mail is where a mail carrier is robbed by force.

§ 1823. The offence of robbing the mail, under the federal statute,[2] is constituted by robbing the carrier of the mail, or other person intrusted therewith, by stopping him on the highway, and demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier.[3]

[1] Under the Revised Statutes the following postal offences are made indictable:—

Enclosing letters with printed matter, § 3887.

Detaining letters, § 3890.

Destroying letters, &c., § 3892.

Posting obscene book, &c., § 3893.

Counterfeiting stamps, &c., § 5413.

Embezzling letter, §§ 5467–8 *et seq.*, 5471.

Robbing carrier, § 5472.

[2] Rev. Stat. § 5472.

[3] U. S. *v.* Hare, 2 Wheeler C. C. 300; 1 Cr. C. C. 82. The same law was recognized by Washington, J., in U. S. *v.* Wood, 3 Wash. C. C. 440, and in U. S. *v.* Bernard, Trenton, 1819. See also U. S. *v.* Aminhisor, 2 Wheeler C. C. xliv.

An indictment for obstructing the U. S. mail does not lie unless the mail was *in transitu*. U. S. *v.* McCracken, 3 Hughes, 645.

The defendant was indicted under the act of Congress for advising, procuring, and assisting a mail carrier to rob the mail; and was found guilty. Upon this finding, the judges of the Circuit Court of North Carolina were

§ 1824. All persons present at the commission of the robbery, consenting thereto, aiding, assisting, or abetting therein, or doing any act which is a constituent of the offence, are principals.[1]

All concerned are principals.

§ 1825. The word "rob," in the statute, is used in the common law sense.[2]

"Rob" is used as at common law.

§ 1826. "Jeopardy," as used in the statute, means a well-grounded apprehension of danger to life, in case of refusal to yield to threats of violence.[3]

And so of "jeopardy."

II. EMBEZZLEMENT FROM MAIL.[4]

§ 1827. To constitute the offence of embezzlement from the mail, the letter must have been obtained from the post-office, or from a letter carrier; after a voluntary delivery to a third person, the letter is no longer under the protection of the laws of the United States; and the act of fraudulently obtaining it from such third person is not punishable under the statute.[5] Where a letteri s delivered to an unauthorized agent, the letter cannot be charged to have been

Letter must have been obtained from post-office.

divided in opinion on the question whether an indictment, founded on the statute for advising, &c., a mail carrier to rob the mail, ought to set forth or aver that the said carrier did, in fact, commit the offence of robbing the mail. The answer to this, it was said by the Supreme Court, as an abstract proposition, "must be in the affirmative. But if the question intended to be put is, whether there must be a distinctive substantive averment of that fact, it is not necessary. The indictment, in this case, sufficiently sets out that the offence has been committed by the mail carrier." U. S. *v.* Mills, 7 Peters, 138.

Upon an indictment for robbing the mail, and putting the person having the custody of it in jeopardy, under the 19th section of the Act of April 30, 1810, c. 262, a sword, &c., in the hands of the robber, by terror of which the robbery is effected, is, within the act, a dangerous weapon, putting the life in jeopardy; though it be not drawn or pointed at the carrier. So a pistol in his hands, by means of which the robbery is effected, is a dangerous weapon; and it is not necessary to prove that it was charged; it is presumed to be so until the contrary is proved. U. S. *v.* Wood, 3 Wash. C. C. 440.

It is not necessary to a conviction, under the 22d section of the act above given, that the carrier of the mail should have taken the oath prescribed by the second section of the Act of 1825, or that the whole mail be taken. U. S. *v.* Wilson, 1 Bald. C. C. 78.

[1] Ibid.

[2] Ibid.

[3] Ibid.

[4] See Rev. Stat. §§ 4046, 5467–8, 5473–7.

[5] U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Mulvaney, 4 Parker C. R. 164.

embezzled. Whether the intent necessary to embezzlement existed, the jury must determine from the evidence.[1]

An errand boy sent by his master for letters, and embezzling one after receiving it, cannot be convicted under this section of embezzlement. The act of Congress does not operate after a delivery has been made.[2]

As a general rule, the detention of a letter which came lawfully into the party's possession is not embezzlement under the act of Congress.[3]

If a clerk in the post-office take a letter containing money from its appropriated place of deposit in the post-office building, with intent to convert its contents to his own use, he is guilty of stealing it from the post-office, under the 22d section of the Act of 3d March, 1825, although it be not removed beyond the building containing the post-office.[4] Under § 5467 of the Revised Statutes a letter carrier may be convicted of having embezzled a letter which was intended to be conveyed by mail and contained an article of value, which letter had been intrusted to him, and had come into his possession as a carrier.[5]

Decoy letter within statute.

§ 1828. A letter containing money, deposited in the mail for the purpose of ascertaining whether its contents would be stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the Post-office Act.[6]

Letter must be traced into defendant's hands.

§ 1828 *a*. On a charge of stealing letters out of the mail by a postmaster or other person, it has been held that the proper course is to call as witnesses the postmasters through whose offices the letters passed or were distributed.[7] When such witnesses are not called, although there may be proof of the mailing of the letters, and that they

[1] U. S. *v.* Sander, 6 McLean, 598; U. S. *v.* Mills, 7 Peters, 138. As to embezzlement generally see supra, §§ 1009 *et seq.*

[2] U. S. *v.* Driscoll, 1 Low. 303; U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Sander, 6 McLean, 598. See U. S. *v.* Pond, 2 Curtis C. C. 265.

[3] U. S. *v.* Thoma, 2 N. J. Law J. 181; 19 Alb. L. J. 482, citing U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Sander, 6 McLean, 598; U. S. *v.* Driscoll, 1 Low. 303.

[4] U. S. *v.* Marselis, 2 Blatch. 108.

[5] U. S. *v.* Pelletreau, 14 Blatch. 126.

[6] U. S. *v.* Foye, 1 Curtis C. C. 364; 4 Stat. at Large, 102. See supra, § 149.

[7] U. S. *v.* Emerson, 6 McLean, 406.

were never received, this is held insufficient for the conviction of any postmaster on the route.[1] But such strictness of proof being in many cases impracticable, the better view is to permit the prosecution to rely on the presumption of regularity of the mails, which, if corroborated by any extrinsic evidence of guilt connecting the defendant with the particular letter, may sustain a conviction.[2]

Sufficient if indictment conform to statute.

§ 1829. An indictment which charges the defendant with unlawfully abstracting a letter containing bank notes from the mail is good, if it alleges that the letter containing bank notes was put into the post-office to be conveyed by post, and came into possession of defendant, as a driver of the mail-stage.[3]

It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, nor to describe the bank notes particularly, enclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid.[4]

It is enough to state that the letter came to the hands of the postmaster, in the words of the statute, without showing where it was mailed, or on what route it was conveyed.[5] But it must be averred that the letter was intended to be conveyed by post.[6]

To convict a person who is employed in the department of stealing a letter, such employment must be distinctly alleged and proved.[7]

It is enough, however, to aver that the defendant was a person employed in one of the departments of the post-office establishment of the United States.[8]

The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid.[9]

It is necessary to lay the property stolen in some person other than the prisoner.[10]

[1] U. S. *v.* Emerson, *ut supra.*

[2] See Whart. Cr. Ev. §§ 835 *et seq.*

[3] U. S. *v.* Martin, 2 McLean, 256.

[4] U. S. *v.* Lancaster, 2 McLean, 431; U. S. *v.* Patterson, 6 Ibid. 466. See U. S. *v.* Sander, 6 Ibid. 598. Ibid.

[6] U. S. *v.* Okie, 5 Blatch. 516.

[7] U. S. *v.* Nott, 1 McLean, 499. See U. S. *v.* Belew, 2 Brock. 280.

[8] U. S. *v.* Patterson, 6 McLean, 466.

[9] U. S. *v.* Foye, 1 Curtis C. C. 364.

[10] Ibid.

A letter carrier may be indicted for larceny of letter at common law.[1]

III. RECEIVING EMBEZZLED MONEY, ETC.

§ 1830. It is an offence under the statute to receive or buy any article that has been stolen from the mail, knowing it to have been so stolen.[2] To show that the article has been stolen, the conviction of the individuals who stole it is sufficient, if the article be identified.[3]

Offence analogous to receiving stolen goods.

When an individual is found in possession of property stolen from the mail, and fails to show how he acquired it, or gives inconsistent or contradictory accounts how he came by it, this, according to the rule expressed elsewhere, may be an inference of guilt.[4]

IV. POSTING INDECENT MATTER.

§ 1831. Congress has constitutional power to pass a statute making it an offence to post indecent matter of any class.[5] Under the statute,[6] which provides that no article or thing "designed or intended for the prevention of conception or procuring of abortion" shall be carried in the mail, and declares guilty of a misdemeanor any person who knowingly deposits, for mailing or delivery, any such article or thing, the defendant, it has been ruled by Benedict, J., cannot show, in defence, that the article deposited in the mail would not, in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to him when he deposited it, it being sufficient that the article, when deposited, was put up in a form, and described in a manner, calculated to insure its use to prevent conception or procure abortion, by any one desiring to accomplish that result and into whose hands it might fall.[7] It was further held that an indictment founded on the same section, which declares it to be a misdemeanor to knowingly deposit in the mail, for mailing or delivery, any advertisement or notice giving information where or

Posting such matter indictable by statute.

[1] Supra, § 959.

[2] U. S. v. Keene, 5 McLean, 509.

[3] Ibid.

[4] Ibid.; Whart. Crim. Ev. § 758.

[5] U. S. v. Bott, 11 Blatch. 346; U. S. v. Heyward, Clifford, J., 1877; compare Jackson, ex parte, 96 U. S. 727.

[6] Act of June 8, 1872 (17 U. S. Stat. at Large, 302), as amended by § 2 of the Act of March 3, 1873 (Ibid. 599, Rev. Stat. § 3893).

[7] See to this point supra, § 119.

of whom any such article or thing may be obtained, if it be shown such a notice was deposited, it is immaterial whether, in fact, the article or thing was at the place designated. Nor is it a defence that the defendant was inveigled to mail the package by a decoy.[1]

[1] Bott *v.* U. S. 11 Blatch. 346.

In this case it was said by Benedict, J.: "The above named defendants were separately indicted, under section 148 of the Act of June 8, 1872 (17 U. S. Stat. at Large, 302), as amended by section 2 of the Act of March 3, 1873 (Ibid. 599), which provides, 'that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, ... shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, ... shall be deemed guilty of a misdemeanor.'

"The first question which it is proposed to consider is, whether, upon an indictment charging the defendant Bott with depositing in the mail a certain powder designed and intended for the prevention of conception or procuring of abortion, he may show, as matter of defence, that the powder which he deposited in the mail would not, in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to the defendant when he made the deposit in the mail. Upon this question my opinion is, that such facts do not constitute a defence. Congress has exclusive jurisdiction over the mails and may prohibit the use of the mails, for the transmission of any article. Any article of any description, whether harmless or not, may, therefore, be declared contraband in the mail by act of Congress, and its deposit there be made a crime. But the protection of the mails is the limit of the power of Congress over the matter in question, and the words of the statute under consideration must be construed with reference to this limitation. The prevention of abortion in the several States is not within the power which, under the Constitution, belongs to the United States. That duty is upon the States. It cannot, therefore, be thought, that Congress proposed, by the words 'designed or intended for the prevention of conception or procuring abortion,' to make the intent to prevent conception or to procure abortion an element of an offence against the United States. These words, consequently, should not be considered as intended to describe the intent which must be an element of the crime against the United States, but simply as descriptive of the article made contraband; and the phrase must be understood to indicate as contraband in mail, any article or thing designed, in a manner calculated to secure its use by any

It has been determined, however, by Judge Dillon, in the construction of the same statute, that a sealed letter, written by the defendant and addressed to a person who, in fact, has no existence, and which *on its face* imparts no information of the prohibited character, and which is brought within the statute only by the fictitious letter of inquiry of a detective, is not a "giving of information" within the meaning of the statute. The distinction between the ruling of Judge Dillon and that of Judge Benedict, as above given, may be sustained on the ground that the clause "giving of information," in the statute, does not qualify the transmission of drugs, as it does that of books or writings.[1]

one, for the purpose of preventing conception or procuring abortion. The crime against the United States relates only to matter in the mails. The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits. The evidence of the crime is, therefore, complete, when the act and the knowledge is shown. Whether the article would, in reality, accomplish the result represented to be its effect, or whether the defendant desired or expected such a result, thus appears immaterial.

"If this view of the law be correct, evidence tending to show the harmless character of the powders, and, also, evidence that the powders were known to the defendant to have been ordered of him by a man, and for the purpose of obtaining evidence on which to base a prosecution, and were made harmless in order to dupe, was properly excluded. If such facts were shown, it would still be true, that the defendant deposited in the mail powders which have been found to be put up in a form, and described in a manner, calculated to insure their use, for the prevention of conception, by any one desiring to accomplish that result, and into whose hands they might fall.

"A similar question arises under the indictment against Whitehead, which charges the deposit of an advertisement or notice giving information where and of whom certain of the articles made contraband by the statute could be obtained. The evidence showed the deposit of a notice stating that certain articles contraband by the statute could be obtained at a designated place. This being shown, whether in point of fact the information in the notice was true, and whether such articles were at the place designated, is of no consequence."

As to attempts to commit offences with inadequate means see supra, § 183. That it is no defence that the defendant was led to the act by a decoy, in cases of offences against the public, see supra, § 149. The main point ruled is that the offence of posting indecent matter was one against the public, in which it is enough if the thing posted is apparently of the character prohibited.

[1] After stating the law with regard to decoys (see supra, § 149), Judge

Dillon, in his opinion, thus proceeds: —

"It is not certain that Congress intended to punish such an act, and, therefore, upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality. 1 Bish. Cr. Law (5th ed.), § 262. In this respect the case falls within the principle strikingly illustrated by Rex *v.* McDaniel, Foster, 121; S. C., 2 East P. C. 665. In order to prevent misconception of the decision now made, it may be proper to add that we only decide the narrow and single point that the letter written and deposited by the defendant did not give the prohibited information, and hence is not within the statute. It would present a different case for consideration, if the letter, written and deposited by the defendant, had been capable, into whosesoever hands it might have fallen or come, of imparting the prohibited information. We do not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws, but recognize the doctrine that such letters may be so used. We only decide that the defendant, by his answer to the decoy letter, did not, under the special circumstances of the case, bring himself within the criminal prohibition of the act of Congress. It would also present a different case if the letter of inquiry had been written by some person actually seeking the prohibited information for immoral purposes, although written under an assumed name, and the defendant had mailed such a letter as he actually wrote and deposited in this case. Congress has not, and probably cannot make the business in which it is claimed the defendant is engaged, namely, of furnishing to whoever may apply therefor the means of preventing conception, to procure abortion, &c., illegal and punish the same; but the State of Missouri may do so. If the State has done so, and the defendant is suspected of being engaged in the illegal business, undoubtedly decoy letters may be used for the purpose of discovering his violation of the law, as the cases above cited show. And if, in answer to a decoy letter, the prisoner deposits in the mail any written or printed card, circular, &c., which on its face gives information of the prohibited character, there is nothing in this decision which precludes us from holding such a case, if it should arise, to be within the act of Congress." U. S. *v.* Whittier, 6 Reporter, 260.

It may be objected to this view: (1.) that consent cannot legalize an offence against public morals (supra, § 142); and (2.) that to exclude the evidence of decoys in such cases is to make the statute inoperative, which could not have been intended by the legislature when establishing the offence.

CHAPTER XXXVIII.

ABUSE OF ELECTIVE FRANCHISE.

Offence equivalent to fraudulent usurpation, § 1832.

I. Illegal Voting.
- No defence that election was voidable, § 1833.
- No merger in perjury, § 1834.
- Ignorance of disqualification no defence, § 1835.

II. Indictment against Voter.
- Indictment must aver election, § 1836.
- Must specify disability, § 1837.
- Double voting to be specified, § 1838.
- Statutory terms must be used, § 1838 *a*.

III. Indictment against Officers.
- Usurpation of office indictable, § 1838 *b*.
- Defendants cannot be joined, § 1839.
- Indictment may be single, § 1840.
- Fraud or breach of duty must be specially averred and proved, § 1841.
- U. S. marshal limited by statute, § 1841 *a*.
- Duty must be specified, § 1842.
- Office to be averred, § 1843.
- And so of *scienter*, § 1844.

IV. Evidence.
- Sufficient to prove officer to be acting as such, § 1845.
- Where there is discretion, no liability for errors of judgment, § 1846.

V. Attempt.
- Attempt is at common law indictable, § 1847.

VI. Bribery by Candidates.
- Corruption by candidates indictable, § 1848.

Offence equivalent to fraudulent usurpation of sovereignty.

§ 1832. In a country based on popular elections, abuse, by force or fraud, of the elective franchise, is an offence against government; and is to be punished on the same principle as by the English common law and the Roman common law are punished forcible or fraudulent usurpations of executive sovereignty. The common law offence, however, in the United States, has given way to statutes imposing specific penalties on misconduct of this class; statutes which are multitudinous and diverse, and which have received adjudications difficult to classify, from this very diversity of subject matter. Premising that most of the questions that thus arise have been already incidentally noticed, the points which meet us most frequently may be thus divided: —

I. ILLEGAL VOTING.

§ 1833. Illegal voting at a void election would be indictable as an attempt, if such election was *primâ facie* valid.[1] Clearly mere curable irregularities would not purge the act of its criminality.[2]

No defence that election was voidable.

§ 1834. The voting, and the falsely swearing to the voter's qualifications, are distinct offences; and the one cannot be held to merge in the other.[3]

No merger in perjury.

§ 1835. For an unqualified person to vote is a misdemeanor at common law.[4] He has no right to usurp an office to which he is not entitled, and conscientious belief that he is entitled goes to sentence and not to verdict. Hence, when such an act is made a misdemeanor by statute, irrespective of intent, it is no defence that the defendant believed himself entitled to vote.[5] And even where the statute requires

Ignorance of disqualification no defence.

[1] See supra, §§ 181–185.

[2] State *v.* Bailey, 21 Me. 62; State *v.* Cohoon, 12 Ired. 178. See supra, §§ 1263, 1282. For offences of this class see U. S. Rev. Stat. §§ 5506 *et seq.*

[3] Steinwehr *v.* State, 5 Sneed, 586.

[4] See supra, § 84. See, however, State *v.* Liston, 9 Humph. 603; Gordon *v.* State, 52 Ala. 308. Compare, as bearing on this point, R. *v.* Price, 3 P. & D. 421; 11 A. & E. 727. As to right of idiots and lunatics see Clark *v.* Robinson, 88 Ill. 498.

[5] U. S. *v.* Anthony, 11 Blatch. 200; Minor *v.* Happersett, 53 Mo. 58; and see supra, § 84. But see *contra*, Com. *v.* Bradford, 9 Met. 268.

In U. S. *v.* Anthony, supra, we have from Hunt, J., the following valuable exposition of the law on this topic:—

"The defendant is indicted under the Act of Congress of May 31, 1870, for having voted for a representative in Congress, in November, 1872. Among other things, that act makes it an offence for any person knowingly to vote for such representative without having a lawful right to vote. It is charged that the defendant thus voted, she not having a right to vote, because she is a woman. The defendant insists that she has a right to vote; and that the provision of the Constitution of this State, limiting the right to vote to persons of the male sex, is in violation of the fourteenth amendment of the Constitution of the United States, and is void.

"The thirteenth, fourteenth, and fifteenth amendments were designed mainly for the protection of the newly emancipated negroes, but full effect must, nevertheless, be given to the language employed. The thirteenth amendment provides, that 'neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.' If honestly received and fairly applied, this provision would have been enough to guard the rights of the colored race. In some States it

the conditions "knowingly and fraudulently," it is no defence that the defendant acted under advice of others, if such advice

was attempted to be evaded by enactments cruel and oppressive in their nature — as, that colored persons were forbidden to appear in the towns, except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the fourteenth and fifteenth amendments were enacted.

"The fourteenth amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some State. No mode existed, it was said, of obtaining a citizenship of the United States, except by first becoming a citizen of some State. This question is now at rest. The fourteenth amendment defines and declares who shall be citizens of the United States, to wit: 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification, every person born in the United States or naturalized, is declared to be a citizen of the United States and of the State wherein he resides.

"After creating and defining citizenship of the United States, the fourteenth amendment provides, that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' This clause is intended to be a protection, not to all our rights, but to our rights as citizens of the United States only; that is, to rights existing or belonging to that condition or capacity. The expression, citizen of a State, used in the previous paragraph, is carefully omitted here. In art. 4, § 2, subdivision 1, of the Constitution of the United States, it had been already provided, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' The rights of citizens of the States and of citizens of the United States are each guarded by these different provisions. That these rights are separate and distinct was held in the Slaughter-house Cases, 16 Wallace, 36, recently decided by the Supreme Court. The rights of citizens of the State, as such, are not under consideration in the fourteenth amendment. They stand as they did before the adoption of the fourteenth amendment, and are fully guaranteed by other provisions. The rights of citizens of the States have been the subject of judicial decision on more than one occasion. Corfield *v.* Coryell, 4 Wash. C. C. R. 371; Ward *v.* Maryland, 12 Wallace, 418, 430; Paul *v.* Virginia, 8 Wallace, 168. These are the fundamental privileges and immunities belonging of right to the citizens of all free governments, such as the right of life and liberty, the right to acquire and possess property, to transact business, to pursue happiness in his own manner, subject to such restraint as the government may adjudge to be necessary for the general good. In Crandall *v.* Nevada, 6

was in point of law wrong.[1] So, no matter how honest the belief of a person that he is entitled to vote twice, at two distinct

Wallace, 35, 44, is found a statement of some of the rights of a citizen of the United States, namely, to come to the seat of government to assert any claim he may have upon the government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, and to have free access to its seaports, through which all the operations of foreign commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States. 'Another privilege of a citizen of the United States,' says Mr. Justice Miller, in the Slaughter-house Cases, 'is to demand the care and protection of the federal government over his life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government.' 'The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*,' he says, 'are rights of the citizen guaranteed by the federal Constitution.'

"The right of voting, or the privilege of voting, is a right or privilege arising under the Constitution of the State, and not under the Constitution of the United States. The qualifications are different in the different States. Citizenship, age, sex, residence, are variously required in the different States, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the State where he offers to exercise it, and not because of citizenship of the United States. If the State of New York should provide that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the Constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of an intelligent State; but, if rights of a citizen are thereby violated, they are of that fundamental class, derived from his position as a citizen of the State, and not those limited rights belonging to him as a citizen of the United States; and such was the decision in Corfield *v.* Coryell.

"The United States rights appertaining to this subject are those, first, under article 1, § 2, subdivision 1, of the United States Constitution, which provides that electors of representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature; and second, under the fifteenth amendment, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or

[1] U. S. *v.* Anthony, supra, § 84; McGuire *v.* State, 7 Humph. 54; State *v.* Hart, 6 Jones (N. C.), 389; State *v.* Boyett, 10 Ired. 336. Under the Rhode Island statute, using the term *fraudulently*, honest belief is a defence. State *v.* Macomber, 7 R. I. 349. The Mass. Stat. requires that the defendant must vote "*knowing himself not to be a qualified voter*," which knowledge, therefore, is essential to the offence. Com. *v.* Bradford, 9 Met. 268. See State *v.* Sheeley, 15 Iowa, 404.

places, he is rightfully convicted, if he so vote, under a statute which makes the naked act indictable, irrespective of intent.[1]

by any State, on account of race, color, or previous condition of servitude.' If the Legislature of the State of New York should require a higher qualification in a voter for a representative in Congress than is required for a voter for a member of the House of Assembly of the State, this would, I conceive, be a violation of a right belonging to a person as a citizen of the United States. That right is in relation to a federal subject or interest, and is guaranteed by the federal Constitution. The inability of a State to abridge the right of voting on account of race, color, or previous condition of servitude, arises from a federal guarantee. Its violation would be the denial of a federal right — that is, a right belonging to the claimant as a citizen of the United States. This right, however, exists by virtue of the fifteenth amendment. If the fifteenth amendment had contained the word 'sex,' the argument of the defendant would have been potent. She would have said, that an attempt by a State to deny the right to vote because one is of a particular sex is expressly prohibited by that amendment. The amendment, however, does not contain that word. It is limited to race, color, or previous condition of servitude. The Legislature of the State of New York has seen fit to say, that the franchise of voting shall be limited to the male sex. In saying this, there is, in my judgment, no violation of the letter, or of the spirit, of the fourteenth or of the fifteenth amendment.

"This view is assumed in the second section of the fourteenth amendment, which enacts, that if the right to vote for federal officers is denied by any State to any of the male inhabitants of such State, except for crime, the basis of representation of such State shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a State, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby conceded to the States as a State's right.

"The case of Bradwell *v.* The State, 16 Wallace, 130, decided at the recent term of the Supreme Court, sustains both of the positions above put forth, viz., first, that the rights referred to in the fourteenth amendment are those belonging to a person as a citizen of the United States and not as a citizen of a State; and second, that a right of the character here involved is not one connected with citizenship of the United States. Mrs. Bradwell made application to be admitted to practise as an attorney and counsellor at law in the courts of Illinois. Her application was denied, and, upon a

[1] State *v.* Williams, 25 Me. 561; State *v.* Perkins, 42 Vt. 399; State *v.* Welch, 21 Minn. 22. See Hamilton *v.* People, 57 Barb. 625. See Com. *v.* Silsbee, 9 Mass. 417.

In California it has been held that drunkenness is a defence to an indictment for double voting; People *v.* Harris, 29 Cal. 678; a decision which may lead "repeaters" to get drunk before they "repeat."

For, by statute, as well as by common law, the electoral franchise, as has just been said, is an office; and a person usurping

writ of error, it was held by the Supreme Court, that, to give jurisdiction under the fourteenth amendment, the claim must be of a right pertaining to citizenship of the United States, and that the claim made by her did not come within that class of cases. Justices Bradley, Swayne, and Field held that a woman was not entitled to a license to practise law. It does not appear that the other judges passed upon that question. The fourteenth amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of law.

"If she believed she had a right to vote, and voted in reliance upon that belief, does that relieve her from the penalty? It is argued, that the knowledge referred to in the act relates to her knowledge of the illegality of the act, and not to the act of voting; for it is said that she must know that she voted." The remainder of the charge is given supra, § 84.

According to the report upon the foregoing ruling, the counsel for the defendant requested the court to submit the case to the jury on the question of intent, and with the following instructions: (1.) If the defendant, at the time of voting, believed that she had a right to vote, and voted in good faith in that belief, she is not guilty of the offence charged. (2.) In determining the question whether the defendant did or did not believe that she had a right to vote, the jury may take into consideration, as bearing upon that question, the advice which she received from the counsel to whom she applied, and, also, the fact, that the inspectors of the election considered the question, and came to the conclusion that she had a right to vote. (3.) The jury have a right to find a general verdict of guilty or not guilty, as they shall believe that the defendant has or has not committed the offence described in the statute.

The court declined to submit the case to the jury on any question, and directed the jury to find a verdict of guilty. A request by the defendant's counsel, that the jury be polled, was denied by the court, and a verdict of guilty was recorded. On a subsequent day, a motion for a new trial was made on the part of the defendant.

Hunt, J. (in denying the motion), said, in substance: —

"The whole law of the case has been reargued, and I have given the best consideration in my power to the arguments presented. But for the evident earnestness of the learned counsel for the defendant, for whose ability and integrity I have the highest respect, I should have no hesitation. Still I can entertain no doubt upon any point in the case. I do not doubt the correctness of my decision, that the defendant had no right to vote, and that her belief that she had a right to vote, she knowing all the facts and being presumed and bound to know the law, did not relieve her from the penalty for voting, when in truth she had no right to vote.

"The learned counsel insists, however, that an error was committed in directing the jury to render a verdict of guilty. This direction, he argues, makes the verdict that of the court and not of the jury, and it is contended that the provisions of the Constitution looking to and securing a trial by jury in criminal cases have been violated.

"The right of trial by jury in civil as well as in criminal cases is a constitutional right. The second section of the first article of the Constitution

such office, no matter how honestly, is liable to penal prosecution, unless the statute expressly excepts cases of "honest intent."[1]

of the State of New York provides that 'the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever.' Articles six and seven of the amendments to the Constitution of the United States contain a similar provision. Yet, in cases where the facts are all conceded, or where they are proved and uncontradicted by evidence, it has always been the practice of the courts to take the case from the jury and decide it as a question of law. No counsel has ever disputed the right of the court to do so. No respectable counsel will venture to doubt the correctness of such practice, and this in cases of the character which are usually submitted to a jury. People *v.* Cook, 4 Selden, 67; Godin *v.* Bank of Com. 6 Duer, 76. The right of a trial by jury in a criminal case is not more distinctly secured than it is in a civil case. In each class of cases this right exists only in respect of a disputed fact. To questions of fact the jury respond. Upon questions of law, the decision of the court is conclusive, and the jury are bound to receive the law as declared by the court. People *v.* Bennett, 49 N. Y. 137, 141. Such is the established practice in criminal as well as in civil cases, and this practice is recognized by the highest authorities. It has been so held by the former Supreme Court of this State, and by the present Court of Appeals of this State.

"At a Circuit Court of the United States, held by Judges Woodruff and Blatchford, upon deliberation and consultation, it was decided, that, in a criminal case, the court was not bound to submit the case to the jury, there being no sufficient evidence to justify a conviction, and the court accordingly instructed the jury to find a verdict of not guilty. U. S. *v.* Fullerton, 7 Blatchf. C. C. R. 177. The district attorney now states that, on several occasions since he has been in office, Judge Hall, being of opinion that the evidence did not warrant a conviction, has directed the jury to find a verdict of not guilty.

"In the case of People *v.* Bennett, 49 N. Y. 137, 141, the Court of Appeals of the State of New York, through its chief justice, uses the following language: 'Contrary to an opinion formerly prevailing, it has been settled that the juries are not judges of the law, as well as the facts, in criminal cases, but that they must take the law from the court. All questions of law during the trial are to be determined by the court, and it is the duty of the jury to regard and abide by such determination. . . . . I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal, and enforce the direction, nor why it is not the duty of the court to do so. This results from the rule, that the jury must take the law as adjudged by the court, and I think it is a necessary result.'

"In these cases the question, in each instance, was, whether the court had power to direct a verdict of not guilty to be rendered. But the counsel for defendant expressly admits that the authority which justifies a direction to acquit will, in a proper case, justify a direction to convict; that it is a question of power; and that, if the

[1] See supra, §§ 84, 1812.

If "honest intent" and "mistake of law" will excuse a person

power may be exercised in favor of the defendant, it may be exercised against him. As I now state this proposition, the counsel again signifies his assent. The reason given by Chief Justice Church, in the case just cited, shows that there is no distinction between the cases in this respect. He says the rule results from the principle, that the jury must take the law from the court. The duty of the jury to take the law from the court is the same, whether it is favorable to the defendant or unfavorable to him.

"It is laid down in Colby on Criminal Law, c. 12, § 125, that no jury shall in any case be compelled to give a general verdict, so that they find the facts and require the court to give judgment thereon. 2 R. S. 421, § 68. 'A special verdict is given when the jury find certain facts to exist, and leave the court to determine whether, according to law, the prisoner is guilty.' 'It is not necessary that the jury should, after stating the facts, draw any legal conclusion. If they do so, the court will reject the conclusion as superfluous, and pronounce such judgment as they think warranted by the facts.' Colby, c. 12, § 125.

"All the authorities tend to the same result. It is the duty of the jury to act upon the facts. It is the duty of the court to decide the law. The facts being specially found by the jury, it is the duty of the court, and not of the jury, to pronounce the judgment of guilty or not guilty. The facts being fully conceded, it is the duty of the court to announce and direct what the verdict shall be, whether guilty or not guilty. Therefore, I cannot doubt the power and the duty of the court to direct a verdict of guilty, whenever the facts constituting guilt are undisputed.

"In the present case, the court had decided, as matter of law, that Miss Anthony was not a legal voter. It had also decided, as matter of law, that, knowing every fact in the case, and intending to do just what she did, she had knowingly voted, not having a right to vote, and that her belief did not affect the question. Every fact in the case was undisputed. There was no inference to be drawn or point made on the facts, that could, by possibility, alter the result. It was, therefore, not only the right, but it seems to me, upon the authorities, the plain duty, of the judge to direct a verdict of guilty. The motion for a new trial is denied."

The defendant was thereupon sentenced to pay a fine of $100 and the costs of the prosecution.

An elaborate criticism on this ruling, by the late Professor Green, will be found in 2 Green's Crim. Law Rep. 215. From this criticism the following cases are extracted: —

The case of R. *v.* Tewkesbury, L. R. 3 Q. B. 629 (1868), was this: At the election of town councillors in Tewkesbury, there were four vacancies and five candidates. One Blizzard was a candidate and was one of the four who had a majority of votes, but he was at the same time the mayor and returning officer, and was therefore legally disqualified as a candidate. The question before the court was, were the votes given for him to be considered as mere nullities, the law having been settled by previous decisions that votes given for an incapacitated person, *with knowledge* of the incapacity, are to be treated as not having been given at all. The knowledge that Blizzard was the mayor and returning officer was clearly brought home to every voter, and it was con-

illegally voting for President of the United States, "honest intended that "therefore every one was bound to know that in law he was disqualified. *Ignorantia juris quod quisque scire tenetur, neminem excusat.*" But the court held the contrary, — Blackburn, J., saying: "It is therefore necessary to decide whether the mere knowledge of the fact that Blizzard was the mayor and returning officer must be taken to involve knowledge of his being disqualified for election. [Did the mere knowledge of the defendant in this case in the text, that she was a woman, involve the knowledge that she was disqualified to vote?] Every elector in the borough must have known that Blizzard was the mayor, and every elector who saw him presiding at the election must have known as a fact that he was the returning officer, and every elector who was a lawyer, and who had read the case of Reg. *v.* Owens, 2 El. & El. 86, would know that he was disqualified. From the knowledge of the fact that Blizzard was mayor and returning officer, was every elector bound to know as matter of law that he was disqualified? I agree that ignorance of law does not excuse. But I think that in Martindale *v.* Falkner, 2 C. B. 719, Maule, J., correctly explains the rule of law. He says: 'There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.' In Jones *v.* Randall, Cowp. 38, 40, Dunning, *arguendo*, says: 'The laws of this country are clear, evident, and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity.' But Lord Mansfield, in delivering the judgment of the court, says: 'As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is even in the last resort.' It was a necessary ground of the decision in that case, that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. In Reg. *v.* Coaks, 3 El. & B. pp. 253, 254, Lord Campbell, C. J., says: 'Blake was, in fact, a candidate, but he was an alderman, and therefore ineligible, and that fact was known to the electors. Now it is the law, both the common law and the parliamentary law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for the man in the moon.' It seems to me that Lord Campbell's opinion was this: 'The reason why the vote given for a dead man is not to be counted is that the voter knowingly votes for a person whom he knows to be incapable of election, and therefore the result is the same as if he had not voted at all.'

"Voting for a dead man, or for the man in the moon, are expressions showing that, in order to make the vote a nullity, there must be wilful persistence against actual knowledge. But it does not seem to me consistent with either justice, or common sense, or common law, to say that because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance, and that therefore their votes are to be considered as mere nullities." Lush, J., in

tent " and " ignorance of the law " will excuse a person usurping

the same case, said: " A maxim has been cited which, it has been urged, imputes to every person a knowledge of the law. The maxim is, *Ignorantia legis neminem excusat;* but there is no maxim which says that, for all intents and purposes, a person must be taken to know the legal consequences of his acts."

The case of Buckmaster *v.* Reynolds, 13 Com. B. N. S. 62 (1862), was an information under 18 & 19 Vict. c. 120, which enacts that " If any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this act, or forge, or in any way falsify, any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or by any contrivance attempt to obstruct or prevent the purposes of any such election, the person so offending shall, on conviction, be liable," &c. The information charged that the defendant " did by a certain contrivance, to wit, by riotously forcing himself into the place . . . . preventing the free access of the rate-payers to such place, and endeavoring forcibly to take possession of the balloting-box, ... attempt to obstruct such election." It appeared in evidence, that " towards the close of the poll, it was well known that the red party was in a hopeless minority. About a quarter before eight o'clock, — the time for closing the poll being eight o'clock — the defendant, who was a man of influence with the red party, was heard threatening outside the place where the poll was being taken, — ' Come on; I know the law. It is past eight o'clock. It is now an open vestry. I want them to give me in charge.' Thereupon, the defendant, at the head of a large number of people, forced his way into the room where the poll was being taken, pushing aside the constables, and throwing his legs over the table on which the balloting-box was placed. About thirty other persons of his party followed him into the room. It became necessary to remove the balloting-box to a distant part of the room. By reason of the defendant's violence, the polling was suspended for about ten minutes, during which it was impossible for any rate-payers to tender their votes." It was contended " by the complainant that any intentional obstruction of the voting by actual violence was an offence " against the statute. " The magistrate thought that it was not an offence within the meaning of the statute, and thereupon dismissed the complaint. The question for the opinion of the court [as reported to them by the magistrate] was, whether an intentional obstruction of the voting at such an election, by actual violence, is an offence " within the meaning of the above quoted section of the statute. Erle, C. J., after recapitulating the facts, said: " Upon these facts the magistrate puts to us the general question I have before mentioned. My answer to it is [in the affirmative, in the wide and general words which are put before me. It seems to me that if a man, with intention to obstruct the voting, uses violence, he is as much guilty of an offence within the act as if he personated a voter or forged a voting-paper. That is the best opinion I can form upon the materials before me. I therefore send back the case to the magistrate with that answer; but accompanying it by a statement that, upon the facts set forth, I am unable to see that he has come to a wrong conclusion. A man

the office of President of the United States. Usurpation, therefore, would cease to be penal when it becomes fanatical.[1]

II. INDICTMENT AGAINST VOTER.

Indictment must aver election.

§ 1836. Following the analogies of perjury, we can well understand why the old English precedents, in cases of illegality at elections, should set out all the preliminary procedure under which the election was held.[2] But as in perjury, the practice, except in one or two juris-

cannot be said to be guilty of a delict unless to some extent his mind goes with the act. Here it seems that the respondent acted in a belief that he had a right to enter the room, and that he had no intention to do a wrongful act." Williams, J.: "I am of the same opinion." Byles, J.: "I entirely agree with my lord, that there is no ground for saying that the magistrate came to a wrong conclusion. Believing it to be past eight o'clock, and therefore that the vestry was an open one, the respondent forced himself into the room where the voting was going on, and thereby prevented and obstructed the polling. I quite agree that there may be a contrivance to do such an act by violence. But if he did it under a misapprehension of his right, the respondent would not be intending by violence to obstruct or prevent the purposes of the election." Keating, J.: "I am of the same opinion. I see no reason for saying that the magistrate came to a wrong conclusion upon the facts. If the question he intended to put to us was, whether 'contrivance' in the statute is to be confined to cases in which there is an absence of violence, I must say I see nothing in the enactment to so confine it. There may be a contrivance, part of which consists in a resort to violence. But a mere act of obstruction, in the belief that the polling was over, would not amount to the offence charged." Decision affirmed.

[1] As disputing this view, see Com. *v.* Aglar, Thach. C. C. 412; Brightly's Elect. Cas. 695; and Com. *v.* Wallace, Thach. C. C. 592; Brightly's Elect. Cas. 703. A decision above given (People *v.* Harris, 29 Cal. 678; Brightly's Elect. Cas. 703), apparently to the effect that ignorance of fact is a defence to an indictment for double voting, may be explained, partly by peculiarities in the California statute, and partly by the fact that the defendant was stupidly drunk at the time of the wrong done, and was consequently an unconscious tool in the hands of others who were the real criminals.

It has been held in Alabama, in opposition to the views in the text, that a minor, honestly believing he is of age, is not liable to an indictment for illegal voting. Gordon *v.* State, 52 Ala. 308; Carter *v.* State, 55 Ala. 181; *sed quære.*

In R. *v.* Bent, 1 Den. C. C. 157, it was held that to falsely personate a voter at a *municipal* election is not indictable at common law; *sed quære.*

[2] This seems to have been held requisite as late as R. *v.* Bowler, C. & M. 559; 6 Jur. 287; and other cases of false swearing at elections; which, however, are not strictly in point, — the element of perjury being distinctively indictable. See Cole on Crim. Inform. 2d Part, 187.

dictions, has been to dispense with such great particularity,[1] so we may apply these rulings to offences at elections, especially when such are held under general laws. To this point, indeed, there is direct authority, showing that it is enough to allege that the offence was committed at a general election lawfully held according to law, stating when and where the election was held and what it was for.[2]

§ 1837. Where the indictment is for voting when disqualified, under a statute which enumerates certain causes of disqualification, the defendant should be specially averred to be within such disqualifying clauses.[3] The same rule applies to unlawfully counselling a disqualified person to vote.[4] But at common law, and under statutes which do not discriminate between disqualifications, it is enough to aver generally that the defendant was disqualified and incompetent.[5]

Must specify disability.

§ 1838. Where a statute makes simply casting two votes indictable, it is sufficient to allege the casting of two votes.[6] But where voting *in two places* is made indictable, the indictment must designate the places.[7]

Double voting to be specified.

§ 1838 *a*. Where the statute qualifies the offence by requiring a particular intent, this intent must be averred. Thus in England, where "wilfully" making a false answer, &c., is indictable, the term "wilfully" must be used.[8]

Statutory terms must be used.

[1] See supra, § 1294.

[2] State *v.* Bailey, 21 Me. 62; State *v.* Boyington, 56 Me. 512; State *v.* Marshall, 45 N. H. 281; State *v.* Hardy, 47 N. H. 538; Com. *v.* Shaw, 7 Met. 52; S. C., Wh. Prec. 1019, where indictment is given; Com. *v.* Silsbee, 9 Mass. 417; Com. *v.* Stockbridge, 11 Mass. 278; Tipton *v.* State, 27 Ind. 492. It is not necessary even to aver who were the officers to be elected, if the election were general. State *v.* Minnick, 15 Iowa, 123.

[3] Whart. Cr. Pl. & Pr. §§ 238 *et seq.*; People *v.* Wilber, 4 Parker C. R. 19; State *v.* Moore, 3 Dutch. 105; Brightly's Elect. Cas. 705; Pearce *v.* State, 1 Sneed, 637; Quinn *v.* State, 35 Ind. 485; Gordon *v.* State, 52 Ala. 308. See R. *v.* Hill, 2 Ld. Raym. 1415; R. *v.* Jarvis, 1 Burr. 148; R. *v.* Wheatman, 1 Doug. 331; U. S. *v.* Hendric, 2 Sawyer, 476; U. S. *v.* Johnson, 2 Sawyer, 482.

[4] State *v.* Tweed, 3 Dutch. 111. See U. S. *v.* Hirschfield, 13 Blatch. 330.

[5] Com. *v.* Shaw, 7 Met. 52; Wh. Prec. 1019; State *v.* Douglass, 7 Iowa, 413; State *v.* Bruce, 5 Oreg. 68. See State *v.* Boyington, 56 Me. 512; State *v.* Lockbaum, 38 Conn. 400.

[6] See form and observations in Wh. Prec. 1021.

[7] State *v.* Fitzpatrick, 4 R. I. 269. See State *v.* Macomber, 7 R. I. 349.

[8] R. *v.* Bent, 1 Den. C. C. 157.

III. INDICTMENT AGAINST OFFICERS.

The general responsibility of officers is heretofore independently considered.[1] At present it must be sufficient to notice the following points: —

Usurpation of office indictable.

§ 1838 *b*. It is an indictable offence to usurp the office of judge of an election; and the acts of unlawfully claiming to be a judge of an election, receiving votes, and causing them to be returned, constitutes a usurpation of the office. In such cases, the lawfulness of the election is no part of the description of the offence of usurping the office of judge of election.[2] And while in most jurisdictions the offence is statutory, there can be no question that it is indictable at common law.

Defendants cannot be joined.

§ 1839. As already seen, in indictments against officers of elections, defendants occupying different offices, charged with different duties, cannot be joined.[3]

Indictment may be single.

§ 1840. A single officer may be charged with an unlawful act in receiving a disqualified vote, without stating how the defendant's co-officers acted.[4]

Fraud or breach of duty must be specially averred and proved.

§ 1841. Special acts of fraud, when officers of elections are indicted for fraud in discharge of their duties, must be shown. It is not enough to aver a mere conclusion of law, that the defendants "did commit wilful fraud in the discharge of their duties."[5]

Deputy marshal restricted by statute.

§ 1841 *a*. It has been held that when a deputy marshal is appointed under the act of Congress establishing supervisors of elections, the deputy marshal has no right to enter the room of the judges of an election, against their orders, during the progress of the election, unless a disturbance of the peace is there threatened, or actual fraud is attempted, or the supervisor is in actual need of protection; but that if

[1] Supra, §§ 1568 *et seq*.

[2] Wayman *v*. Com. 14 Bush, 466.

[3] Com. *v*. Miller, 2 Parsons, 480; Brightly's Elect. Cas. 711; and see State *v*. Welch, 21 Minn. 22; Wilson *v*. State, 52 Ala. 299; State *v*. Boyington, 56 Me. 512.

[4] Com. *v*. Gray, 2 Duvall, 373.

[5] Com. *v*. Miller, 2 Parsons, 480; Brightly's Elect. Cas. 711, — a ruling clearly sustained by the analogy of pleading in the statutes of false pretences. Supra, § 1221; and see supra, § 1569; Whart. Cr. Pl. & Pr. § 154.

there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in the said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed on him by the statute.[1]

[1] Gitman, ex parte, 3 Hughes, 548; 7 Reporter, 361. In this case Hughes, J., said: —

"Section 2022 defines the object of the appointment of deputy marshals, and defines their powers and duties. It makes it their duty to 'keep the peace and support and protect the supervisors in the discharge of their duty; to preserve order at the voting places; to prevent fraudulent voting, or fraudulent conduct on the part of any officer of elections, and to arrest without process any person who commits illegal acts in their presence.' It omits to give them authority to go behind the ballot-boxes and to place themselves in any position they please. This omission has much meaning, as showing that the powers and duties of marshals are different from those of supervisors. This same § 2022, while providing that the supervisors, in addition to their own powers, shall, in the absence of deputy marshals, have the same duties and powers as deputy marshals, omits to give the reverse authority; and neither this section nor any other section of the law gives to marshals, in the absence of supervisors, the powers and duties of supervisors proper. Their duties, therefore, are not those of supervisors of elections, but merely those of conservators of the peace at the polls. My conclusion, therefore, is, that unless for the purpose of suppressing actual violence, or of preserving the peace when actually disturbed, or protecting the supervisor when actually needing protection, or preventing fraud actually attempted in the room, the deputy marshals have no right to be in the room in which the judges and supervisors of election are performing their duties, or to go behind 'the ballot-boxes' unless requested to do so by both judges and supervisors. If Congress had designed that they should have that power (as it did design that supervisors should have it), it would have given it expressly (as it did give the power to the supervisors expressly). Unless it can be shown that their presence is required by the exigencies which have been mentioned, the judges of election have the same right to order deputy marshals out of their room as they have to order out any unofficial person.

"Unless it is shown that a disturbance of the peace has actually occurred, or violence is committed, or that one or the other is threatened, or that actual fraud is attempted, or that the supervisor is in actual need of protection, in the room of the judges of election, the deputy marshals of election have no right to be in the said room against the orders of the judges of election during the progress of the voting. But if there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in the said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed on him by § 2022."

§ 1842. That in the indictment the particular duty of the defendant must be specified results from the necessities of the case. Otherwise the defendant would have no notice of the duties he is charged with violating.[1]

Duty must be specified.

§ 1843. It is sufficient, as already seen, to aver that the defendants (officers of elections) were duly charged with their particular offices.[2]

Office to be averred.

§ 1844. When guilty knowledge is necessary to constitute the offence, then the *scienter* must be averred.[3]

And so *scienter*.

IV. EVIDENCE.

§ 1845. The principle is well established, as has been stated, that it is sufficient to prove that an alleged officer, in an indictment against him for misconduct, was acting in the office averred.[4] This rule applies to election officers.[5]

Sufficient to prove officer was acting as such.

§ 1846. Where there is discretion given the officer, there is no criminal responsibility for a wrong act done honestly in belief that it was right.[6]

When there is discretion no responsibility for errors of judgment.

V. ATTEMPT.

§ 1847. Wherever the consummated offence is a misdemeanor, the attempt to commit it is indictable at common law.[7]

Attempt indictable at common law.

VI. BRIBERY BY CANDIDATES.

§ 1848. By a provision in the Constitution of Pennsylvania (adopted by statute in other States), "Any person who shall, while a candidate for office, be guilty of bribery, fraud, or wilful violation of any election law, shall be forever disqualified from holding an office of trust or profit in

Corruption by candidates indictable.

[1] Com. *v.* Rupp, 9 Watts, 114. Supra, § 1569.

[2] See supra, §§ 1568, 1570, 1578, 1589; Edge *v.* Com. 7 Barr, 275; State *v.* Randles, 7 Humph. 9.

[3] Supra, § 999; Wh. Cr. Pl. & Pr. § 164; State *v.* Daniels, 44 N. H. 383.

[4] Supra, § 1589.

[5] Com. *v.* Shaw, 7 Met. 52.

[6] State *v.* Smith, 18 N. H. 91; State *v.* Daniels, 44 N. H. 383; State *v.* McDonald, 4 Harring. 555. For form of indictment see People *v.* Pease, 30 Barb. 588; Com. *v.* Gray, 2 Duvall, 373.

[7] Com. *v.* Jones, Phil. Leg. Int. Oct. 16, 1874. See supra, §§ 173 *et seq.*

this Commonwealth; and any person convicted of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years."[1] It has been held under this provision, and under the statute defining legal expenses, that a violation of the law is sufficiently charged by alleging that money was paid by the defendant to another, for purposes other than those prescribed, "but for corrupt and illegal purposes in procuring his (the defendant's) election."[2] There can be no question, also, that for a candidate to corrupt a constituency is indictable at common law,[3] and that it is indictable for parties charged with the selection to corruptly agree to divide certain offices.[4]

[1] Const. art. 8. By the Act of 1874 legal expenses were defined.

[2] Com. *v.* Walter, 86 Penn. St. 15.

[3] See infra, §§ 1856 *et seq.*; Nichols *v.* Mudgett, 32 Vt. 546.

[4] Infra, § 1858.

CHAPTER XXXIX.

FORESTALLING, REGRATING, AND ENGROSSING.

By the Roman law, offences are made penal, § 1849.
And so by statute 5 & 6 Edw. 6, § 1850.
At common law indictable to oppress community by absorbing staple, § 1851.

§ 1849. THESE offences are taken from the Roman law. The Roman title is *Dardanariatus*, and consists in the artificial production of dearness and scarcity in any market staple (*ne dardanarii ullius mercis sint*),[1] but especially of grain. Popular feeling was then, as it has been often since, aroused against the monopolizers or hoarders of food. The Ædiles were vested with jurisdiction to repress such offences; and Plautus[2] illustrates the process of prosecution before them in a passage where the Parasite calls for proceedings against those, *qui consilium iniere* (something like our own conspiracies to raise prices) *quo nos victu et vita prohibeant.* So Livy[3] tells us of a fine imposed upon *frumentarii ob annonam compressam.* The proceedings allowed in such cases took definite shape in the famous *Lex Julia de annona*, which declared the usurious hoarding of grain to be a public crime. In the exposition of the law[4] we are told that *lege Jul. de ann. poena statuitur adversus eum qui contra annonam fecerit societatemve coierit, quo annona carior fiat;* and by the first section a penalty is imposed on interference with transportation, or in any way preventing the free carriage of grain, — *eadem lege continetur, ne quis navem nautamve retineat aut dolo malo faciat, quo magis detineatur.* Still sharper edicts followed, of which Ulpian[5] mentions one: *ne aut ab his; qui coemtas merces supprimunt* (purchasers) *aut a locupletioribus* (hoarders of their own pro-

By the Roman law offences are made penal.

[1] L. 6. pr. D. extraord. crim. 47. 11.
[2] Chap. iii. 1. 32. sqq.
[3] XXXVIII. 35.
[4] L. 2. D. h. t. 48. 12.
[5] L. 6. pr. D. extraord. crim.

duce) *annona oneretur.* Zeno issued a special statute against monopolizers, who, to create an artificial scarcity, buy up all a necessary staple in order subsequently to sell at their own price. Such offenders, on conviction, were to be sentenced to confiscation of goods, and to banishment.[1]

§ 1850. The *Lex Julia de annona* was reproduced by the statute 5 & 6 Edward 6, c. 14. By this statute *forestalling* is defined to be the buying or contracting for merchandise or victual coming to market, or dissuading persons from bringing their goods or provisions there; or inducing them to raise their prices. "*Regrating*," by the same statute, "is the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. . . . . Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victual, with intent to sell them again."[2] This statute was brought with them by the English colonists who settled in North America, and though in its details, *e. g.* in prohibiting purchase by middle-men in the same market, it is now obsolete, and although so far as it interferes with the right of the merchant to buy in the cheapest market and sell in the dearest, it is in conflict with a sound and healthy system of political economy,[3] it is in one point a recognition of common law principle which it is important here specifically to enunciate.

And so by statute 5 & 6 Ed. 6.

§ 1851. While we must regard the provisions of the Roman and English statutes against middle-men and commission merchants as obsolete; and while in England the statute of 5 & 6 Edward 6 has been repealed by 12 Geo. 3, c. 71, yet, entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary staple or constituent of life so as to impoverish and distress the

At common law indictable to oppress community by absorbing staple.

[1] L. un. C. de monop. (4. 59.) For a fuller history of the law on this point see Rein's Criminalrecht der Römer, p. 829, — a work to which I am much indebted for aid in this and other departments.

[2] 4 Black. Com. (Wend. ed.) 155.

[3] Mr. Story (Sales, p. 647) says: "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end." This remark is sustained by Mr. Benjamin, in the second edition of his Law of Personal Property, p. 414 (1873).

mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value. Questions of this kind have usually come before the courts on indictments for conspiracy; for it is by conspiracies that extortions of this kind are generally wrought. But on an indictment against an individual for buying up all the grain or other necessary staple so as to produce a famine in the market, and thus to obtain grossly extortionate prices, wrung through a sense of misery from the community, the offence might be held indictable at common law.[1] For not merely is the extortion to be taken into account, but the terror as to the future, and the actual deprivation for the present, which are thus inflicted on the community at large.[2] But to sustain such a prosecution, the commodity must be a necessity, it must be totally absorbed by the monopolizer, and the prices must be unjustifiably extortionate.[3]

[1] See fully supra, § 1366; and see, to same effect, R. v. Waddington, 1 East, 143, 167; and R. v. Rushby, 2 Ch. C. L. 536; and see Wh. Prec. 1007, and note thereto.

[2] See 1 Russ. on Cr. 168, 169.

[3] R. v. Webb, 14 East, 406; Pratt v. Hutchinson, 15 East, 511.

CHAPTER XL.

CchampERTY AND MAINTENANCE.

Champerty indictable at common law, § 1853. | Otherwise with maintenance, § 1854.

§ 1853. CHAMPERTY is support granted to a litigant in pursuance of an agreement that, if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor.[1] Champerty, as the name (*Campi partitio*) indicates, is a relic of the old Roman law, and exhibits the distaste of that law to all combinations of individuals which might be regarded as in any way unduly promoting litigation, or, by the numbers and influence of those engaged, intimidating those concerned in the administration of public justice. That a combination of individuals, not themselves interested in the result, to carry on for gain a litigation, is indictable at common law, has been more than once intimated in American courts. No doubt if the object, as the idea of champerty necessarily involves, is a division of profits accruing from the raking up of old claims for purposes purely speculative, the peace of the community and the security of titles require that enterprises of this kind should be the subject of penal condemnation. No man has a right for profit to speculate in law process; and the law itself naturally steps in to punish, as if for contempt, those who would abuse it by turning it into an instrument, not of benignity but of extortion.

Champerty indictable at common law.

[1] Steph. Dig. C. L. art. 141. Buying or selling a pretended title is buying or selling lands, of which the title is known to be in dispute, below the value which they would have if the title was not in dispute, and to the intent that the buyer may carry on the suit in place of the seller. Ibid.

For a discussion of the modern rule as to champerty see 19 Alb. L. J. 468.

§ 1854. Maintenance is support given to a litigant in any legal proceeding in which the person giving assistance has no valuable interest, or in which he assists from any improper motive.[1] In maintenance no personal profit is expected or stipulated. The object is simply, from motives, on their face, of kindness to a suitor, or of personal enthusiasm for the vindication of a particular principle, to aid a party in pressing his suit. That this is not now considered indictable in England is evident from the fact that societies for the aid of the alleged Sir Roger Tichborne, in his claim on the Tichborne estates, and for the prosecution of a series of ecclesiastical offenders, have been openly instituted, without any attempt to check or suppress them, though their effect is to conduct legal proceedings against opponents whose zeal and power stimulate them to take the extremest measures for their own defence.[2]

Otherwise with maintenance.

[1] Steph. Dig. C. L. art. 141.

[2] This was ruled not to be a contempt of court in R. *v.* Skipworth, 12 Cox C. C. 371. See Whart. Cr. Pl. & Pr. § 957. As to barratry see supra, § 1444.

Champerty and maintenance are not indictable in New York and Connecticut. Richardson *v.* Rowland, 40 Conn. 565. See Hutley *v.* Hutley, L. R. 8 Q. B. 112.

In Richardson *v.* Rowland, supra, it was said by Foster, J.: —

"The only question presented by the finding for our consideration is, whether the plaintiff is entitled, upon the facts found, to recover one half of the sum of $468.53, the amount received by the defendant as the net avails of his suit against Sturges. The plaintiff claims one half of this sum under a contract with the defendant, by which he was to render him certain services in connection with the suit and receive half the net amount recovered; the defendant resists the demand, claiming that the contract is void for maintenance and champerty.

"Maintenance at common law signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right. The maintaining of one side, in consideration of some bargain to have part of the thing in dispute, is called champerty. Champerty therefore is a species of maintenance.

"Maintenance was an offence at common law, and divers statutes have been passed in England by parliament regarding it, commencing as early as the reign of Edward I. The reasons upon which the ancient doctrine rested in England can now scarcely be said to exist, and the law has, at times, been regarded with disfavor. As long ago as 1791, Mr. Justice Buller, in the case of Master *v.* Miller, 4 T. R. 340, speaks of a particular application of the law of maintenance almost in the language of contempt. Our statute against unlawful maintenance, first passed in 1809, forbade certain officers of the law, attorneys and counsellors, sheriffs, deputy sheriffs, and constables, from buying any bond, bill, promissory writing, book,

debt, or other *chose in action*, under certain penalties. As modified in 1848, and as the law now stands in our statutes, if either of the above-named officers shall, with intent to make gain by the fees of collection, purchase any *chose in action*, and commence a suit upon the same, he shall forfeit a sum not exceeding $100.

"As the plaintiff is not one of the officers named in our statute, that statute is not interposed by the defendant in the way of a recovery; the common law is the law relied on.

"We are not aware of any case where the law of maintenance and champerty has been considered and passed upon by this court. It is alluded to by Church, J., in giving the opinion of the court in the case of Stoddard *v.* Mix, 14 Conn. 23, 24, and by Ellsworth, J., in Bridgeport Bank *v.* New York & N. Haven R. R. Co. 30 Conn. 273.

"Some of our sister States have adopted the common law on this subject and some have not. Massachusetts and Rhode Island recognize the rule of the common law. Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489; Martin *v.* Clark, 8 R. I. 389. Among the States which discard the rule are Vermont, Delaware, Tennessee, and Iowa. Danforth *v.* Streeter, 28 Vt. 490; Bayard *v.* McLane, 3 Harrington, 139, 209; Therley *v.* Riggs, 11 Humph. 53; Wright *v.* Meek, 3 Iowa, 472.

"There are such broad distinctions in the state of society between Great Britain and this country, that the reasons which make a law against maintenance and champerty salutary or necessary there, do not exist here, — certainly not to the same extent. Mr. Justice Grier, in giving the opinion of the court in Roberts *v.* Cook, 20 How. 467, says that the ancient English doctrines respecting maintenance or champerty have not found favor in the United States. The enforcement of the law here would not always, perhaps not generally, promote justice. Mr. Chief Justice Parker, in giving the opinion of the court in Thurston *v.* Percival, 1 Pick. 417, says: 'It sometimes may be useful and convenient, where one has a just demand which he is not able from poverty to enforce, that a more fortunate friend should assist him, and wait for his compensation until the suit is determined, and be paid out of the fruits of it.'

"The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situate; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract, in short, was to be performed in the State of New York. The law of New York therefore must necessarily govern the contract. Commonwealth of Kentucky *v.* Bassford, 6 Hill, 526. It becomes quite unnecessary to decide what the law of Connecticut, or of other States, may be on the subject of champerty and maintenance.

"The law of New York upon this subject is very clearly and explicitly laid down by the Court of Appeals of that State, in the case of Stanton *v.* Sedgwick, 14 N. Y. 289. The facts in that case, briefly stated, are these. One Trowbridge undertook, at his own expense, to obtain for the defendant, Stanton, title from the State of New York to a certain lot of land in the city of Syracuse, in that State, then used and occupied by Stanton for a stone yard. Stanton had made erections on the lot, exceeding the value of $200, by virtue of which he had acquired a preëmption right to purchase it from the State, under a

certain legislative act then in force. Stanton agreed to convey to Trowbridge, by a good and sufficient conveyance, in consideration of the above mentioned expenses and trouble, one undivided half of the lot free from incumbrance or lien except for the purchase money; both parties to share mutually the cost, or purchase price to be paid to the State therefor. Trowbridge performed the contract on his part; he procured a patent to be duly issued to Stanton, and paid to him one half of the purchase money advanced to the State. Trowbridge then assigned his interest in the contract to the plaintiff, Sedgwick, and a demand of a conveyance of the one half of the lot was made, which Stanton refused to give, and this action was brought to enforce the contract. The case was tried at a special term, and judgment was given requiring the defendant to convey to the plaintiff the undivided half of the premises. The defendant excepted, and the judgment was affirmed at the general term, and on appeal that judgment was affirmed by the Court of Appeals.

"The doctrine of this case is, that the law of maintenance and champerty is not in force in that State, except as contained in their statutes. The opinion, a very elaborate one, pronounced apparently on very full consideration, was given by Selden, J. No question seems to have been made but that the contract sought to be enforced was within the definition of champerty at common law. The statute of the State then existing (1856) prohibited any officer or other person from taking any conveyance of lands from any person not in possession, while such lands were the subject of controversy by suit, knowing the pendency of such suit; and also prohibited the buying or selling of any pretended title to lands, unless the grantor and those under whom he claimed should have been in possession for the space of a year before the sale, — mortgages of lands by persons not in possession, and conveyances by such persons to those in possession, being excepted.

"There was nothing in the contract which the plaintiff there sought to enforce in contravention of the provisions of this statute. The same may be said of the case at bar. Judge Selden says (page 301), 'I still think, in view of the manifest tendency of modern judicial opinion, as well as of the plain scope and intent of our legislation on the subject, that not a vestige of the law of maintenance, including that of champerty, now remains in this State, except what is contained in the Revised Statutes.' See also Durgin *v.* Ireland, 14 N. Y. 322; Voorhies *v.* Dorr, 51 Barb. 580.

"We see nothing in the character of this contract contrary to the principles of natural justice and equity, and feel no repugnance therefore in allowing the plaintiff to recover."

"It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned or granted over to another. Co. Lit. 214 *a*, 266 *a*; 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In 2 Roll. Abr. 45, 46, it is admitted that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it *in his own name*. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious and not altogether useless

to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Bro. tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpœna or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and amongst others it was held that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 Roll. Abr. 115. But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed an assignment of a *chose in action*, and that was in case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt; and therefore they always acted in direct contradiction to it. And we shall soon see that courts of law have altered their language upon the subject very much. In 12 Mod. 554, the court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in Roll. Abr. 29; Sid. 212, and T. Jones, 222; and lastly by all the judges of England in Mouldsdale *v.* Birchall, 2 Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted that though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action should be brought in the name of the assignor and not in the name of the assignee. I see no use or convenience in preserving the shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the courts have taken care that it shall never work injustice." Buller, J., in Master *v.* Miller, 4 T. R. 340.

An elaborate history of the law in this respect is to be found in Pike's Hist. of Crime in England, i. pp. 250 *et seq.*, given in 2 Green's Cr. Law Rep. 500.

Sir J. Stephen, Dig. C. L. note viii. says: —

"It is not without hesitation that I have inserted these vague and practically obsolete definitions in this book. As, however, maintenance and champerty hold a place in all the text-books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the fifth report of the Criminal Law Commissioners, pp. 34–9. The Commissioners observe in conclusion: 'Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a

frequent recurrence of doubt and vexation would probably have occasioned. . . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in.' The Commissioners recommend that all these offences should be abolished. The definition of barratry, in particular, is so vague as to be quite absurd; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorizes any judge to sentence a man to seven years' penal servitude, after a summary inquiry conducted by himself in his own way.

"These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependents. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy."

CHAPTER XLI.

BRIBERY.

Bribery, or attempt at bribery, is a misdemeanor at common law, § 1857.
Corroboration required to convict, § 1859.

CORRUPTION, so far as it concerns the misconduct, active or passive, of the officer corrupted, has been already independently noticed.[1] At present will be singly considered bribery as it relates to the person offering the bribe.[2]

Bribery, or attempt at bribery, is a misdemeanor at common law.

§ 1857. Bribery as a common law offence is defined by Blackstone to be where a judge or other person connected with the administration of justice seeks an undue reward to influence his behavior in office.[3] Sir W. Russell[4] extends it to all cases where any undue reward is received or offered by or to any person whatsoever, whose ordinary business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.[5] To attempt to bribe, even though the offence be not consummated, is a misdemeanor at common law.[6] And the offence is complete when an offer is made, although in a matter not within the jurisdiction of the officer.[7] So far as concerns judicial officers,

[1] Supra, § 1570.

[2] As to attempts see supra, § 179. As to indictment see State *v.* Walls, 54 Ind. 561. For federal statutes see Rev. Stat. U. S. §§ 5449 *et seq.*

[3] 4 Blac. Com. 139. It is not bribery for a person who is a candidate for public office to offer to give a certain portion of his salary, if elected, to the county treasurer, unless it appear that the persons addressed would in some way be benefited by the offer. State *v.* Church, 5 Oregon, 575.

[4] 2 Russ. on Cr. 122.

[5] R. *v.* Beale, cited in R. *v.* Gibbons, 1 East, 183. Supra, § 1572.

[6] 2 Russ. on Cr. 124. Supra, § 179; Walsh *v.* People, 65 Ill. 58; Hutchinson *v.* State, 36 Tex. 294. See Barefield *v.* State, 14 Ala. 603.

[7] State *v.* Ellis, 33 N. J. L. 102.

it has been stated generally that "Every gift or payment made in respect of, or in relation to, any business having been, being, or about to be transacted before any such person in his office is a bribe, whether it is given in order to influence the judicial officer in something to be done, or to reward him for something already done, and whether the thing done or to be done is itself proper or improper."[1]

§ 1858. In conformity with these views, it has been held indictable at common law to be concerned either as actor or receiver in the bribery or attempt at bribery of a voter at any governmental election;[2] of a cabinet minister and member of the privy council;[3] of a commissioner of the revenue;[4] of a member of the state legislature;[5] of a member of a municipal board;[6] of a justice of the peace, even though the case in which the bribe is offered is not yet instituted;[7] of a judicial officer of any grade;[8] and of a sheriff, to induce him to summon jurors to be nominated by the defendant.[9] And the same rule has been applied to a corrupt agreement between A. and B., that A. shall vote for C. as commissioner, in consideration that B. will vote for D. as clerk.[10]

An offer by a public officer to receive a bribe is an indictable offence.[11]

To constitute bribery, a mere present *after* the act, without a corrupt prior understanding, will not suffice.[12]

[1] Steph. Dig. Cr. L. art. 126, to which is appended the following note: 3 Inst. 144–8; 1 Hawk. P. C. 414–5; 5th Rep. C. L. C. 20–1. See, too, Spedding's Life of Bacon, vii. 209–78. The crime is so rare that the definition is very imperfect and more or less conjectural.

[2] R. v. Pitt, 3 Burr. 1335; R. v. Plympton, 2 Ld. Raym. 1377; R. v. Taggart, 1 C. & P. 201; R. v. Joliffe, 1 East, 154, n.; Com. v. Shaver, 3 W. & S. 338; State v. Ellis, 33 N. J. L. 102; Com. v. Callaghan, 2 Va. Cas. 460. See Russell v. Com. 3 Bush, 469. Supra, § 1572.

[3] Vaughan's case, 4 Burr. 2494.

[4] U. S. v. Worrell, Wh. St. Tr. 189.

[5] Com. v. McCook, cited in Whart. Prec. 1012, n. For Pennsylvania constitutional provision see Judge Pearson's charge, 7 Weekly Notes, 306.

[6] State v. Ellis, 33 N. J. L. 102.

[7] Barefield v. State, 14 Ala. 603.

[8] State v. Carpenter, 20 Vt. 9.

[9] Com. v. Chapman, 1 Va. Cas. 138.

[10] Com. v. Callaghan, 2 Va. Cas. 460. Supra, § 1375.

[11] Supra, § 1572; Walsh v. People, 65 Ill. 88; but see Hutchinson v. State, 36 Tex. 293.

[12] Hutchinson v. State, 36 Tex. 293. See supra, § 1572.

Embracery is considered in another volume.[1]

Corroboration when more than a single witness is required.

§ 1859. When a statute requires that a conviction for bribery shall not be had on the testimony of a single witness, without corroborating circumstances, the corroboratory evidence must go directly to the fact of the bribe.[2]

[1] Wh. Cr. Pl. & Pr. §§ 367, 729, 966. "Every one commits the misdemeanor called embracery who, by any means whatever, except the production of evidence and argument in open court, attempts to influence or instruct any juryman, or to incline him to be more favorable to the one side than to the other, in any judicial proceeding, whether any verdict is given or not, and whether such verdict, if given, is true or false." Steph. Dig. Cr. L. art. 128.

[2] Russell *v.* Com. 3 Bush, 469.

PART V.

OFFENCES ON THE HIGH SEAS.

CHAPTER XLII.

PIRACY.

I. Definition.
Piracy is robbery on the high seas, § 1860.
May be committed by foreigners or by citizens, § 1861.
II. Jurisdiction.
United States have jurisdiction over vessels without national character, and over citizens on board foreign vessels, § 1862.
III. What is Complicity.
All aiding are principals, § 1863.
IV. Privateering.
Privateers are not internationally pirates, § 1864.
V. Intent.
Intent must be felonious, § 1865.
VI. Belligerents.
Belligerents are not pirates, § 1866.
VII. Indictment.
Venue must be in admiralty, § 1867.
Count for larceny may be joined, § 1868.
Proper technical averments to be made, § 1869.

I. DEFINITION.

§ 1860. At common law [1] piracy was not a felony,[2] but statutes were passed at an early period making the offence highly penal. By these statutes piracy is an act of robbery, and depredation upon the high seas, which, if committed upon land, would have amounted to felony;[3] or, to adopt a fuller definition,[4] a pirate is one who roves the sea in an

Piracy is robbery at sea.

[1] U S. *v.* Smith, 5 Wheat. 153, 161; U. S. *v.* Pirates, Ibid. 184. See a learned and comprehensive note to U. S. *v.* Smith, 5 Wheat. 163–180, which is now known to have been written by Mr. Justice Story, who delivered the opinion of the court in that case. 1 Story's Life of Story, 283; U. S. *v.* Palmer, 3 Wheat. 610.

[2] R. *v.* Morphas, 1 Salk. 85.

[3] This, however, is defective, from the indefiniteness of the term "felony." Mere larceny on the high seas does not make piracy, though robbery does.

[4] U. S. *v.* Baker, 5 Blatch. 6.

armed vessel, without a commission from any State, upon his own authority, for the purpose of seizing by force and appropriating any vessel he may meet.[1] Piracy, therefore, is robbery within the jurisdiction of the admiralty.[2]

The German and French authorities concur substantially in this view. By them piracy (Seeraub, or Sea Robbery, Piraterie) consists, by the law of nations, in an attack, in the nature of robbery as distinguished from larceny, by an uncommissioned vessel of war on trading vessels on the high seas. Whether there must be the *lucri causa* was originally doubted; though now by the more recent jurists this element is held not necessary.[3]

Under the 9th section of the Act of 1790, physical force is unnecessary;[4] but the *animus furandi* is essential.[5]

The Revised Statutes give no definition; it being simply declared that "Every person who on the high seas commits the crime of piracy, *as defined by the law of nations*, and is afterwards brought into or found in the United States, shall suffer death."[6]

§ 1861. Piracy is extended in England to the following cases:

May be committed by foreigners as well as citizens.

(1.) When a subject of her majesty commits any act of hostility or robbery against others, her majesty's subjects, on the sea, or in any place where the admiral has jurisdiction, under color of any commission from any foreign prince or State, whether such prince or State is at war with her majesty or not, or under pretence of authority from any person whatever; or,

(2.) Being a subject of her majesty, during any war is in in any way adherent to or gives aid or comfort to her majesty's enemies upon the sea, or in any place where the admiral has jurisdiction; or,

(3.) Belonging to any ship or vessel whatever (whether he is the subject of her majesty or not), upon meeting any British merchant ship or vessel on the sea, or in any place where the

[1] See also Davison *v.* Seal-skins, 2 Paine, 324.

[2] Atty. Gen. *v.* Kivok-a-Sing, L. R. 5 P. C. 180. See Judge Nelson's Opinion in the trial of the Savannah Pirates, Pamph. N. Y.

[3] Heffter. Völkerr, § 104; Broglie, Sur la piraterie, in his works, iii. 335.

[4] Malek Adhel, in re, 2 How. 210; U. S. *v.* Tully, 1 Gall. 247.

[5] U. S. *v.* Furlong, 5 Wheat. 183; U. S. *v.* Riddle, 4 Wash. C. C. 644.

[6] U. S. Rev. Stat. § 5368.

admiral has jurisdiction, enters into such British ship or vessel, and though he does not seize or carry off such ship or vessel, throws overboard or destroys any part of the goods belonging to it; or,

(4.) Being on board any British ship in any place where the admiral has jurisdiction, —

Turns pirate, enemy, or rebel, and piratically runs away with the ship, or any boat, ordnance, ammunition, or goods; or,

Yields them up voluntarily to any pirate; or,

Brings any seducing message from any pirate, enemy, or rebel; or,

Counsels or procures any person to yield up or run away with any ship, goods, or merchandise, or to turn pirate, or to go over to pirates; or,

Lays violent hands on the commander of any such ship in order to prevent him from fighting in defence of his ship and goods; or,

Confines the master or commander of any such ship; or,

Makes or endeavors to make a revolt in the ship; or,

(5.) Being a subject of her majesty in any part of the world, or (whether a subject or not) being in any part of her majesty's dominions, or on board a British ship, knowingly

Furnishes any pirate with any ammunition or stores of any kind; or,

Fits out any ship or vessel with a design to trade with or supply or correspond with any pirate; or,

Conspires or corresponds with any pirate.[1]

[1] The above is a codification of the law in this relation as given by the English Commissioners in their Draft Code of 1879.

The Commissioners do not define piracy by the law of nations, simply declaring it a crime.

In this respect, therefore, apart from the specifications given above, the English legislation stands on the same footing as our own.

Sir J. Stephen summarizes the law as follows: —

"Taking a ship on the high seas, or within the jurisdiction of the lord high admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county," is piracy by the law of nations. Steph. Dig. Cr. L. art. 104.

"It is doubtful whether persons cruising in armed vessels, with intent to commit piracies, are pirates or not." Ibid.

For the following note I am indebted to Mr. W. B. Lawrence: —

II. JURISDICTION.

§ 1862. The United States courts have jurisdiction[1] of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States; as when she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation.[2] If the offence be committed on board of a foreign vessel by a citizen of the United States,[3] or on board a vessel of the United States by a foreigner, or by a citizen or a for-

United States jurisdiction over vessels having no national character, and over citizens on board foreign vessels.

In applying the term "piracy" in the Codes of different countries regard has not always been had to the fact whether the offence described is one against the law of nations, and consequently everywhere justiciable, or a crime for which its nomenclature has been arbitrarily adopted, and which is only cognizable before the municipal tribunals having jurisdiction — territorial, actual, or implied — over the person of the offender. The South American publicist, Bello, says: "The American Congress declared in the year 1790 that every crime committed at sea, which, if committed on land, would be punishable with death, was piracy. Nevertheless, as this law is beyond the definition of the crime by the law of nations, it would not render legal the judgment of the American tribunals over acts committed under the flag of another nation which were not strictly piratical." Principio di legge Internacional, p. 271.

The Supreme Court decided that the crime of robbery committed by a person who is not a citizen of the United States on the high seas, on board of a ship belonging exclusively to subjects of a foreign State, is not piracy, and is not punishable in the courts of the United States. U. S. *v.* Palmer, 3 Wheat. 610; U. S. *v.* Pintock, 5 Wheat. 152; U. S. *v.* Pirates, 5 Wheat. 185.

In the case of the privateersmen tried in the United States Circuit Court at New York, in 1861, the case went to the jury under that section of the Act of 1820 which was intended to apply to piracy, as a substitute for the 5th section of the Act of 1819, which defined piracy by a reference to the law of nations. It was held by Judge Nelson that "if it were necessary, on the part of the government, to bring the crime charged against the prisoners within the definition of robbery and piracy as known to the common law of nations, there would be great difficulty in so doing, perhaps upon the counts, certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only, the United States, which falls far short of the spirit and intent that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the act of Congress prescribes as a crime, and may be denominated a statute offence, as contradistinguished from that known to the law of nations." Trial of Officers of the Savannah, p. 371, Judge Nelson's Charge.

[1] See U. S. Rev. Stat. § 5318.

[2] See supra, §§ 269 *et seq.*

[3] U. S. *v.* Peterson, 1 W. & M. 306.

eigner on board a piratical vessel, the offence is cognizable by the United States courts. And it is said that, in such a case, it makes no matter whether the offence was committed on the vessel or on the sea, as by throwing a person overboard, and drowning him; or shooting him when in the sea.[1] All persons, on board any vessel which throws off its national character, by cruising piratically, are within the act.[2] But it is clear that piracies committed on land, or in the waters over which any particular State of the United States has jurisdiction, are not cognizable, under the act, by the United States courts.[3] The same limitation was adopted, after a careful review of the authorities, by the late learned Judge Hopkinson, with the concurrence of his associate, Judge Baldwin.[4] It is true that it was once thought, under the Acts of 30th April, 1790, §§ 8, 9, and 10; of 15th May, 1820, § 3; and of 3d March, 1825, that acts of piracy, when committed by citizens of a foreign country, in foreign vessels, are not punishable by the United States courts.[5] But maturer reflection led to the conclusion that persons on board piratical vessels, acknowledging the jurisdiction of no sovereign recognized by the United States, are within the statutes.[6] It is otherwise, as will be seen, when the offenders are subjects of a recognized foreign sovereign, under whose flag the vessel sails.

III. WHAT COMPLICITY CONSTITUTES.

All aiding are principals.

§ 1863. No orders from a superior officer will justify a subordinate in the commission of what the latter knows, or ought to know, to be piracy.[7] But the simple fact of presence on board a piratical vessel, where there was no original piratical design, is not *per se* to affect a party with the crime. In order to taint all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design, and the officers and crew

[1] U. S. *v.* Holmes, 5 Wheat. 412. See also U. S. *v.* Furlong, U. S. *v.* Riddle, supra.

[2] U. S. *v.* Furlong, 5 Wheat. 183; U. S. *v.* Klintock, 5 Wheat. 144; in this respect qualifying U. S. *v.* Palmer, supra.

[3] U. S. *v.* Holmes, 5 Wheat. 412; Ex parte Bollman, 4 Cranch, 75.

[4] U. S. *v.* Kessler, 1 Bald. C. C. 20.

[5] U. S. *v.* Kessler, 1 Bald. C. C. 20; U. S. *v.* Palmer, 3 Wheat. 630.

[6] U. S. *v.* Klintock, 5 Wheat. 144; U. S. *v.* Furlong, Ibid. 183; and see Act of March 3, 1847, Brightly, 211.

[7] U. S. *v.* Jones, 3 Wash. C. C. 209.

have known and acted upon such design; otherwise those only are guilty who actively coöperated in the piracy. All who are present, aiding or assisting in the offence, are to be deemed principals.[1] The same distinction applies to presence on board the vessel where the piracy was committed.[2]

A confederacy by citizens of this country, whether on land or on board of an American ship, with such as are pirates by the law of nations, or the surrender of a vessel by a citizen to them, is within the provisions of § 8 of the Act of 1790; and so is any intercourse with pirates calculated to promote their views, or an endeavor by a mariner to corrupt the master, so as to induce him to go over to them.[3]

IV. PRIVATEERING.

§ 1864. A pirate being *hostis humani generis*, and having utterly forfeited all national character,[4] is lawful spoil to be attacked and captured on the ocean by the public or private ships of every nation;[5] nor do our courts recognize an exception to this rule, so far as concerns acts done by them *lucri causa*, in favor of commissioned privateers, manned by citizens of the United States, under a foreign commission.[6] But to convict such of piracy, it must be proved not only that they participated in the taking of property, not liable to capture, but that they did it feloniously.[7] And privateers, by the law of nations, are not pirates so far as concerns hostile acts against an enemy's vessels, or *bonâ fide* against neutral trading ships. *Jedenfalls können die von gültig bestellten Kapern verübten, gegen feindliche oder bonâ fide gegen neutrale Handelschiffe begangenen, Gewaltacte nicht als Seeraub betrachtet werden.*[8]

Privateers are not internationally pirates.

[1] U. S. *v.* Gibert, 2 Sumner, 19.

[2] U. S. *v.* Jones, 3 Wash. C. C. 209.

[3] U. S. *v.* Howard, 3 Wash. C. C. 340.

[4] U. S. *v.* Pirates, 5 Wheat. 184.

[5] The Marianna Flora, 11 Ibid. 1.

[6] U. S. *v.* Furlong, 5 Wheat. 184; U. S. *v.* Jones, 3 Wash. C. C. 209. This is under the Act of 1790, which makes a commission as privateer from a foreign state no defence to an indictment for piracy, in our courts, *against a citizen of the United States.* U. S. *v.* Baker, 5 Blatch. 6; U. S. *v.* Bass, 4 City Hall Rec. 161; U. S. *v.* Greathouse, 2 Abb. U. S. 364; and cases cited supra, § 1799. Unless with this qualification, the statement as to the laws of nations is erroneous. See supra, § 1861.

[7] U. S. *v.* Jones, 3 Wash. C. C. 209; U. S. *v.* Baker, 5 Blatch. 6.

[8] Holtzendorff, Rechts-lexicon, ii. 449. This was conceded by our government in the late civil war, when

V. INTENT.

§ 1865. An attack by an armed merchantman upon an American vessel, with intent to cripple or destroy her, made with no piratical purpose, but upon a mistaken idea that she was a pirate, is not a piratical aggression under the Act of 1819; nor is it a case of hostile aggression for which the property taken *in delicto* is subject to confiscation by the law of nations.[1] If the act be done under an honest but mistaken sense of duty, it is not piracy.[2]

Intent must be felonious.

VI. BELLIGERENTS.

§ 1866. According to the views already expressed, an armed vessel cannot be treated as a pirate when acting under a commission from a State acknowledged as a belligerent by the prosecuting State;[3] and this applies to armed vessels of insurgents, when such insurgents are recognized as belligerents by the party prosecuting, whether such party prosecuting be a foreign State[4] or the State against whom they are in insurrection.[5]

Belligerents are not pirates.

VII. INDICTMENT.

§ 1867. The *venue* is sufficiently laid in the indictment as "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State."[6]

Venue must be in admiralty.

§ 1868. Where one count charges the prisoner with piracy in piratically running away with his ship's cargo, and the other with larceny of the same cargo, and the verdict is, guilty of the last count only, judgment will not be arrested.[7]

Count for larceny may be joined.

it sought to make privateering piracy by treaty. The abandonment of the prosecution of Semmes was afterwards put on the express ground that privateering by a belligerent is not piracy by our law. Mr. Bolles, solicitor of the navy, in Atlantic Monthly, July, 1872. Supra, § 1799.

[1] Marianna Flora, 11 Wheat. 1.

[2] U. S. *v.* Ruggles, 5 Mason, 192.

[3] Supra, §§ 1799, 1864.

[4] R. *v.* Tivnan, 5 B. & S. 645; cited at large in Wh. Confl. of L. § 956.

[5] See this position with its qualifications illustrated, supra, § 1799.

[6] U. S. *v.* Gibert, 2 Sumner, 19; U. S. *v.* Jones, *ut supra*.

[7] U. S. *v.* Peterson, 1 Wood. & M. 306; U. S. *v.* Stetson, 3 Ibid. 164. Wh. Cr. Pl. & Pr. §§ 285 *et seq.*

§ 1869. In an indictment for a piratical murder (under the Act of the 30th April, 1790, c. 36, § 8), it is not necessary that it should allege the prisoner to be a citizen of the United States, or that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.[1]

Proper technical averments to be made.

An indictment for manslaughter on the high seas, charging that the prisoner committed it, first, by casting A. B. from a vessel, &c., whose name was unknown; and second, by casting him from the long-boat of the ship W. B., &c., is sufficiently certain.[2]

The character of the technical averments in piracy has been elsewhere considered.[3]

[1] U. S. *v.* Furlong, 5 Wheat. 183; Curtis on Merchant Seamen, 120.

[2] U. S. *v.* Holmes, 1 Wall. Jr. 1. See supra, § 511.

[3] Wh. Cr. Pl. & Pr. § 268.

CHAPTER XLIII.

MALTREATMENT OF CREW.

I. Who are Crew.
"Crew" includes all seamen except master, § 1871.

II. Power of Officers.
Master has power of corporal punishment by maritime law, § 1872.
Otherwise under statute, § 1873.

I. WHO ARE CREW.

Crew includes all seamen except master.

§ 1871. By the word "crew," in the Revised Statutes, is meant all the officers and common seamen, except the master; and the offence therein described may be committed upon the first mate.[1]

II. POWER OF OFFICERS.

Master has power of corporal punishment by maritime law.

§ 1872. By the maritime law the master has authority, apart from statute, to punish corporally and summarily the negligence or misconduct of his men.[2] Of his own discretion, no mate or subordinate officer has any right to punish a seaman, and if the master, being present, tacitly consents thereto, he becomes responsible for it; but in the master's absence, the next highest officer succeeding him is clothed with all his authority.[3] Every exception to this general principle must, however, be made in favor of those cases where prompt and instantaneous action is demanded of the mate or other officers by the necessities of the case, as to subdue mutinous or flagrant disorders,[4] though the punishment must always be reasonable, and not with instruments unlawful for the exigency.[5] Where the necessity actually existed, however, the

[1] U. S. *v.* Winn, 3 Sumner, 209. See Rev. Stat. U. S. § 5347.

[2] Bangs *v.* Little, Ware, 506; U. S. *v.* Hunt, 2 Story, 120; Turner's case, Ware, 83.

[3] U. S. *v.* Taylor, 2 Sumner, 584.

[4] U. S. *v.* Hunt, 2 Story, 120.

[5] Carlton *v.* Davis, Davies, 221.

quantum of punishment will by maritime law not be too nicely measured in the court.[1]

§ 1873. The act abolishing the punishment of flogging in the navy, and in vessels of commerce, is not a penal law, and no indictment can be framed upon it. It applies to whaling ships, which are "vessels of commerce,"

Otherwise under statute.

[1] It has been said that a master occupies to his crew a position resembling that of a parent to a child, or a master to an apprentice. U. S. *v.* Freeman, 4 Mason, 511; Fuller *v.* Colby, 3 Wood. & M. 13; Bangs *v.* Little, Ware, 506. See supra, § 634. He has a right to respectful demeanor as well as obedience. U. S. *v.* Smith, 3 Wash. C. C. 525. But this right would be fruitless, unless he is justified in enforcing it, when virtually denied, by reasonable punishment inflicted by himself. U. S. *v.* Freeman, 4 Mason, 511; Thorn *v.* White, 1 Pet. Adm. 171. He may chastise corporally as well as confine, when treated impertinently, or disobeyed. Michaelson *v.* Denison, 3 Day, 294; Thompson *v.* Busch, 4 Wash. C. C. 340. But he must not punish for mere private immorality if the offender conducted himself properly as a seaman. Bangs *v.* Little, *ut supra*. Nor must he chastise excessively or indecently, even for offences committed by the seaman distinctively as such. Cushman *v.* Ryan, 1 Story, 101. He may use, apart from statute, such weapons as are suitable and needful to compel obedience; Michaelson *v.* Denison, 3 Day, 295; Thorn *v.* White, 1 Pet. Adm. 118; U. S. *v.* Smith, 3 Wash. C. C. 526; Butler *v.* McLellan, Ware, 223; Curtis on Adm. 88, 90; keeping in mind, however, that weapons, and especially deadly weapons, should be used only to prevent future or impending, and not to punish past, disobedience. Schelter *v* Yorke, Crabbe, 449.

For impudent conduct or language, it seems a master may box a mariner's ears, without the punishment being either unusual or oppressive; and if the latter, in such case, draws a knife, or arms himself with an axe, he places himself in an unlawful position. He has no right, by the force or even the intimidation which such a course naturally may effect, to resist his arrest either for the original impudence or the use of the weapons, or to make terms for his surrender; and the ship's officers may employ what means they think best to compel him to obedience, and to suppress conduct mutinous, insubordinate, and dangerous to the safety of the vessel or cargo, and may pursue him to the prow (which is traditionally a sailor's sanctuary), or any other part of the ship. If improperly punished, the law affords the sailor an ample remedy on reaching port; and in most cases, in the language of Judge Woodbury, summary corporal punishment for slight offences is not advisable, in the present age. Wherever convenience allows, a little time for reflection on the one part, and repentance on the other, is recommended. Fuller *v.* Colby, 3 Wood. & M. 15. But to convict the master under the act, two things must be proven: (1.) Malice (*i. e.* wilfulness, or a wilful intention to do a wrong act), hatred, or revenge; and (2.) want of justifiable cause for inflicting the injury. U. S. *v.* Taylor, 2 Sumner, 584.

within the meaning of the act.[1] It prohibits corporal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto.[2] The degree of such punishment is not material: it is the kind of punishment which is alone to be considered.[3]

[1] U. S. *v.* Cutler, 1 Curtis, C. C. 502.

[2] Ibid.

[3] Ibid.

It is a question of fact for the jury, whether the punishment inflicted was, in substance and effect, the punishment of flogging. U. S. *v.* Cutler, 1 Curtis C. C. 502.

Subsequently to the Act of 1850, if it appear the punishment inflicted was flogging, this is an indictable offence, if malicious and without justifiable cause. But it is incumbent on the government to prove, not only that the act was without justifiable cause, but that it was malicious, and that it was a wilful departure from a known duty. If the master knew that his act was illegal, it was malicious, in the sense of the Act of 1835. U. S. *v.* Cutler, 1 Curtis C. C. 502.

Under the Act of 1850, the officer should be indicted, not for cruel or unusual punishment, but for beating or wounding the seaman. U. S. *v.* Collins, 2 Curtis C. C. 194.

CHAPTER XLIV.

REVOLT, AND ENDEAVORING TO MAKE REVOLT.[1]

I. In what Revolt consists.
Revolt consists in usurpation of ship, § 1876.
Under Act of 1835, intimidation must be malicious, § 1877.
To the endeavor to revolt some overt act is necessary, § 1878.
Necessity is a defence, § 1879.

II. Indictment.
Indictment must particularize offence, § 1880.

III. Confining Master.
Confinement must be malicious and real, § 1881.
Necessity or self-defence may be a defence, § 1882.

I. IN WHAT REVOLT CONSISTS.

Revolt consists in usurpation of ship.

§ 1876. The Crimes' Act of 1790, c. 86, § 12, not defining the offence of endeavoring to make a revolt, the courts took an early opportunity to give a judicial definition of it, and this definition was subsequently adopted by the Act of 1835, and in the Revised Statutes.[2] A revolt is a usurpation of the authority and command of the ship, and an overthrow of that of the master or commanding officer. Any conspiracy to accomplish such an object, or to resist a lawful command of the master for such purpose, or any endeavor to stir up others of the crew to such resistance, is an endeavor to commit a revolt.[3]

[1] There are various other offences for whose commission on the high seas the law has made special provisions; but they are more properly referred to other heads. Vide the preceding chapters upon Homicide, Rape, Mayhem, Assault, Burglary, Arson, Larceny, Receiving Stolen Goods, Embezzlement, and Malicious Mischief.

[2] Rev. St. U. S. §§ 5359, 5360.

[3] U. S. *v.* Hemmer, 4 Mason, 105; U. S. *v.* Kelly, 11 Wheat. 417; 4 Wash. C. C. 528; U. S. *v.* Hamilton, 1 Mason, 443; U. S. *v.* Savage, 5 Mason, 460; U. S. *v.* Rogers, 3 Sumner, 342. See Davison *v.* Seal-skins, 2 Paine, 324; U. S. *v.* Staly, 1 Wood. & M. 338; U. S. *v.* Seagrist, 4 Blatch. 420.

Where the crew of a vessel by their overt acts entirely overthrow the authority of the master in the free management of the ship, and the free exercise of his rights and duties on

§ 1877. A master is prevented in the free and lawful execution of his authority, within the meaning of the Act of 1835,[1] if he be prevented from carrying into effect any one lawful command; and a command to continue the business of whaling is *primâ facie* lawful. A combination to refuse to pursue such business is not, of itself, the intimidation required to constitute the crime of revolt, but it may be the means of intimidation. Such combination and intimidation may be lawful. If, from the improper conduct of the captain, the crew have good reason to believe, and do believe, that they will be subjected to unlawful and cruel or oppressive treatment, or that a great wrong is about to be inflicted on one of their number, they have a right to take reasonable measures for his or their own protection. What would be reasonable measures must depend upon the nature and extent of the wrong, and upon the means of prevention, having regard to the importance of preserving the authority of the master, as well as to the importance of protecting the crew.[2]

Under Act of 1835, intimidation must be malicious.

board, it is a revolt. U. S. *v.* Forbes, Crabbe, 558.

A combination by the crew to prevent the vessel going to sea, against the order of the master, is an attempt to commit a revolt. U. S. *v.* Nye, 2 Curtis C. C. 225.

"An endeavor to make a revolt," said Judge Story on a trial when sitting as circuit judge, "within the act, is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is, in effect, an endeavor to make a mutiny among the crew of the ship." U. S. *v.* Smith, 1 Mason, 147. Mere insolent conduct to the master, disobedience of orders, or violence committed to the person of the master, unaccompanied by other acts showing an intention to subvert his command as master, is not sufficient. Mere conspiracy of the crew to displace the master, unaccompanied by overt acts, is not sufficient. Neither is concert among the crew to that event essential to constitute the offence. U. S. *v.* Kelly, 4 Wash. C. C. 528. The offence of revolt, or endeavoring to make a revolt, may be committed in any kind of a vessel. Ibid. One who joins in the general conspiracy, and by his presence countenances acts of violence, but who does not individually use force or threats to compel the master to resign the command of the vessel, is guilty of the offence of confining the master. Ibid.

[1] Rev. St. § 5359.

[2] U. S. *v.* Borden, 21 L. Rep. 100; 1 Sprague, 374. Supra, § 95.

It is not necessary to prove that the offence was committed on the high seas (U. S. *v.* Hamilton, 1 Mason, 443; U. S. *v.* Keefe, 3 Ibid. 475; U. S. *v.* Staly, 1 Wood. & M. 338), but a confederacy between two or more of the crew to refuse to do their lawful duty must be shown (U. S. *v.* Cassidy, 2 Sumner, 582), under the Act of 1835, § 2. It had before been held, that

§ 1878. To make an endeavor to commit a revolt, under the Act of 1790, there must have been some effort or act to stir up others of the crew to disobedience;[1] in fact to create a virtual mutiny on board;[2] and where a crew had signed their articles with a particular master, who for a reasonable cause was removed, and they combined to resist and refuse all duty under his successor, this was within the statute.[3]

To the endeavor to revolt some overt act is necessary.

§ 1879. It is a sufficient defence, however, to such an indictment, that the endeavor, &c., was to compel the master to return to port on account of the unseaworthiness of the ship, provided the men acted *bonâ fide* on reasonable and apparently true grounds; and this whether it be doubtful if the ship is seaworthy or not. If clearly the former, of course the defence fails.[4] These, said Mr. Justice Story, are the general principles of law, and depend on no particular statute. Nor is the crew's refusal, because of a deviation from the voyage in their shipping articles, to do duty held to amount to an endeavor to commit a revolt, under the Act of 1835.[5]

Necessity is a defence.

no previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operation, was necessary to bring it within the Act of 1790, § 12. Rev. Stat. U. S. § 5539; U. S. *v.* Morrison, 1 Sumn. 448. The interposition of the crew, by force and intimidation, preventing the master's lawful punishment of a seaman (Ibid.), or a combination not to do duty, though no further orders were given (U. S. *v.* Barker, 5 Mason, 404; U. S. *v.* Gardner, Ibid. 402), was within the act. But this offence is now to be considered and punished only as provided for by the Act of March 3, 1835 (Woodbury, J., in U. S. *v.* Peterson, 1 Wood. & M. 309), and under it the mere resistance to the master's lawful authority, or assembling with others in a mutinous and tumultuous manner, so as to endanger the police of the vessel, is a crime.

Foreign seamen on board American ships are to be treated by our laws as though of our country; and so are American seamen put on board at a foreign port by an American consul; Woodbury, J., in U. S. *v.* Peterson, 1 Wood. & M. 309; U. S. *v.* Sharp, 1 Pet. C. C. 118, 121; but a whaling vessel, not having surrendered her register, or taken out an enrolment and license, as prescribed by the Act of 1793, c. 52, is not "an American ship" within the Act of 1835; and therefore its crew are not, under that act, indictable for an endeavor to make a revolt. U. S. *v.* Rogers, 3 Sumner, 342.

[1] U. S. *v.* Savage, 5 Mason, 460; U. S. *v.* Kelly, 11 Wheat. 417; 4 Wash. C. C. 528.

[2] 1 Mason, 147.

[3] U. S. *v.* Haines, 5 Mason, 272.

[4] U. S. *v.* Ashton, 2 Sumner, 13. Infra, § 1882; supra, § 95.

[5] U. S. *v.* Matthews, 2 Sumner, 470.

II. INDICTMENT.

§ 1880. An indictment under the Crimes' Act, charging that the prisoners "then and there did make a revolt," does not adequately describe the offence; the particulars must be set forth.[1] It is otherwise, however, when the charge is for "endeavoring to make a revolt," when details need not be given.[2]

Indictment must particularize revolt.

III. CONFINING MASTER.

§ 1881. To constitute the offence of confining the captain, the act of confining must be maliciously done.[3] Any such confinement, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or by intimidation preventing him from the free use of every part of the vessel, amounts to a confinement of the master within the 12th section of the Act of 1799.[4] To take hold of the master on the deck, and afterwards present a pistol at his breast in the cabin, thereby preventing his going on deck, is a confinement under the act.[5] Such confinement is not limited merely to a seizure of the master, and preventing the moving of his body, or to locking him up in a particular place, as a cabin or state-room, but extends to all restraints of personal liberty in freely going about the ship, by present force, or threats of bodily injury.[6] The offence, if committed within the mouth of a foreign river which is a mile and a half wide, is within the act of Congress.[7] If the master of a vessel is restrained from performing his duties by such mutinous conduct in his crew as would rea-

Such confinement must be malicious and real.

[1] U. S. *v.* Almeida (D. C. U. S.), Whart. Prec. 1061, 1062.

[2] U. S. *v.* Bladen, 1 Pet. C. C. 213; U. S. *v.* Smith, 3 Wash. C. C. 525; U. S. *v.* Kelly, 4 Wash. C. C. 528; 11 Wheat. 417; U. S. *v.* Smith, 1 Mason, 147; U. S. *v.* Hamilton, 1 Mason, 443; U. S. *v.* Keefe, 3 Mason, 475; U. S. *v.* Hemmer, 4 Mason, 105; U. S. *v.* Haines, 5 Mason, 272; U. S. *v.* Gardner, 5 Mason, 402; U. S. *v.* Barker, 5 Mason, 404; U. S. *v.* Savage, 5 Mason, 460; U. S. *v.* Thompson, 1 Sumner, 168; U. S. *v.* Morrison, 1 Sumner, 448; U. S. *v.* Ashton, 2 Sumner, 13; U. S. *v.* Cassidy, 2 Sumner, 582; U. S. *v.* Rogers, 3 Sumner, 342; U. S. *v.* Seagrist, 4 Blatch. 420.

[3] U. S. *v.* Henry, 4 Wash. C. C. 428.

[4] U. S. *v.* Sharp, 1 Pet. C. C. 118. See Rev. Stat. U. S. § 5539.

[5] U. S. *v.* Stevens, 4 Wash. C. C. 548.

[6] U. S. *v.* Hemmer, 4 Mason, 105.

[7] U. S. *v.* Smith, 3 Wash. C. C. 525.

sonably intimidate a firm man, this is a confinement within the meaning of the act of Congress.[1] The fact that the master went armed to every part of the ship, if it was necessary for his safety that he should protect himself, will not vary the case.[2] Seizing the person of the master, although the restraint is but momentary, is a confinement prohibited by law; and such conduct is not excused or justified by a previous battery on the seamen, to enforce a command which the seamen ought to have obeyed.[3] It is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement.[4]

[1] U. S. *v.* Bladen, 1 Pet. C. C. 213.

[2] Ibid.

[3] U. S. *v.* Bladen, 1 Pet. C. C. 213; U. S. *v.* Savage, 5 Mason, 460.

[4] Ibid. "The offence of confining the master," says Mr. Curtis (Rights and Duties of Merchant Seamen, 124), "is not limited to mere personal restraint by seizing him and preventing the free movements of his body, nor to imprisonment in any specific place. It is equally a confinement within the act, to prevent him from free movement about the ship, by force or intimidation, as by limiting him to walking on a particular part of the deck, by terror of bodily injury, or by present force. If he is surrounded and prevented from moving where he pleases, according to his rights and duties as a master, under the threats of force, or if he is restrained from going to any part of the ship by an avowed determination of the crew, or any part of them, to resist him and to employ adequate force to prevent it, these fall within the meaning of confinement. So, too, if the master is prevented from performing the duties of his station by such mutinous conduct of his crew as would reasonably intimidate a firm man, it is confinement; and if he is compelled to go armed about the ship from a reasonable fear for his own safety, although not actually molested, it is a confinement. So, too, seizing the person of the master, though but for a minute or two; and seizing him, though only temporarily and for the purpose of inflicting upon him personal chastisement, are within the meaning of the act. But the restraint, whether moral or physical, must be an illegal restraint.

"If the master is about to do an illegal act, and especially a felony, a seaman may lawfully confine or restrain him. So a seaman may confine the master in justifiable self-defence. If the master assault him without cause, he may restrain the master so long and with so much force as are necessary for this purpose. And if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature, he seizes hold of the master to prevent any injury, for an instant only, and as soon as he may he withdraws the restraint, so that the act may fairly be deemed involuntary, it might not, perhaps, be deemed an offence within the act, even though the seizing by the master be strictly justifiable; for the will must coöperate with the deed. But if the seizing by the master be justifia-

§ 1882. A master of a vessel may so conduct himself as to justify the officers and crew in placing restraints upon him, to prevent his committing acts which might endanger the lives of all on board; but an excuse of this kind must be listened to with great caution, and such measures should cease whenever the occasion for them ceases. To continue the confinement after the necessity is over is a new and indictable imprisonment.[1]

Necessity or self-defence may be a defence.

ble, and he does not exceed the chastisement which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in personal confinement or restraint, it is an offence within the statute."

[1] Ibid. See 1 Wh. Dig. 5th ed. 578. Supra, §§ 95 *et seq.*

CHAPTER XLV.

FORCING OR LEAVING SEAMEN ON SHORE.

Statute covers all the crew, § 1885.
Obstinate refusal to obey is justifiable cause, § 1886.
Desertion is a defence to leaving behind, § 1887.

§ 1885. FORCING a seaman on shore is a crime which, though strictly speaking not an offence upon the high seas, partakes so much of the nature of it, being virtually a maltreatment of the crew out of the jurisdiction of any State of this Union, and cognizable in the same courts as have jurisdiction over the present class of offences, that it may not be out of place to consider it here.[1] It will be seen that the statute does not leave it to judicial construction to include any inferior officer within its scope, but specially provides for such a contingency; and it has been held that it applies equally to officers or seamen in American ships, who are or are not citizens, or who are foreigners, provided they are not subjects of a State which by treaty prohibits the employment in its vessels, public or private, of white citizens of the United States.[2] The act refers to such persons as the master "carried out" with him, and the "home" is the home port of the ship for the voyage.

Statute covers all the crew.

§ 1886. Not every sufficient cause to *discharge* a seaman in a foreign port is a "justifiable cause" in the sense of this act.[3] It must be such a cause as renders the forcing him on shore necessary to prevent the jeopardizing the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline; and the *onus probandi* is on the master to prove such a cause. If a seaman, on being injured by a flogging and incapac-

Obstinate refusal to obey is justifiable cause.

[1] See Rev. Stat. U. S. § 5363.

[2] Story, J., in U. S. *v.* Coffin, 1 Sumner, 394. See U. S. *v.* Ruggles, 5 Mason, 192; U. S. *v.* Netcher, 1 Story, 307; U. S. *v.* Riddle, 4 Wash. 644.

[3] U. S. *v.* Coffin, *ut supra*.

itated to do duty, refuses to do any more work, this is not a justifiable cause; if, on the contrary, he is able, and his refusal is from obstinacy and malice in order to revenge himself, and to destroy the ship's discipline and incite others of the crew to disobedience, it is sufficient cause. But the jury may infer "malice" on the master's part from the fact of forcing on shore, until the contrary is shown; "maliciously" meaning all acts wilfully or wantonly done against what any one of reasonable capacity must know to be his duty.[1]

§ 1887. Three separate offences are included in the statute: —

I. Maliciously and without justifiable cause forcing an officer or mariner ashore in a foreign port.

II. Maliciously and without justifiable cause leaving any officer or mariner behind in a foreign port.

III. Maliciously and without justifiable cause refusing to bring home again all the officers and mariners of the ship who are in a condition to return and willing so to do.

The words "in a condition to return and willing to return" apply only to the third class; they are not requisite to make out the offence in the second or first.[2] But it does not follow that because a seaman is left behind, it is necessarily an offence within this act. An unauthorized absence of the man for forty-eight hours has been declared to amount to desertion; and an unauthorized absence has been held to be a defence to the master in cases when the seaman's return, within forty-eight hours, has been anticipated by the sailing of the ship.[3] The words "maliciously and without probable cause" must always qualify and interpret the master's conduct.

Desertion is a defence to leaving behind.

[1] U. S. *v.* Coffin, 1 Sumner, 399, and see cases there cited; U. S. *v.* Lunt, 14 Law Rep. 683.

If it is alleged, as a justifiable cause, that the man was dangerous, it must be shown that a man of ordinary firmness would have been affected by his conduct. The Nimrod, 1 Ware, 9. The policy of the law is against the discharge of seamen in foreign ports (Hutchinson *v.* Coombs, 1 Ware, 65), unless for legal cause, — such as continued misconduct, or some aggravated outbreak or offence. Smith *v.* Treat, Davies, 266. And it sets its face much more strongly against an enforced and compulsory setting ashore of the man against his will and without his consent. Buck *v.* Lane, 12 S. & R. 266.

[2] U. S. *v.* Netcher, 1 Story, 307.

[3] Coffin *v.* Jenkins, 3 Story, 108.

CHAPTER XLVI.

ENGAGING IN SLAVE-TRADE.

Persons having no power or interest in the enterprise not responsible, § 1889.
Complicity to be shown inferentially, § 1890.
Indictment must conform to statute, § 189
Offence based exclusively on statute, § 1892.

Persons having no interest in or power over the negroes not responsible.

§ 1889. UNDER the Act of 1820, it has been held that a person having no interest in or power over the negroes transported, so as to impress upon them the character of slaves, and only employed in the transportation of them for hire from port to port, is not guilty.[1]

Complicity to be shown inferentially.

§ 1890. Complicity in the alleged act may be established inferentially. Thus on an indictment under the Act of April, 1818, against the owner of a slave-ship, the declarations of the master, being a part of the *res gestae* connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, are admissible in evidence against the owner.[2] Evidence, also, on an indictment against the owner, under the Act of April 20, 1818, charging him with fitting out the ship, with intent to employ her in the illegal voyage, is admissible to show that he commanded, authorized, and superintended the outfit, through the instrumentality of his agents, without being personally present.[3]

[1] U. S. *v.* Battiste, 2 Sumner, 240. For recent statutes see Rev. Stat. U. S. §§ 5376 *et seq.*

[2] U. S. *v.* Gooding, 12 Wheat. 460.

[3] Ibid.

There are various circumstances which will be received to show that a master of a vessel is guilty of participating in the offence of engaging in the slave-trade, however artfully he may contrive to present clean hands, and to evade the responsibility of his conduct. Thus, though a freighting voyage of an American vessel, owned and commanded by citizens of this country, from the United States to Rio Janeiro, with orders to the consignee to sell her at a limited price, or to let her for freight, is so far, *primâ facie* legal; and though she be chartered by the consignee for a certain time at a reasonable rate, to a

§ 1891. The indictment need not specify the particulars of the fitting out; it is sufficient to allege the offence in the words of the statute.[1] Nor is it necessary that there should be any principal offender whom the defendant

Indictment must conform to statute.

Brazilian, with orders to carry no illegal goods, or persons not free, and she proceeds on a voyage to the coast of Africa, laden with rum, cottons, gunpowder, iron bars, brass rings, &c. (such goods as are in demand there, in exchanging for the usual products of that country), the owner of the cargo going with it; yet, nevertheless, this may all be shown to be colorable and false. It may be shown that the full intent and purpose of the voyage was not to exchange this cargo for gold-dust, palm-oil, or any other leading articles of traffic, but for slaves, to be embarked for the Brazils in other vessels; and if the master stands by and sees this exchange and embarkation made, and knowingly has brought the cargo's owner and others interested in the slave-trade thither, these are fair circumstances for a jury to infer his own guilt. U. S. *v.* Libby, 1 Wood. & M. 221.

On an indictment charging the master with having received on board his vessel, at a certain place called Lorenzo Marquez, within flow of the tide, on the eastern coast of Africa, a certain negro, &c., with intent to make him a slave, the court ruled that anything done by the master or charterers, during the voyage and near the time when the negro was taken on board, might be shown to prove his knowledge and intent, but nothing of a separate and independent character, done at a different place and on a different voyage, and so distant in time as not to bear on this transaction, where the prisoner would not be likely to come prepared to meet it or rebut it at the trial. Ibid. 225. See People *v.* Hopson, 1 Denio, 574. Nor can it be shown what became of slaves put on board another vessel, sailing from that part of the coast, whilst the prisoner and his vessel were there, to the Brazils, unless some connection in interest and business be first shown. The letters and instructions of the owner and consignees to the master, written before the reception of the alleged slaves on board, are part of the *res gestae*, and good evidence (U. S. *v.* Libby, 1 Wood. & M. 221), and so are notarial letters of manumission of the two negroes taken on board; and any testimony *pro* or *con.* of the master's belief in their authenticity, when he so received them. If the master received on board his ship in Africa a negro, not supposing him to be free, and transports him to Brazil, his guilt would be according to whether he was merely carrying him for another, or an actual participator in the design himself. A passenger in such vessel, however, is not one of the crew or ship's company, within the scope of the statute. In short, to convict one under the Act of 1820 both *intent* and *actual conduct*, tending to make some one a slave, must be shown; and if a principal be not liable under our laws, another cannot be charged with aiding and abetting him, unless he do it in such a manner as to involve himself as a principal; nor has any act of Congress yet made punishable the transportation of any kind of goods to the coast of Africa, irrespective of the intent with which they are carried. Ibid. 240.

[1] U. S. *v.* Gooding, 12 Wheat. 460.

might be aiding and abetting. These terms in the statute do not refer to the relation of principal and accessary in cases of felony; both the actor and he who aids and abets the act are considered as principals.[1] It is necessary that the indictment should aver that the vessel was built, fitted out, &c., or caused to sail, or be sent away, within the jurisdiction of the United States.[2] An averment that the ship was fitted out, &c., "with intent that the said vessel should be employed" in the slave-trade, is fatally defective, the words of the statute being "with intent to employ" the vessel in the slave-trade, and exclusively referring to the intent of the party doing the act.[3]

The offence of sailing from a port, with intent to engage in the slave-trade, is not committed, unless the vessel sails out of the port.[4]

One of the phrases in the statute used being "persons of color," it is sufficient in the indictment to use the same words, without more definite specifications of the meaning of the words.[5]

§ 1892. The illegality of the slave-trade arises from the federal legislation upon the subject, and not from its supposed violation of the law of nations. Although it is now prohibited by the laws of civilized nations generally, it may be still lawfully carried on by the subjects of those

Offence based exclusively on statutes.

[1] Ibid.

[2] Ibid.

[3] Ibid.

If the offence be alleged in the indictment to be on a day now last past, and on divers days and times before and since that day, this allegation is sufficient. U. S. *v.* La Coste, 2 Mason, 129.

It is not necessary to allege that the negroes, &c., were to be transported to the United States or their territories; or that they were free and not bound to service; or that the defendant was a citizen or resident within the United States, or that the offence was committed on board of an American vessel. It is sufficient if the indictment follows, in this respect, the language of the statute, and is as certain. Ibid.

The offence under the 7th section of the Act of 2d of March, 1807, is not that of importing or bringing into the United States persons of color, with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any further than to impose a duty upon the officers of armed vessels, who make the capture, to keep them safely, to be delivered to the overseer of the poor, or the governor of the State, or persons appointed by the respective States to receive the same. U. S. *v.* Preston, 3 Peters, 57.

[4] U. S. *v.* La Coste, 2 Mason, 129.

[5] Ibid.

States who have not prohibited it by municipal acts and treaties. It is not piracy unless made so by the treaties or statutes of the nation to which the party belongs. It is true that it was at one time held in one of the United States Circuit Courts, and maintained very learnedly, that this traffic was a violation of the law of nations,[1] but this was overruled by the Supreme Court;[2] and that case, with the decisions of Lord Stowell,[3] and Bailey, J., and Best, J.,[4] in England, has been considered as settling the question. How far these rulings are overturned by the recent abolition of slavery has not yet been judicially determined.[5] But the question, so far as it municipally concerns England and the United States, is of no moment, since by both of those powers the slave-trade is made piracy. It is also made piracy by the treaty of 1841 between England, Austria, Prussia, and Russia.

[1] U. S. *v.* La Jeune Eugenie, 2 Mason, 409.

[2] The Antelope, 10 Wheat. 66, per Marshall, C. J.

[3] Le Louis, 2 Dodson, 210.

[4] Madrazo *v.* Willes, 3 B. & Ald. 353.

[5] See Whart. Confl. of L., Introduction; R. *v.* Zulueta, 1 C. & K. 215.

CHAPTER XLVII.

DESTROYING VESSEL WITH INTENT TO DEFRAUD UNDERWRITERS.

Not necessary to prove charter of company, § 1894.
Combination to be proved inferentially, § 1895.
"Destroy" means to unfit for service, § 1896.
Intent is material, § 1897.

§ 1894. UNDER the federal Act of 1804,[1] on an indictment for destroying a vessel with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers *de facto* the policy was executed, and to prejudice whom the vessel insured was destroyed, without proving the existence of a legal corporation authorized to insure, or a compliance on the part of such corporation with the terms of its charter, or the validity of the policy of insurance.[2]

Not necessary to prove charter of company.

The act applies to our internal as well as to our foreign commerce.[3]

Statutes apply to internal commerce.

§ 1895. Under the Act of 1823, any combination of two or more persons to destroy the vessel or cargo consummates the offence under the law, though in point of fact neither the vessel nor the cargo was at the time insured.[4]

Combination to be proved inferentially.

The testimony to show the unlawful combination does not end at the destruction of the boat. After as well as before that

[1] Rev. Stat. U. S. §§ 5364–6.

[2] U. S. *v.* Amedy, 11 Wheat. 392; 6 Cond. Rep. 362. Supra, §§ 716, 741, 816. See, however, U. S. *v.* Johns, 1 Wash. C. C. 363; S. C., 4 Dall. 412.

[3] U. S. *v.* Cole, 5 McLean, 513.

[4] Ibid. See supra, § 185.

The burning of the vessel is not punishable under the act of Congress, but it operates as evidence against the defendants. Ibid. 514.

event, the acts of the confederates may be examined to show their guilt.[1]

But under the Act of 1844, which does not make it an offence in the owner to destroy his vessel to the prejudice of the underwriters on the cargo, no evidence can be given to establish charges against the defendant for such destruction to the prejudice of the underwriters on the cargo, even if the indictment contain such a charge. Evidence of the value of the property insured may be given, to show inducements to destroy or preserve it.[2]

"Destroy" means to unfit for service.

§ 1896. The meaning of the term "destroy," by the act of Congress, is to unfit the vessel for service beyond the hope of recovery by ordinary means. This, as to the extent of the injury, is synonymous with "cast away." Both mean such an act as causes the vessel to perish and to be lost, or to be irrecoverable by ordinary means.[3]

Intent is material.

§ 1897. Under the English statute, where the intent is to prejudice the underwriters, the policy must be proved,[4] and the sailing of the vessel.[5]

Under our own statutes, the intent is material and must be averred.[6]

The intent may be stated in different ways.[7]

[1] Ibid. 513. See U. S. *v.* Lockman, 1 Law Rep. (N. S.) 151.

[2] U. S. *v.* Johns, 1 Wash. C. C. 363.

[3] Ibid.

[4] R. *v.* Gilson, R. & R. 138.

[5] Archbold's C. P. 304. As to form of indictment see Wh. Prec. 575; U. S. *v.* Vanzanst, 3 Wash. C. C. 146.

[6] U. S. *v.* Hand, 6 McLean, 274.

[7] Whart. Crim. Pl. & Pr. § 253; R. *v.* Smith, 4 C. & P. 569; R. *v.* Bowyer, Ibid. 559. See also generally, R. *v.* Newill, 1 Mood. C. C. 458; R. *v.* Phillip, Ibid. 263.

PART VI.

OFFENCES AGAINST FOREIGN NATIONS.

CHAPTER XLVIII.

VIOLENCE TO FOREIGN MINISTERS.

§ 1899. It is provided in the United States, by statute, that "every person who violates any safe conduct or passport duly obtained or issued under authority of the United States; or who assaults, wounds, imprisons, or in any other manner offers violence to the person of a public minister, *in violation of the law of nations*, shall be imprisoned for not more than three years, and fined at the discretion of the court."[1] The statute makes penal something more than an assault, which the state courts could punish as an ordinary misdemeanor; and which, as a municipal offence, would not, apart from the official character of the person assaulted, be within the range of federal legislation. Not only are the federal courts authorized to take jurisdiction of the assault, when so aimed, but a new offence is established for their cognizance: viz., offering violence to the person, "in violation of the law of nations." Under this clause a threat of violence would become indictable.[2] But be this as it may, of assaults on ministers of foreign states the federal courts have frequently taken cognizance;[3] and it is

Violence to foreign ministers an offence.

[1] Rev. Stat. U. S. § 4062; Act of April 30, 1799, c. 9, § 28. By subsequent sections process against foreign ministers and their domestics is void under certain limitations, and penalties are imposed for suing out such process. Similar statutes exist in England. Steph. Dig. Cr. L. art. 96; Wh. Cr. Pl. & Pr. § 38.

[2] U. S. *v.* Jeffers, 4 Cr. C. C. 704.

[3] U. S. *v.* Liddle, 2 Wash. C. C. 205; U. S. *v.* Ortega, 4 Wash. C. C. 531; U. S. *v.* Hand, 2 Wash. C. C. 435; U. S. *v.* Benner, Bald. C. C. 234; 5 Opin. Atty. Gen. 69.

clear that in such cases the federal Circuit Courts have jurisdiction.[1] The *property* of a foreign minister, it is also held, is identified by the law of nations with his person; and under the act of Congress, an attack on his property is an assault on himself; though to convey to the offence this particular character, the defendant must have known the official character of the owner of the property.[2] But there can be no conviction if it appear that the defendant in making the assault was acting in self-defence.[3] A secretary of the legation,[4] a chargé d'affaires,[5] an attaché,[6] and domestic servants,[7] are within the statute. But the privilege does not extend to persons accredited from foreign revolutionary governments not recognized by the United States.[8]

Privilege from arrest is considered in another work.[9]

The state courts in such cases have jurisdiction,[10] though on the question of privilege they are bound by federal legislation.[11]

[1] U. S. *v.* Ortega, 11 Wheat. 467.

[2] U. S. *v.* Jeffers, 4 Cr. C. C. 704; U. S. *v.* Hand. 2 Wash. C. C. 435.

[3] Supra, § 87; U. S. *v.* Liddle, 2 Wash. C. C. 205; U. S. *v.* Ortega, 4 Wash. C. C. 531.

[4] Cabrera, ex parte, 1 Wash. C. C. 232; Resp. *v.* Longchamps, 1 Dall. 111.

[5] U. S. *v.* Ortega, *ut supra.*

[6] U. S. *v.* Benner, Bald. C. C. 234.

[7] U. S. *v.* Lafontaine, 4 Cr. C. C. 173.

[8] U. S. *v.* Skinner, 2 Wheel. Cr. C. 232.

[9] Wh. Cr. Pl. & Pr. § 59.

[10] Resp. *v.* Longchamps, 1 Dall. 111.

[11] Cabrera, ex parte, 1 Wash. C. C. 232.

CHAPTER XLIX.

LIBELS ON FOREIGN STATES.

§ 1900. It has already been seen that it is at common law an indictable offence to publish a libel tending to disturb the peace between the State in which the publication is made and a foreign State. In the federal courts, from their lack of common law jurisdiction, such offences cannot be punished unless in conformity with statute. But there is authority to the effect that in the state courts prosecutions may be maintained for such libels at common law.[1]

Indictable to publish libel tending to disturb peace with foreign state.

[1] Supra, § 1612 *a*.

CHAPTER L.

BREACH OF NEUTRALITY.[1]

Indictability not convertible with national duty, § 1901.
Sympathy not participation, § 1902.
Not indictable to furnish belligerent with munitions of war, § 1903.
Otherwise as to recruiting, § 1904.
And so of fitting out and arming cruiser, § 1905.
And so of lending money for belligerent purposes, § 1906.
And so of furnishing coal from a constant base of naval supply, § 1907.
Punishment, but not extradition of offender, may be demanded, § 1908.

Indictability not convertible with national duty.

§ 1901. It by no means follows, that because, by the law of nations, a neutral State is bound to a certain line of conduct towards belligerents, its subjects are bound by the same line of conduct, and are responsible to their State for any such acts of participation in foreign wars, as by the law of nations it is bound to prevent. A nation, on the one side, may say, "I do not choose to suppress these acts of participation, or I cannot suppress them, but I will take on myself the consequences, and will make reparation." Such was the position of President Washington, before the passage of the neutrality statute. Prosecutions against the offenders were attempted at common law; and although, as we have seen, it was at first held that the federal courts had common law jurisdiction of offences against the law of nations, yet, the conclusion was soon reached, that without a statute such offences could not be judicially reached. This conclusion was communicated to the English minister, Mr. Hammond, with the announcement that

[1] As recent authorities on the topic in the text may be cited Revue de Droit Intern. 1874; Calvo, Examen des trois règles, &c., pp. 433, 533; in same volume are Opinions of President Woolsey, M. Rolin-Jaequemyns, Mr. W. B. Lawrence, and Mr. M. Bernard, on the same topic; Revue de Droit Intern. 1875; Discussion of the Rules by Messrs. Lorimer, Neumann, Rolin-Jaequemyns, and Westlake; Bluntschli, Moderne Völkerrecht (3d ed.), Nordlingen, 1878, §§ 749 *et seq.*

As to common law jurisdiction see supra, § 253.

the United States government would nevertheless hold itself responsible to foreign nations for any infractions of its international obligations, though it might not be able to proceed penally against its own citizens for such infractions. The same attitude was assumed by England in the Alabama controversy. Its legislation might be defective, it was admitted, so far as concerned the power to punish British subjects for breaches of neutrality; but this in no way limited its obligations to make good to the United States losses incurred through such misconduct. And, on the other hand, a State may impose by statute on its subjects an abstention much more strict than that which is imposed by international law on itself. If so, its subjects are bound by the statute, and may be convicted of offences, which, for municipal purposes, it deems breaches of neutrality, though the litigated acts would not be breaches of neutrality by the law of nations.[1]

Sympathy not participation.

§ 1902. Strong sympathy may be felt for one of the parties to a foreign struggle, without, by international law, any breach of neutrality.[2] Such sympathy was frankly expressed by President Washington with France at the beginning of the French and English war, but both then and afterwards a strict neutrality was maintained in this war. In the French-German war of 1870, the Germans in the United States were outspoken in their expressions of sympathy with Germany, and the French in the United States with France, but this was so far from being regarded as a breach of the neutrality laws, or as imposing any penal responsibility on the parties so speaking, that President Grant, in his proclamation of neutrality issued August 22, 1870, expressly recognized it as perfectly consistent with the national neutral attitude. During our own civil war, public meetings were held in England expressing strong sympathy with the South, and so spoke some of the leading English papers; but that the English government was not bound to prohibit these demonstrations, our own government conceded.[3] Nor is this toleration of recent recognition. Simi-

[1] The English Foreign Enlistment Act, according to Sir A. Cockburn, "going far beyond the restraints which international law imposes on the neutral subjects, prohibits even the fitting out and equipping of vessels for the purpose of war." Opinion in the Alabama case, p. 255.

[2] See supra, §§ 227, 1340, 1403.

[3] See Wheaton Int. L. § 489; Bemis, American Neutrality, Boston, 1866; Declaration of the International

lar meetings, sometimes unchecked by the government of the day, sometimes even encouraged by it, were held in England for the purpose of expressing sympathy with the Greek insurrection against Turkey, in 1820–4; and with Kossuth and his revolutionary agitations in 1850. For the same reason it has never been contended in England that it is any international breach of neutrality for meetings of Irishmen to be held in the United States expressing sympathy with Fenianism.

Not indictable to furnish belligerent with munitions of war.

§ 1903. Is it an indictable offence, supposing the law of nations to be part of the municipal law of the land, for the subject of a neutral State to furnish munitions of war, even though these be contraband of war, to a belligerent? At first glance, this would seem to be a participating in the war in which such belligerent is engaged, and hence a breach of neutrality. A more careful study of the question, however, leads us to a contrary conclusion. (1.) Between selling arms to a man, and an indictable participation in an illegal act intended by the vendee with such arms, there is no necessary causal relation. "The miner, the manufacturer, and the merchant," as has already been said,[1] "may regard it not only as possible but probable, that their staples may be used for guilty purposes, but neither miner, manufacturer, nor merchant becomes thereby penally responsible." "To enable a gunshot wound to be inflicted, an almost innumerable series of conditions is necessary. It is necessary that the gun should be procured by the assailant. It is necessary that the gun should have been made by the manufacturer. It is necessary that the steel of the gun should have been properly tempered; that the bullet should have been properly cast; that the materials from which bullet, tube, and trigger were made should have been dug from the mine and duly fashioned in the factory. . . . All these are necessary conditions of the shooting, without which the shooting could not have taken place. No one of them, however, is in the eye of the law the cause." (2.) To make the vendor of munitions of war indictable would make it necessary to impose like penal responsibility on the manufacturer; and if on

Institute, Hague, 1875; Annuaire, 1877; Bluntschli, Mod. Völkerrecht, § 756, ed. of 1878.

[1] Supra, § 169.

the manufacturer, then on the producer of the raw material which the manufacturer works up. In each case the article contributed is one of the conditions of war. In each case the producer or vendor knows that the thing produced or sold will probably be used for this purpose. Hence, in times of war, not merely would neutral sale of munitions of war become penal, but penal responsibility would be attached to the production of any of the materials from which such weapons are manufactured, if such weapons afterwards fell into the hands of a belligerent. (3.) Nor would this paralysis be limited to periods of war. A prudent government, long foreseeing a rupture, or preparing in secret to surprise an unprepared foe, might take an unfair advantage of its adversary, were this permitted, by purchasing in advance of the attack all munitions which neutral States might have in the market; but on the theory before us, a neutral State could not permit this without breach of neutrality, since to permit such sales would be to give a peculiarly unfair advantage to the purchasing belligerent. Hence, if such sales are indictable in times of war, they would *a fortiori* be indictable in times of peace. Why would a foreign nation, it would well be argued, want in time of peace to buy Dahlgren guns, or Armstrong guns, or iron-clads, unless to suddenly pounce down on an unprepared foe? No munitions of war, therefore, could be sold in any country unless to its own subjects, and for its own use; and countries which cannot produce the iron or coal necessary for the manufacture of artillery would have to do without artillery, if it is indictable for a neutral to furnish a belligerent, either present or prospective, with munitions of war. (4.) To establish a national police which would prevent the sale of such commodities would impose a burden on neutral States not only intolerable, but incompatible with constitutional traditions. It might be possible in a land-locked province such as Switzerland; it might be even possible in an island like Great Britain, and with a navy so powerful; but in a country as vast as the United States, and with an ocean frontier so extended, it would be impossible to establish a system of adequate prevention without employing naval and military armaments inconsistent with our settled policy, and imposing on us a pecuniary burden far greater than any corresponding loss to belligerents. (5.) The

laissez faire rule may undoubtedly be pressed too far; but when we say that we will not prohibit the sale of firearms to our own citizens because they may be used for homicidal purposes, we cannot be called upon to intervene to prevent their sale to citizens of other States, simply because such citizens may use them homicidally. For these and other reasons there is an almost unbroken current of authority to the effect that it is no breach of neutrality for the subjects of a neutral State to furnish to a belligerent munitions of war.[1]

[1] Bluntschli, § 764. This right was assumed by President Grant, in his proclamation of August 22, 1870, and is incorporated in the treaties of the United States and Prussia of 1799 and 1828.

Germany, however, does not concede the view expressed in the text, and during the war of 1870 sent repeated and vehement remonstrances to England against the sale by English merchants of war material to France, France obtaining the almost exclusive benefit of this license. Lord Granville, in his reply, maintained that the right to make such sales is granted by international law, and that Prussian subjects, recognizing this right, had sent, during the Crimean War, to Russia large stores of ammunition and firearms.

As is seen in a subsequent note, the Prussian government took still more serious exception to the action of the United States in permitting the sale to France of munitions of war which the United States government possessed in excess at the close of the civil war.

"The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and, although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers regardless of the destination of these articles." President Pierce, Message, Dec. 1854.

To the same effect is Mr. Fish's dispatch to Gen. Schenck, June 10, 1871. On general principles of international law the conclusion in the text is sustained by Lord Granville's statement, given by Mr. Schenck, June 12, 1871. Mess. of Prest. Hayes, Jan. 14, 1879, p. 5; and by Mr. Gladstone's explanation in House of Commons, June 12, 1871 (Ibid. p. 7).

Mr. Cushing takes the same position in his work on the Treaty of Washington, p. 180.

"It is not the practice of nations to undertake to prohibit their own subjects from trafficking in articles contraband of war." Mr. Webster to Mr. Thompson, Webster's Works, vi. 452.

By Chancellor Kent, in a passage accepted by both sides of the argument in the Alabama case, it is held to be no breach of neutrality for the subjects of a neutral State to sell things capable of being used in war to a belligerent; and hence the subject of a neutral State would not be indictable

§ 1904. No State can prevent its subjects from volunteering in the service of other States; nor is its non-prevention of such action any breach of neutrality. For a citizen of the United States to go abroad to enlist is not

Recruiting is breach of neutrality.

in his own country (unless a statute impose specific indictability) for making such sales. 1 Kent Com. 142. See Ortolan, Dipl. de la Mer, ii. c. 6, p. 180; Massé, i. pp. 203–5.

The sale of armed ships by a neutral to a belligerent was held in England, in 1721, not to be a breach of neutrality; Sir A. Cockburn's Opinion, 251, Am. reprint; and in the United States by Judge Story, in the case of The Santissima Trinidad, in 1822, cited infra, § 1905. To the same effect is Mr. Adams's letter of April 6, 1863, to Lord Russell.

As holding that it is a breach of neutrality for the subjects of a neutral nation to sell to a belligerent articles contraband of war may be cited Galliani, quoted in Sir A. Cockburn's argument in the Alabama case, p. 241 (Pres. Mes. 1873).

It may be said that the three rules adopted by the treaty of Washington for the guidance of the Alabama arbitrators modify the conclusions of the text. Those rules are considered at large in the discussion of this topic by Mr. W. B. Lawrence, with which this chapter closes. So far as concerns the particular point in the text, it may be maintained that the conclusions of international law in this respect are not affected by the "three rules" for the following reasons: —

(1.) These rules are only to be binding as rules of international law if accepted by the leading powers, which they have not been.

(2.) They are not binding as permanent and absolute rules on England and the United States: (*a*) because neither England nor the United States have ever considered them to be so binding; and (*b*) because, by the treaty that proposed them, as temporary rules of action, for guidance of a special and exceptional court, their permanent adoption is dependent upon their communication to the great European powers, which communication has never been made. This position is taken by Mr. Fish in his letters to Sir Ed. Thornton of May 8, and Sept. 18, 1876, as communicated by President Hayes in his message to the Senate of Jan. 13, 1879; and there is no dissent of the British government recorded.

(3.) Even if the rules are binding, it must be remembered that on the topics discussed in the text they are couched in a vagueness which no doubt was intentional, and which leaves open the main points of dispute. The opinions of the arbitrator, it is agreed on all sides, do not bind the parties. In the debate in the House of Commons, on March 21, 1873, the attorney general, discussing this question, said: —

"Arbitrators were not judges or legislators. . . . . They had no authority, beyond that given them by the treaty, of deciding this particular point according to the rules and according to international law, and as far as they had gone beyond this we are not bound by their decision." Mr. Gladstone, then prime minister, Mr. Disraeli, Mr. Vernon Harcourt, Mr. Foster, and Mr. Hardy took the same ground. President Hayes's Message of Jan. 13, 1879, pp. 24 *et seq.*

(4.) The treaty of Washington, as a treaty, cannot enlarge, beyond their present statutory limit, the criminal

indictable under our statute.[1] But a neutral State cannot, without breach of neutrality, permit enlistments within its borders of persons to serve in foreign wars. Hence, both in England and in the United States, codifying in this respect the law of nations, it is made by statute an indictable offence to enlist soldiers for such purpose.[2]

And so is fitting out and arming cruiser.

§ 1905. While it is no offence, either under the law of nations or under our own statute, for our citizens to sell munitions of war to a belligerent, it is otherwise as to the fitting out and arming a cruiser to serve one of the belligerents.[3] To permit our territory to be used as a base for naval armament is as much a breach of neutrality as to permit it to be used as a base for military armament. In Washington's proclamation of June 5, 1793, this was expressly declared, and such assistance was made an indictable offence by the Act of April 3, 1818, § 3.[4] The English statute of 1819 contains

responsibility of citizens of the United States. Whatever we may say, in other relations, of the right of the President and Senate by treaty to modify or repeal statutes already in force, they cannot create, under the rulings heretofore noticed, a new jurisdiction for the courts. Supra, § 253. "A citizen," to adopt the language of an eminent publicist, "can incur no new criminal responsibility to his own country without the interposition of the legislature, which may define the offence and fix the penalty."

In a lucid exposition of the arbitration in the Am. Law Rev. vii. 237, it is said: "In limiting the rights of neutrals and augmenting the rights of belligerents, a grave injury is done to the cause of civilization and humanity. . . . . It seems to us that the tendencies of modern theorists and the tendencies which have found expression in the decision at Geneva, are in the interests of absolutism, of enormously powerful states, of immense standing armies, of military power. . . . . That the United States should in a few years have become so drunk with military excitement and success as to labor for such a consummation is simply marvellous."

[1] U. S. *v.* Kazinski, 2 Sprague, 7; 8 Bost. Law Rep. 254; 4 Opin. Atty. Gen. 336; U. S. *v.* Skinner, 2 Wheel. C. C. 232.

[2] U. S. Statutes of June 5, 1794; April 20, 1818; English Foreign Enlistment Act of July 3, 1819 (59 Geo. 3, c. 69), s. 2; Phill. Int. L. iii. § 146; Wheat. Int. L. § 439. To hire others to go abroad as soldiers is within the act. U. S. *v.* Hertz, Whart. Prec. § 1123, n.; 3 Pitts. L. J. 194.

[3] Either to fit out or to arm constitutes the offence. U. S. *v.* Quincy, 6 Pet. 445; 3 Opin. Atty. Gen. 738, 741; U. S. *v.* Guinet, 2 Dall. 321.

[4] Bemis, American Neutrality, Boston, 1866.

The mere fact of selling a merchant vessel, in an American port, to parties who may use her in the service of a belligerent, she being in fact so used, is not by itself an infringement of the act. Williamson *v.* The Betsey, Bee,

a similar prohibition. The imperfect performance by the British government of its duties in this respect provoked a controversy which led to the treaty of Washington of May 8, 1871, which provided for an arbitration for the purpose of determining how far the British government had failed in the discharge of its neutral duties. The treaty established certain lines within which the arbitrators were to move, laying down for the purposes of the arbitration three rules which are given in a note to this chapter. The report of the arbitrators, therefore, is not to be received as giving a construction to international law, but as a finding based upon certain specific rules agreed upon for a special and temporary purpose, by the parties from whom the arbitration sprang. The proceeding, therefore, is in the nature of a special finding upon law assumed for the time being, and establishes no modification whatever of public international law. We have, therefore, to fall back on that law, as elsewhere determined, to reach the distinction between fitting out and arming ships of war, for the service of a belligerent, which is not permissible, and selling to such belligerent, ships, to be converted into men-of-war, and munitions of war, which is permissible.[1] And this distinction, though sometimes of difficult application, is, as is seen in a prior connection, based upon principles of universal recognition. It is not indictable for a gunsmith to sell a pistol to a party who may use it unlawfully, even though the vendor may have reasons to suspect the object of the purchase. It would, however, be unlawful for the gunsmith to join in arranging a machine by which a specific unlawful purpose is to be

67; The Santissima Trinidad, 7 Wheat. 283. Compare The Meteor, 1 Am. L. Rev. 401; S. C., 3 Am. L. Rev. 173.

It is, however, clearly an offence within the act to augment the armament of a belligerent ship of war. U. S. *v.* Grassin, 3 Wash. C. C. 65; The Nancy, Bee, 73; Moodie *v.* The Brothers, Bee, 76; Moodie *v.* The Betty Cathcart, Bee, 292.

It is no defence that the enterprise was concocted beyond seas, if the aid the defendant is charged with giving is imparted within our jurisdiction. Needham, ex parte, Pet. C. C. 487.

A commission from one of the belligerents is no defence. The Bello Corrunes, 6 Wheat. 152; La Conception, 6 Wheat. 235.

Mere desire to aid, or contemplation of it as a probability, at the time of fitting out a merchant ship, does not bring the party within the statute. U. S. *v.* Quincy, 6 Pet. 445; The Meteor, 1 Am. Law. Rev. 401.

[1] See U. S. *v.* Quincy, 6 Pet. 445.

achieved. It is not unlawful, in other words, to be concerned in preparations which will not, unless diverted by an independent force, produce a violation of law. It is, however, unlawful to be concerned in putting in actual operation dangerous machines. He who is concerned in fitting out and arming a man-of-war, for the purpose of preying on the commerce of a friendly State, or of attacking its armed ships or ports, is as much concerned in the attack as he who takes part in manufacturing and planting a torpedo in a frequented channel is responsible for the mischief done by the torpedo. This distinction has been already asserted in the cases which rule that it is an indictable offence to be concerned in counselling and aiding a specific attack, but not an indictable offence to be concerned in selling arms by which such attack is to be made.[1]

Money loaned for belligerent purposes an infraction of neutrality.

§ 1906. To lend money to sustain a foreign belligerent, or insurgents against such a belligerent, is an offence under the neutrality statutes, provided that such money is sent to sustain the pending war. It is otherwise as to contributions sent to relieve distress even in a belligerent army.[2] Hence, in the late French-German war, it was no breach of neutrality for persons of French origin in the United States to send money for French hospital use, or for persons of German origin in the United States to send money for German hospital use.[3]

Coaling forbidden from a constant base.

§ 1907. It is a moot question how far it is permissible, by the law of nations, for a neutral state to supply the armed steamers of belligerents with coal. The Geneva award declares: "In order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character."[4] Mr. Adams, in his opinion thus speaks: "The supply of coal to a belligerent involves no responsibility to the neutral, when it is made in

[1] See supra, §§ 180–1; The Gran Para, 7 Wheat. 486.

[2] Phillimore, iii. § 151; Bluntschli, § 768.

[3] Ibid.

[4] Rep. State Depart. 1872–3, Part i. pp. 11, 49, 74.

response to a demand presented in good faith, with a single object of satisfying a legitimate demand openly assigned. On the other hand, the same supply does involve a responsibility, if it shall in any way be made to appear that the concession was made, either tacitly or by agreement, with a view to promote the execution of a hostile act."

According to Sir A. Cockburn, "A base of operations signifies a local position which serves as a point of departure and return in military operations, and with which a constant communication can be kept up, and which may be fallen back upon whenever necessary. In naval warfare it would mean something analogous, — a port or water from which a fleet or ship of war might watch an enemy and sally forth to attack him, with the possibility of falling back upon the port or water in question for fresh supplies or shelter or a renewal of operations."[1]

The true distinction is this: it is not a breach of international obligation for a neutral State to permit the coaling of belligerent steamers in its ports to the same extent as it permits the coaling of other foreign steamers resorting to its ports casually and without prior preparations established for them. It would, however, be a breach of international obligation for a neutral to permit a permanent depot or magazine to be opened on its shores, on which a particular belligerent could depend for constant supplies. For a neutral to blockade its ports so as to exclude from coaling all belligerents, would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent, who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous, and constitutional strains so severe as those thus imposed. On the other hand, the breaking up of local depots or magazines for the supply of particular belligerents would be within easy range of ordinary national police. Nor can there be any charge of partiality made in allowing coaling with the limitation above stated, when the same privilege is granted to both belligerents.

§ 1908. By international law, a belligerent State whose rights

[1] Sir A. Cockburn's Opinion in Geneva case, adopted by Mr. Hardy, in House of Commons, March 21, 1873; President Hayes's Message, January 14, 1879, p. 28. See Cushing's Treaty of Wash. p. 180.

are invaded by the subjects of a neutral State has the right to demand the punishment of the offender, but not his extradition, the offence being of a political character, to which the extradition treaties do not apply. The persons whose punishment may be thus demanded have been classified[1] as follows: —

Punishment but not extradition of offender may be demanded.

1. Subjects of one of the belligerents.[2]

2. Subjects of the neutral State.[3]

3. Strangers, belonging to other neutrals in such neutral State.[4]

[1] Bluntschli, § 780.

[2] Hence a foreign consul is not exempted from the penalties of the Act. 7 Opin. Atty. Gen. 307; U. S. *v.* Guinet, 2 Dall. 321.

[3] Henfield's case, 1 Wh. St. Tr. 49.

[4] U. S. *v.* Villato, 1 Wh. St. Tr. 185; 3 Dall. 370.

For the following valuable summary of the history of the law in connection with the topics in the foregoing chapter, I am indebted to Mr. Wm. Beach Lawrence: —

Most of the States of Continental Europe now have laws to prevent such action on the part of their subjects as may embroil them with other powers. The 84th and 85th articles of the Penal Code of France, under the head of crimes and misdemeanors against the safety of the State, provide that whoever shall by hostile action, not approved by the government, expose the State to a declaration of war shall be punished by banishment (bannissement), and if war ensues by transportation (deportation); and whoever shall by acts not approved by the government subject Frenchmen to reprisals shall be punished by banishment (bannissement). These same provisions form part of the penal Code of Belgium and the Netherlands, while Spain, in the 140th article of the Codigo Penal, and the 258th article of the law of 1822, has provisions corresponding to those of the French Code.

England had not until the Act of 1819 any statute provisions enforcing neutrality in favor of a foreign belligerent. The statutes 9 and 29 George 2 were intended to prevent enlistments for the formation of Jacobite armies in France and Spain, and it was only in 1870, after the controversy with the United States as to her neutral duties in the American civil war, that the Act of 1870, which prohibited the building of ships for the service of a belligerent, which was not included in the Neutrality Act of 1819, was passed. England has, however, always recognized the law of nations as part of her common law, and consequently all offences against international obligations may be punished according to the ordinary criminal procedure, either in the common law or admiralty tribunals, as the nature of the case requires.

The Constitution of the United States, art. 1, § 8, gives to Congress power to define piracies and felonies committed on the high seas, and offences against the law of nations. The provision is not merely to define and punish piracies, but felonies against the law of nations. Offences against the law of nations cannot be said to be completely ascertained and defined in any public code recognized

by the common law of nations. As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the nation is essentially connected with the conduct of our citizens in regard to foreign nations, Congress ought to possess the power to define and punish all such offences which may interrupt our intercourse and harmony with other nations and our duties to them. All cases of admiralty and maritime jurisdiction are made, by art. 3, § 2, matters for the exclusive cognizance of the federal judiciary; as the seas are the joint property of all nations, the rights and privileges thereto are regulated by the law of nations. Story's Commentaries on the Constitution, vol. 3, pp. 52–58, 525, 536; Tucker's Blackstone, vol. 1, Appendix, 268, 269; Rawle on the Constitution, p. 108; Kent's Commentaries, vol. 1, § 17, passim; Sergeant on the Constitution, c. 21; De Lovio *v.* Boit, 2 Gall. 470.

On the occasion of the war in 1793 between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands on the one part, and France on the other, the United States were called upon to decide on their international obligations. The necessity of immediate action was induced by the conduct of the French government and their minister in the United States in fitting out privateers in our ports, whose prizes, whether made on the high seas or within our territorial waters, were brought into our ports. There were intrinsic difficulties in the maintenance of an impartial neutrality, arising from the discordant if not incompatible character of the obligations existing on our part to France and England respectively. The treaty with France, which commenced by stipulating exemption from belligerent capture of enemy's goods in neutral ships, was in many respects at variance with the rules which we had accepted from England as governing the consuetudinary law of nations; while by the treaty of 1792, which was subsequent to the President's proclamation of neutrality, we gave to the English interpretation of international obligations a conventional sanction.

But there are many things which may be done by a neutral in war which have the appearance of equality, but in their operation may have a different effect on the conflicting interests of the belligerents. A neutral country may, without breach of neutrality, permit both belligerents to equip vessels in its ports. Even without any previous stipulation with either party, the ports of a neutral may be closed or kept open to the prizes of both. It is competent for a nation to stipulate during a period of peace to give in war privileges to one party exclusively: thus by the treaty of 1778 with France it was declared that it should be lawful for the ships of war of either of the contracting parties, and privateers, to carry whithersoever they please the ships and goods taken from their enemies, while no access shall be given to the ships of war or privateers of their enemies, except when forced in by stress of weather.

Congress had, at the time of the proclamation, passed no law respecting neutrality, and if the case was to be met at all, it could only be, in the recess of Congress, by executive action through the courts or otherwise. The question, which afterwards became one of such grave import, as to whether the federal government in criminal matters had a common law jurisdiction, does not appear to have suggested itself to the authors of the proclamation. So late as 1823 the law officers of the crown advised the British government that parties who

had violated the neutrality of the country, by making loans to a belligerent, were, though there was no express statute on the subject, liable to criminal proceedings according to the course of the common law. Halleck's International Law, by Baker, vol. ii. pp. 196, 197, note; Phillimore, vol. iii. p. 247; De Wütz *v.* Hendricks, 9 Moore, C. P. 585.

The proclamations usually issued at the beginning of a war were against breaking blockade established by or on behalf of either of the contending parties, or of carrying officers or any articles considered and deemed to be contraband according to the usage of nations, and declare that all persons so offending would be liable to the several penalties imposed by statute or by common law; and yet in the absence of any statutory enactments no criminality is incurred, nor are the persons who engage either in the violation of a blockade, or in a contraband trade, exposed to any criminal proceedings on the part of the belligerent, or are they liable to be treated even as prisoners of war. Neutral subjects are responsible to their own government, not to that of the belligerent, for infractions of neutrality.

"The States-General, as well as every other prince, may make what laws they please with respect to their subjects; not so with respect to foreigners. Hence it is properly asked, What is lawful for us by the law of nations to carry to the enemies of our friends? or, what is the same thing, What may our friends lawfully carry to our enemies? Whatever is not lawful to be carried, if the friend take it, he may lawfully confiscate, and by *that confiscation alone* the whole penalty of the law is satisfied." Bynkershoek, Quaestiones juris publici, lib. i. c. x. p. 181; Duponceau's Translation, p. 75.

Nor is it deemed a crime on the part of a neutral to take a commission from one of the belligerents. In the case of the denunciation as pirates by the government of the United States, at the commencement of the war of secession, of all who engaged in Confederate privateers, it was intimated in the debate in the House of Lords (May 16, 1861), that if an English subject thus engaged was convicted and executed for piracy, it would afford a ground for international reclamation. Parliamentary Debates.

[After the close of the war, the United States government declined to prosecute Semmes, captain of the Alabama, on the ground that it could not sanction the view that privateering with a belligerent commission is piracy. See Letters of Mr. Bolles, Solic. of the Navy, Atlantic Monthly, July and August, 1872. Supra, § 1864.]

But although the United States exercised the right of restoring property captured under the circumstances before indicated, they have invariably maintained the extra-territoriality of ships of war, whether public armed vessels or privateers, having a commission from their sovereign, and in restoring the prizes have always refused any damages or costs as against the captors.

In the case of U. S. *v.* Peters, 3 Dallas Rep. 121, a prohibition was granted against proceedings in the District Court against The Cassius, an armed corvette of the French Republic, for an alleged illegal capture on the high seas of a neutral merchant vessel belonging to a citizen of Pennsylvania.

In the case of The Exchange, the principle that a vessel bearing the flag and commission of a belligerent power was not within the local jurisdiction of the neutral law, though claimed by citizens of the neutral country as having

been forcibly taken from them, as prize, contrary to international law, was fully upheld on appeal by the Supreme Court of the United States. Cranch's Rep. vol. vii. pp. 135, 147. Schooner Exchange *v.* McFadden and others. Lawrence's Wheaton, 201, 725.

The private armed vessel of a foreign friendly power may claim the same immunities and is as free from the jurisdiction of our courts as if she were a national vessel. L'Invincible, 1 Wheaton, 238, 252. The principles of the proclamation were incorporated in a law of Congress passed in 1794, which, after being extended in 1797, was perpetuated by the Act of 24th April, 1800.

It was during the continuance of this act that the trial of Smith and Ogden was held, for being concerned in the expedition of Miranda against the dominions of the king of Spain, in South America. The defence proposed to establish that the expedition had been instituted with the concurrence, if not at the suggestion, of the government of the United States, and for that purpose summoned as witnesses the secretary of state, and other principal members of the administration. These officers, in a communication to the court, expressed their inability to attend on account of public duties, but proposed that their testimony should be taken by commission, to which the defendants refused to assent, but asked for compulsory process, and that the case might be deferred until their attendance. The court decided that their testimony would be immaterial, inasmuch as the previous knowledge or approbation of the President to the illegal acts of a citizen could afford him no justification for the breach of a constitutional law. The President's duty is faithfully to execute the laws, and he has no such dispensing power. But although the charge of the judge was strongly against the defendants, and there was no question as to the law, the jury returned a verdict of not guilty. Trial of Smith and Ogden, p. 237.

The difficulties with France, to which we have adverted, were not solved till the abrogation of all treaties with her and the quasi war of 1798, which was terminated by the treaty of 1800. Nor did that treaty, nor the exceptional indemnification provided by the conventions of Louisiana, terminate our controversies respecting the rights and duties of neutrals.

From the end of the last century to the termination of our War of 1812 with England, there were few occasions on which we could well be called on to fulfil as neutrals international obligations. England, mistress of the ocean, the dominion of the European continent was secured to France, and it would, from their orders in council and imperial decrees, seem that they deemed that they had a common interest in extinguishing neutral rights. The outrages of one belligerent constituted an acknowledged sanction for the correspondent acts of the other.

Thus Mr. Canning, in a note of 22d September, 1808 (to Mr. Pinkney, minister in London, and the contemporaneous language of the Duke of Bassano to our minister in France was similar), said: "I have uniformly maintained the unquestionable right of his Majesty to resort to the fullest measures of retaliation, in consequence of the unparalleled aggressions of the enemy, and to retort upon that enemy the evils of his own injustice; and have uniformly contended that if third parties suffer from these measures, the demand of reparation must be made to that power which first violates estab-

lished usages of war and the rights of neutral States."

At this time the interchange of commodities required for the use of the respective belligerents was effected through a direct trade by licenses, of which England granted, in 1809, 16,000. Lawrence's Wheat. p. 835.

The revolutionary movements in Spanish America, which commenced in 1810, afforded, after the termination of our war with England in 1815, occasion for encouragement to our citizens to take part, especially in the fitting out of privateers, which were complained of by Spain as violative of our neutrality. An amended act of neutrality, giving preventive powers, was passed 3d March, 1817, all the provisions of which were incorporated in the Act of 20th April, 1818, which repeals the several acts of 1794, 1797, 1800, and 1817.

There is a change in the first section, which extends the prohibition to citizens of the United States, within the territory or jurisdiction of the same, from accepting or exercising a commission to serve a *foreign prince or state by land or sea.*

The existing law, according to the summary of it as given by Chancellor Kent (Kent's Commentaries, p. 128), and adopted by Wheaton (Lawrence's Wheaton, p. 729), declares it to be a misdemeanor for any person within the jurisdiction of the United States to augment the force of any armed vessel belonging to one foreign power at war with another power with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service, or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them; and the vessel in this latter case is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by law. Revised Statutes, §§ 1033 *et seq.*

It is to be noted that it is equally unlawful to fit out ships against an insurgent government as it is to fit them out for the insurgent.

The complaints, notwithstanding the passing of this act, against the United States by Spain and Portugal, were not unlike those which were made by the United States against England during our late civil war. The courts looked to the political department of the State to determine who were entitled to belligerent rights, and whether or not a formal recognition of independence had taken place; and they attempted to apply the same principles as were applied in General Washington's administration to the cases of captures made either within our territorial jurisdiction or by vessels fitted out in our ports. The same difficulty of distinguishing, especially as to fitting out vessels of war, between acts done in furtherance of the military aid to a belligerent, and those which came fairly within the scope of commercial transactions, was constantly occurring. Reference may be made to the case known as The Santissima Trinidad, which illustrates both the validity of the sale of a vessel as a commercial transaction, even when sent abroad to seek a market, and the duty of restoring property taken by that same vessel after her sale and subsequent augmentation of her armament in an American port. In that case, Judge Story shows that the sale of armed ships of war has never been held to be contrary to law in America, as it will appear that it never was in England, till after her Neutrality Act

of 1870. The case was that of a vessel called The Independencia, which had been equipped for war, was armed with twelve guns, and had been sent from the port of Baltimore avowedly upon a voyage to the northwest coast, but in reality to Buenos Ayres, then at war with Spain, with instructions to the supercargo to sell her to the Buenos Ayres government if he could obtain a certain price. She was sold to that government, and, having been commissioned, was sent to sea and made prizes. She afterwards put into an American port, and *having there received an augmentation of her force, again put to sea and captured a prize.* The validity of this prize was questioned in the suit on two grounds: 1. That the sale of the vessel to a foreign government by American citizens, for the purpose of being used in war against a belligerent with whom the United States were at peace, was a violation of neutrality and illegal. 2. Because the capture had been made after an augmentation of the force of the vessel in a port of the United States. The capture was held invalid on the latter ground. Upon the first the judge delivered judgment as follows: —

"The question as to the original illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent that though equipped as a vessel of war she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the person engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bonâ fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was for that cause alone invalid." 7 Wheat. 283.

Besides the invalidity of the captures made by the Independencia subsequent to the increase of her armament, other cases of action under the Act of 1818 may be noticed: La Conception, 6 Wheat. 235; Amistad de Rues, 5 Wheat. 385; The Bello Corrunes, 6 Wheat. 152; The Fanny, 9 Wheat. 658; and especially The Gran Para, 7 Wheat. 471. To meet the case of the Canada insurgents in 1838 a special act of Congress was passed. Statutes at Large, vol. v. p. 211.

In the case of The Meteor, libelled in 1866 at New York, Betts, Judge, says: "As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied is not the extent and character of the preparations, but the intent with which the particular acts are done. The intent is all. Is the intent one to prepare an article of contraband merchandise to be sent to the market of a belligerent, subject to the chances of capture and of the market? On the other hand, is it to fit out a vessel which shall leave our port to cruise immediately or ultimately against the commerce of a friendly nation? The latter we are bound to prevent, the former the belligerent must prevent."

The public history of the United

States contains several instances in which the President has felt himself obliged to call by proclamation the attention of the citizens to expeditions menaced against foreign countries, and to warn them of the consequence of disobedience to the provisions of the neutrality acts.

During the Crimean War it was necessary to apply the provisions of that act to the case of enlistments made or attempted to be made for the British armies. Supra, § 1904.

In 1856, in consequence of the complicity, as understood and maintained by the American government, of the British minister, Mr. Crampton, and of the consuls at New York, Philadelphia, and Cincinnati, with reference to the arrangements for the enlistment of persons resident in the United States to serve in the British army in the Crimea, in violation of the neutrality law of the United States, as construed by the American government, the President determined to send to Mr. Crampton his passport, and to revoke the exequatur of the three consuls. Annual Register, 1856, p. 277; 34th Cong. 1st Sess. H. R. Ex. Doc. No. 107.

The Franco-German war did not terminate without exposing the United States to some embarrassment, on the ground of the sale to France of munitions of war, which, whether or not the property of the government at the time of the exportation, had shortly before been in the public arsenals.

The termination of the civil war left the United States in possession of a vast quantity of materials of war, for which they had no use. The British minister at Washington wrote: "A series of public sales of surplus guns, rifles, and other arms took place at New York. Large quantities were bought by French agents, were taken on board French ships direct from the arsenal at Governor's Island, and were paid for through the French consul." Mr. Thornton to Lord Granville, 1863, State Papers, lxxi. 202.

At the session of the Reichsrath, which followed the sale to France of munitions of war taken from American arsenals, it was proposed in the Commission of Foreign Affairs to suppress the appropriations for the mission to the United States. This was prevented by the intervention of Prince Bismarck, who, avowing that a *casus belli* existed, said, as it was unworthy of great nations to utter menaces without giving effect to them, Germany had no alternative but war or silence; and as it was not consistent with his policy to go to war with America, he requested that nothing further should be done in the matter. Albany Law Journal, vol. xi. p. 28, note.

There were not wanting also complaints by Prussia of the violation of neutrality, in matters of contraband, against England, though not by the direct action of her government; and, as we shall see, the embarrassments to which both governments had exposed themselves in this particular contributed, not a little, to the indefinite postponement of any efforts to bring the *three rules* of the Alabama treaty to the notice of other powers.

The Act of 59 George 3, c. 69 (1819), was entitled, "An Act to prevent the Enlisting or Engagement of his Majesty's Subjects to serve in Foreign Service, and the fitting out or equipping in his Majesty's Dominions, Vessels for Warlike Purposes, without His Majesty's License." This law was passed to carry out the obligations contracted by the treaty of 1812 with Spain, in reference to the revolutionary movements then going on in Spanish America.

It was after a very severe struggle, and mainly by the great power of Mr.

Canning, carried through parliament. Public feeling, however, was generally averse to it, and a notion, that it assisted the despotic powers of Europe in repressing the efforts of their subjects to obtain constitutional liberty, prevailed. It is a very remarkable fact, that no public prosecution of an offender against the provisions of the statute appears to have been formally conducted by order of the government in a court of justice until the period of the recent American civil war; that is, nearly fifty years after the passing of the act. Phillimore Commentaries on International Law, vol. i. p. 466.

Mr. Baron Channell, in the case of The Alexandra, said: "The Foreign Enlistment Act, particularly the seventh section, is very imperfectly worded. There is no doubt that it was in a great measure, but with what appeared to me very important variations, penned from an act of the United States, passed in Congress, 1792, and reënacted in 1818." This vessel was built at Liverpool, nominally for Frazer, Trenholm and Company. She was, after being launched, immediately taken to a public dock for completion. According to the evidence at the trial, she was apparently built for war but not for commerce, but might have been used as a yacht. At the trial, which took place before the Chief Baron of the Court of Exchequer, on an information by the attorney general, the jury found for the defendants. The question was left to the jury by the Chief Baron as follows: "Was there any intention that in the port of Liverpool, or in any other port, she should be either equipped, furnished, fitted out, or armed with the intention of taking part in any contest? If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order and in compliance with a contract, leaving to those who bought it to make what use they thought fit of it, then, it appears to me that the Foreign Enlistment Act has not in any degree been broken." The Neutrality of Great Britain during the American Civil War, Montague Bernard, c. xiii. p. 355. The arguments on the motion to discharge the rule are in Atty. Gen. *v.* Sillem, 2 Hurl. & C. 431.

Contrary to the course of the United States in confiding the execution of her neutrality acts, including that of 1818, to the admiralty courts, the English Act of 1819 gave jurisdiction to the common law courts; and the case of The Alexandra, which was formally decided in favor of the defendant, though the opinions of the judges of the Court of Exchequer were divided on a technical question of construction, produced an irritation in the minds of the American people which neither the decision, in a contrary sense, of a Scotch court, nor even the interference of the government with the purchase of the Anglo-Chinese squadron, supposed to be intended for the South, had any effect in allaying.

So far back as January, 1867, a commission was appointed consisting of some of the most eminent English jurists, including Phillimore, Twiss, and Vernon Harcourt, all high authorities on international law, and to which Mr. Abbot (now Lord Tenterden) was attached in the capacity that he held to the High Commission at Washington. The result of their labors was embodied in the Act of 9th of August, 1870, the passage of which was hastened by the Franco-Prussian war. This act prohibits the building, or causing to be built, by any person

within her Majesty's dominions any ship, with intent or knowledge of its being employed in the military or naval service of any foreign State at war with any friendly State; issuing or delivering any commission for any such ship; equipping any such ship, or dispatching or causing any such ship to be dispatched for such purpose. It is deserving of notice that Mr. Vernon Harcourt dissented to that portion of the Report of the Commissioners that applied to the prohibition of ship-building. Jurisdiction in cases under the act is given to the Court of Admiralty, which is not the least important amendment of the law.

The most interesting question affecting the obligations of neutrals and belligerents, during the war of secession, grew out of the reclamations of the United States, in their character of belligerents, against England, who, it was contended, had failed to fulfil her neutral obligations. The merits of the controversy it is not intended here to discuss. That the United States had at least a *primâ facie* claim for indemnity is implied from the terms of 1st Article of the Treaty of Washington of 1871, expressing the regret of her Majesty's government "for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels," and from their referring what was called the Alabama Claims to a tribunal of arbitration. Distinguished as were the members of the High Commission, as well as the Commissioners at Geneva to whom the adjudication of these claims was referred, the value of the whole proceedings, as precedents in the public law of nations, is greatly impaired by the anomalous course prescribed to the arbitrators. Instead of taking the law of nations as their sole guide, they were to be governed by three rules, which the parties had agreed upon as rules to be taken as applicable to the case, and by "such principles of international law not inconsistent therewith, as the arbitrators shall determine to be applicable to the case."

The rules thus adopted were as follows:—

"A neutral government is bound, First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

While prescribing these rules the British members of the High Commission caused to be inserted in the treaty, that "Her Majesty's government cannot assent to the foregoing rules as a statement of principles of international law, which were in force at the time when the claims mentioned in art. 1 arose; but that her Majesty's government in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory

provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that her Majesty's government had undertaken to act upon the principles set forth in these rules." "And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."

Before an award had been rendered, an attempt was made to carry out the provision of the treaty, which requires the communication of the three rules to other powers, asking their adoption of them. It had been proposed to present them in identical notes. A delay arose from the apprehension that the stipulation of the second rule, "not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies, or arms, or the recruitment of men," might be interpreted contrary to the acknowledged practice of the two contracting parties, especially in the Franco-German war, as a general prohibition of the sale of munitions of war by neutrals to belligerents. The two parties were agreed that the rule should not be presented to foreign powers for their acceptance without an explanation which would prevent such a conclusion, and which would restrain their operation to those acts which are done for the service of a vessel cruising or carrying on war, or intending to cruise or carry on war against another belligerent, and that they should not extend to cases where military supplies or arms are exported for the use of a belligerent power from neutral ports or waters in the ordinary course of commerce. To formalize a new clause in a manner acceptable to England and America had not been practicable before the interruption of the correspondence in 1872.

It was not resumed till June, 1873, after the difficulties of agreement had been increased by the exaggerated construction given by the arbitrators to the terms of the rules. "The due diligence," they say, "referred to in the first and third of the said rules, ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;" and that "the circumstances out of which the facts constituting the subject matter of the present controversy arose were of a nature to call for the exercise, on the part of her Britannic Majesty's government, of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by her Majesty on the 31st May, 1861."

A dispatch of Earl Granville, alluding to the proposition of Mr. Fish to submit the *three rules* to the maritime powers, refers to the embarrassments which resulted from the presentation to the commission of the indirect claims, and to the difficult position in which the representatives of England and of the United States would be placed if they submitted to other States a series of rulings as to the meaning of which they entirely differed. Earl Granville furthermore insisted that, while the English government is not at all disposed, as it appears especially from the debates in parliament, to accept all the decisions of the tribunal at Geneva, the presentation of the *three rules* to "the great powers" would probably be considered as an acceptance of its interpretation of them, and inevitably induce

the rejection of the *three rules* by all these powers.

The President, in pursuance of their resolution of June 3, 1878, submitted to the Senate, January 13, 1879, the correspondence between the governments of the United States and Great Britain in regard to inviting other maritime powers to accede to the *three rules*. The last note, which was from Mr. Fish to Sir Edward Thornton, bears date September 18, 1876. The correspondence clearly establishes that there was no disposition on the part of the two powers, least so on the part of Great Britain, to make the submission; and from the subsequent silence we are to infer that the *three rules* are to be deemed limited in their operation to the single matter of the Alabama Claims, and as withdrawn from any proposed reform of the law of nations. It may be added that there was a conviction on the part of both governments that they could not receive the assent of a single State. Austria and Germany had early given instructions to that effect. Parliamentary Papers, 1874; Congressional Documents (Senate), Ex. Doc. No. 26; 45th Cong. 3d Session, 1879.

These rules, however, after having been greatly modified by Bluntschli and other continental jurists, received, in 1875, the assent of a majority of the members of the institute of international law, present at the Hague. Montague Bernard, Sir Travers Twiss, and Professor Lorimer, opposed their adoption, — the last named declaring that the *three rules* of Washington, as well as the American and foreign enlistment acts passed under the influence of the same ideas, are bad in theory and inapplicable in practice.

The English publicists — Sir Robert Phillimore, in his Commentaries, vol. iii., and Sir Shenston Baker, in his able notes to Halleck's International Law, vol. ii. p. 189 — would seem not to differ from their countrymen who are members of the institute. The latter remarks: "The better opinion seems that impressive and impracticable obligations would be imposed on neutral nations, if the principles set forth as the basis of the award and the interpretation placed on the *three rules* were acceded to in future cases."

The condition of belligerency would be infinitely preferable to that of neutrality as defined by the conference of Geneva; and the due diligence prescribed would compel the United States, whenever they were neutrals, to maintain a naval police competent to cope with any belligerent forces, throughout the whole extent of our coasts, both on the Atlantic and Pacific coasts.

By the repudiation of the *three rules* by their authors, we are remitted to the laws of neutrality as understood before the attempt to define neutral obligations by municipal or by conventional law. Though it is conceded that munitions of war may be sold in a neutral country to be used against a nation at peace with it, and though a ship fitted out for war may be sent across the ocean to seek a purchaser, it is contended that she cannot be sold at home to a belligerent. There can be no other ground on which to rest the distinction than that which was assumed by President Washington's administration, and which connects itself with the well recognized rule forbidding, in all cases, a neutral to permit his territory to be used as the basis of hostile operations whether by sea or by land. It was against the use of the port, not against the sale of ships, that the proclamation of 1798 was directed. It was from confounding the right to build and sell a ship of war in a neutral port, with the equipment and dispatch from it of a hostile expedition, that all the difficulty has arisen.

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