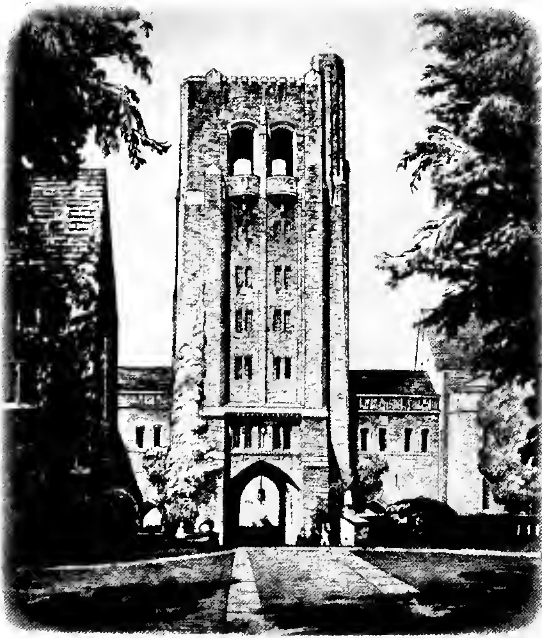

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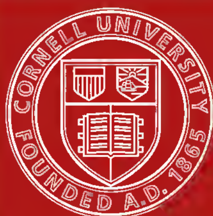

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A TREATISE

ON THE

CRIMINAL LAW

OF THE

UNITED STATES:

COMPRISING A

GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW,

AND A

Digest of the Penal Statutes

OF THE

GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO;

WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES,

BY

FRANCIS WHARTON,

AUTHOR OF "PRECEDENTS OF INDICTMENTS AND PLEAS," "MEDICAL JURISPRUDENCE," "AMERICAN LAW OF HOMICIDE," ETC.

FIFTH AND REVISED EDITION.

VOL. I.

PHILADELPHIA:
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PHILADELPHIA:

COLLINS, PRINTER.

[Dedication to the First Edition.]

TO THE

Hon. JOHN K. KANE,

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Sir:

I beg leave to present to you the following Volume, prepared during the period in which, as Attorney-General of Pennsylvania, you were pleased to associate me with yourself in the prosecution of the pleas of the Commonwealth. It affords me great pleasure to take this opportunity, at the close of the connection which was thus established, of expressing my sense of the generous confidence and the powerful support with which you honored me while that connection lasted. It was my good fortune to witness the unspotted honor, the eminent ability, the varied accomplishments, and the professional skill, with which you executed the duties of the office you then occupied; and I earnestly hope that for many years you will continue to adorn with the same high qualifications the judicial station you have since been called to fill.

With great respect, I remain

Your obliged servant and friend,

FRANCIS WHARTON.

Philadelphia, August 20, 1846.

PREFACE TO THE FIFTH AND REVISED EDITION.

SINCE the publication of the Fourth Edition several circumstances have required the expansion of the one volume into two. Great additions have been made to the penal codes of the States whose statutes are cited at large, and in Pennsylvania, in particular, a new and extended code has been just adopted. The law, in other respects, both in England and in America, has received from the courts modifications which are numerous and important, requiring a considerable correction and expansion of the text. And recent German research, on the subject of indicatory evidence, has made it desirable considerably to enlarge the chapters on this topic.

Concurrently with this work is published the second edition of the Treatise on Medical Jurisprudence, edited by Dr. ALFRED STILLÉ and myself, to which the student is referred as giving a full exposition of the present state of legal medicine and legal psychology.

F. W.

JANUARY, 1861.

PREFACE TO THE FOURTH EDITION.

In this, the fourth edition of my work on Criminal Law, I have subjected it to such a revision as will place it, I trust, in that permanent shape which the rapid exhaustion of the former editions requires. A large portion of the text has been re-written. A severe and minute analytical division has been adopted, so as to cut away mere surplusage; to facilitate reference from point to point within both its own pages, and those of the treatises on kindred topics which I have placed by its side; and to give the practitioner the information he requires, in the smallest possible space, and with the least possible trouble. In addition to these alterations, I have worked into the text the decisions of the English and American Courts, so far as published, down to January, 1857; and I have introduced the penal Statutes of Ohio, with the decisions under them.

Simultaneously with this volume, will be issued a second edition of my collection of Precedents of Indictments and Pleas, a volume which is so framed as to make it uniform with this volume in the interchange of references, as well as in the statement of the law. In connection with this, I may now mention the Treatise on Homicide, published by me in 1855, and that on Medical Jurisprudence, prepared in 1856, by the late Dr. Moreton Stillé and myself, which, with the volumes now issued, make up a consistent, if not a complete exposition of Criminal Law, in its theory and practice in the United States.

F. W.

May 1, 1857.

PREFACE TO THE THIRD EDITION.

In the present edition the text has been carefully revised, as well as extended; the intermediate English and American Cases, from April, 1852, down to November, 1854, added; and the Index greatly amplified and improved.

F. W.

PHILADELPHIA, February, 1855.

PREFACE TO THE SECOND EDITION.

INDEPENDENTLY of the additions which were necessary to bring the work down to the present day, it will be found that in this edition several new chapters have been added, and others entirely recast. Of the latter, I may cite as instances, the chapters on Conspiracy and False Pretences: of the former, the chapters on Preparation for Trial, in which it will be seen I have drawn largely from the Civilians, and particularly from those of the German nation, and of recent years. It would be improper in me not to mention, also, the great obligation I have been under, in preparing this branch of the work, to the late elaborate treatise of Prof. Mittermaier on Criminal Jurisprudence.[a]

Since the publication of the first edition, a collection of "PRECEDENTS OF INDICTMENTS AND PLEAS," suited to the practice of the Federal and State Courts, has been published, which is, properly speaking, a second volume to the present work, and to which the student is referred, as containing the learning of the technical portion of pleading, and for a large and varied collection of forms.[b]

As will be observed, the Index has been much enlarged, and a Table of Cases added.

F. W.

PHILADELPHIA, June 1852.

[a] Das Deutsche Strafverfahren von Dr. C. J. M. Mittermaier, Vierte Auflage, Heidelberg, 1845, 1846.

[b] Precedents of Indictments and Pleas, adapted to the use both of the Courts of the United States and those of all the several States: together with Notes on Criminal Pleading and Practice, embracing the English and American authorities generally. By Francis Wharton, author of a Treatise on American Criminal Law. Philadelphia: Kay & Brother.

PREFACE TO THE FIRST EDITION.

It is somewhat remarkable, that although in the text and administration of the criminal law, we have departed widely from the English system, there has as yet been no attempt to compile a general treatise or commentary upon that branch of the American jurisprudence. The breaking up of some of the principal common law crimes into degrees; the creation of new statutory offences, and the recognition of others as existing at common law, which in England were either only punishable in the ecclesiastical courts, or not punishable at all; the existence of slavery as a new ingredient in the social system; the assumption of authority by the courts to grant new trials after conviction of felony in cases which admit of relief in England only by recourse to the mercy of the crown; have tended, putting aside the changes in the extent and method of our punishments, and the alteration of our practice, to create a series of cases without precedent except in our own Reports. By the introduction of these new elements, large portions of American practice are left without authority in the English books; while through the non-existence among us of the consequences of the feudal system, equally large portions of the English books are left without operation in American practice. The treatises of Mr. Barbour,[a] of Mr. Daniel Davis,[b] and of Mr. J. A. S.

[a] The Magistrate's Criminal Law, a Practical Treatise on the Jurisdiction, Duty, and Authority of Justices of the Peace in the State of New York, in Criminal Cases, &c. By Oliver L. Barbour, Albany, 1841.

[b] Civil and Criminal Justice, &c. By Daniel Davis, Solicitor-General of Massachusetts, Boston, 1838. Precedents of Indictments, to which is prefixed a concise treatise on the office and duties of Grand Jurors. Ibid. Boston, 1831.

Davis,[a] the only American works bearing on the subject I have been able to discover, are devoted to an examination of the duties of Justices of the Peace; and valuable as they are in the practice of the States to which they are adapted, cannot be considered as going further in the elementary exposition of criminal law than is necessary to a proper consideration of their particular topics. To supply this deficiency is not within the province of an annotator, forced as he is, by the necessity of his office, to the close pursuit of his text "over chasm and through waste;" and it is for this reason that the American notes to the English Criminal text-books, numerous and important as they are, fail in placing within the reach of the profession, the construction given by the American courts to the peculiarities arising out of American doctrine and practice. Thus, for instance, the cases which have been decided on the statutory offence of murder in the second degree, important as they are to the determination of every trial of homicide in the States of Maine, New Hampshire, New Jersey, Pennsylvania, Virginia, Ohio, Tennessee, Alabama, and Michigan, and abounding as they do with the result of the labors of some of the most eminent judges of the country, are only to be reached in the Reports in which they are scattered, and are consequently, from the want of any general work in which they may be found, but rarely made use of, except in the particular States in which they have severally occurred.

It is to meet this want, that the following work is designed. To give in every instance a complete and circumstantial report of the English cases, it does not pretend. In the treatises of Mr. Chitty, of Mr. Archbold, and more particularly in the late comprehensive commentary of Sir William Russell, the cases are presented with much minuteness and at great length; and it would be trespassing too much on the time and patience of the Profession to do more than to give full abstracts of such as bear upon our system,

[a] A Treatise on Criminal Law, with an Exposition of the Office and Authority of Justices of the Peace in Virginia, &c. By J. A. S. Davis, Professor of Law in the University of Virginia. Philadelphia, 1838.

citing in notes those which are more collateral and less important. While preparing this portion of the work, I did not hesitate to avail myself of the English text-books, containing, as they do, the settled views of the English profession; and I take this opportunity of mentioning my acknowledgments more particularly to Mr. Archbold's Treatise on Pleading and Evidence, the plan of which I have, to a certain extent, followed, and to the late elaborate edition of Burn's Justice, published by Mr. T. Chitty and Mr. Commissioner Bere, from which, as the most thorough digest of Criminal Law in use, I have repeatedly drawn cases which the Reports either do not give at all, or give but imperfectly. In collating the American authorities, I have carefully searched the Reports of each State down to the present time, considering and citing each case under two separate heads; first, in reference to indictments, evidence, and practice, generally; and secondly, in reference to the particular offence with which it is connected. In the consideration of the latter branch of the subject, I have assigned a chapter to each offence, giving in the first place, in full, the Statutes of Massachusetts, New York, Pennsylvania, and Virginia, and of the United States, relating to it; secondly, the interpretation attached to those Statutes by the Courts by whom they are carried into effect; and thirdly, the common law authorities, both English and American, by which it is governed. Trusting that the execution of this plan will prove to be such as to place the American Criminal Law in a comprehensive shape in the hands of the American practitioner, I submit the following pages to the Profession, in the hope that the assistance they will render, will be in some degree commensurate with the object at which they aim.

PHILADELPHIA, August 20, 1846.

NOTE.

The present edition incorporates the American authorities, down to the following volumes, inclusive:—

MAINE, ...	Ludden, ...	43 Maine.
NEW HAMPSHIRE,	6 Fogg, ...	37 N. H.
VERMONT, . . .	1 Shaw, ...	30 Vt.
MASSACHUSETTS,		
RHODE ISLAND, .	2 Ames, ...	5 Rh. Is.
CONNECTICUT, . .	Hooker, ...	26 Connect.
NEW YORK, . . .	4 E. D. Smith, . . . 3 Parker, ...	4 E. D. Smith. 3 Parker, C. C. 29 Barb.
NEW JERSEY, .	Dutcher, ...	3 Dutch.
PENNSYLVANIA, .	10 Casey, ...	34 Penns.
MARYLAND, . . .	Miller, ...	14 Maryland.
VIRGINIA, ...	Patten, Jr., and Heath,	2 P. & H.
NORTH CAROLINA,	. . . .	6 Jones, (Law.)
GEORGIA, ...	. . . .	24 Georgia.
FLORIDA, ...	. . . .	6 Florida.
ALABAMA, ...	. . . .	32 Alab. (N. S.)
MISSISSIPPI, . . .	. . . .	33 Miss. (4 George.)
LOUISIANA, . . .	. . . .	13 La. Am.
CALIFORNIA, . . .	. . . .	12 Cal.
ARKANSAS, . . .	. . . .	19 Arkan.
MISSOURI, ...	. . . .	27 Missouri, (6 Jones.)
TENNESSEE, . . .	. . . .	5 Sneed.
KENTUCKY, ...	. . . .	1 Metcalfe.
OHIO, ...	. . . .	8 Ohio St. R. (N. S.)
INDIANA, ...	. . . .	12 Tanner.
ILLINOIS, ...	. . . .	22 Illin.
WISCONSIN, . . .	. . . .	77 Wisc.
IOWA, ...	. . . .	7 Iowa, (Clark.)
MICHIGAN, ...	. . . .	7 Michigan, (3 Cooley.)
MINNESOTA, . . .	. . . .	1 Minnes.
UNITED STATES COURTS,	. . . .	20 Howard. 2 Blatchford.

ANALYTICAL TABLE.

ANALYTICAL TABLE.

BOOK I.

OF INDICTMENTS GENERALLY.

CHAPTER I.

WHAT OFFENCES ARE INDICTABLE.

I. How offences are classified, § 1.

1st. Felonies, § 2.
2d. Misdemeanors, § 3.

(*a*) *Mala in se*, § 3.
(1.) Disturbance of public peace, § 4.
(2.) Malicious injury to others, § 5.
(3.) Nuisance or scandal to the community, § 6.
(4.) Personal lewdness, § 7.
(5.) Attempts, § 8.

(*b*.) *Mala prohibita*, § 10.
(1.) Acts enjoined or forbidden by statute, though no statutory remedy by indictment is prescribed, § 10.
(2.) Where the statute prescribes the punishment, § 10.
(3.) Where a new punishment is given to a common law offence, § 10.
(4.) Where a common law misdemeanor is made a statutory felony, § 10.
(5.) When common law is absorbed in statute generally and herein of the Pennsylvania Act of March 21, 1806, § 11.

CHAPTER II.

WHAT PERSONS MAY BE INDICTED.

I. Persons non compotes mentis, § 13.

1st. Where the defendant is incapable of distinguishing right from wrong in reference to the particular act, § 15.

2d. Where the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility, or where his reasoning powers are so depraved, as to make the commission of the particular act the natural consequence of the delusion, § 17.

3d. Where the defendant is impelled by a morbid and uncontrollable impulse to commit the particular act, § 24.

4th. How intoxication affects responsibility for crime, § 32.

(*a*) Insanity produced by *delirium tremens*, affects the responsibility in the same way as insanity produced by any other cause, § 33.

(*b*) Insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated, § 37.

(*c*) While intoxication *per se* is no defence to the *fact* of guilt, yet when the question of *intent* or *premeditation* is concerned, evidence of it is material for the purpose of determining the precise degree, § 41.

5th. Medical witnesses as experts, § 45.

6th. By whom and how, the defence of insanity may be taken, § 51.

7th. Presumption of sanity, and when such presumption shifts, § 55.

8th. How far evidence of prior insanity is admissible, § 57.

II. Infants, § 58.

III. Feme coverts, § 66.

1st. How feme coverts are to be indicted, § 67.

(*a*) Indictments against the wife alone, § 67.

(*b*) Indictment against the wife jointly with her husband, § 69.

(*c*) Misnomer in indictment, § 70.

2d. Where the marital relation is a defence, § 71.

(*a*) Husband's presence and coercion, § 71.

(*b*) Where the offence appertains chiefly to the husband, § 77.

(*c*) Where the offence appertains chiefly to the wife, § 78.

(*d*) Cases involving conspiracy and concert, § 79.

(*e*) Husband and wife as accessaries, § 80.

IV. Persons in certain extreme cases presumed ignorant either of law or fact, § 82.

V. Corporations, § 85

CHAPTER III.

PRINCIPAL AND ACCESSARY.

I. Statutes, § 91.

United States, § 91.

Aiding, advising, &c., felony on high seas, § 91.

Concealing or aiding felony, § 92.

Massachusetts, § 93.
Aiding or advising felony, § 93.
May be indicted for substantive felony, § 94.
Accessary before fact, may be tried in the county where the offence was committed, § 95.
Concealing or harboring felon, § 96.
Not necessary that principal felon should have been convicted, § 97.

New York, § 98.
Principal in second degree, and accessary before fact, punishment of, § 98.
Accessary after fact, punishment of, § 99.
Where indictment may be found, § 100.
Principal need not have been convicted, § 101.
Accessary to kidnapping, &c., § 102.

Pennsylvania, § 103.
Accessaries before the fact, § 103.
Accessaries after the fact, § 104.

Virginia, § 107.
Where indictment may be found, § 107.
Accessaries to be attached, &c., § 108.
Harboring horse stealers, &c., § 109.
Liability of accessary in case of principal, § 109.
Standing mute, &c., § 110.

Ohio, § 111.
Punishment for aiding and abetting, &c., § 111.

II. Principals and accessaries generally, § 112.

1st. Principals in the first degree, § 112.
2d. Principals in the second degree, § 116.
3d. Accessaries before the fact, § 134.
4th. Accessaries after the fact, § 146.
5th. Liability of principal for criminal act of agent, § 151.
(*a*) Where the agent acts directly under the principal's commands, § 152.
(*b*) Where the agent is acting at the time in the line of the principal's business, but without specific instructions, § 153.
(*c*) Where the principal resides out of the jurisdiction, § 154.

CHAPTER IV.

IN WHAT COURTS INDICTMENTS ARE COGNIZABLE.

I. Of what offences the federal judiciary has cognizance, § 156.

1st. What federal judicial powers the Constitution creates, § 157.
2d. How far the federal courts have a common law power, § 163.

3d. What is the statutory jurisdiction of the federal courts, § 174.
(*a*) Offences against the law of nations, § 175.
(*b*) Offences against federal sovereignty, § 176.
(*c*) Offences against the persons of individuals, § 177.
(*d*) Offences against property, § 178.
(*e*) Offences against public justice, § 179.

II. IN WHAT COURTS OFFENCES COGNIZABLE BY THE UNITED STATES ARE TO BE TRIED, § 182.

1st. When the State and the Federal courts have concurrent jurisdiction, § 181.

2d. Jurisdiction as to habeas corpus, § 195.

3d. Criminal jurisdiction of the Senate, § 198.

4th. Criminal jurisdiction of the Supreme Court, § 199.
(*a*) Original, § 200.
(*b*) Appellate from Circuit Court, § 201.
(*c*) Appellate from District Court, § 202.
(*d*) Appellate from Circuit Court for the District of Columbia, § 203.
(*e*) Appellate from the Territorial courts, § 204.
(*f*) Appellate from the highest State courts, § 205.

5th. Criminal jurisdiction of Circuit and District courts, § 208.

6th. Criminal jurisdiction of Territorial courts, § 210.

CHAPTER V.

FORM OF INDICTMENT.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION, § 211.

II. STATUTES OF AMENDMENT, § 215.

III. CAPTION AND COMMENCEMENT, § 219.

IV. NAME AND ADDITION OF DEFENDANT, AND NAME OF PROSECUTOR AND THIRD PARTIES, § 233.

1st. When defendant is a corporation, § 233.

2d. How often the defendant's name must be repeated, aud how far a subsequent full name cures a former omission, § 234.

3d. What is a misnomer, § 236.

4th. Alias dictus, § 237.

5th. Defendant's middle names, § 238.

6th. Abbreviations and initials, § 239.

7th. Where defendant's name is unknown, § 242.

8th. Addition and mystery, § 243.

9th. Junior and senior, § 249.

10th. Description of parties injured and third parties, § 250.

11th. General summary of practice, § 259.

V. Time, place, and venue, § 261.

1st. Time must be averred, but not generally material, § 261.
2d. What precision is necessary in its statement, § 264.
3d. Initials and numerals, § 265.
4th. Double and obscure dates, § 266.
5th. Historical epochs, § 269.
6th. Hour, § 270.
7th. Record dates, § 271.
8th. "Then and there," § 272.
9th. Repugnant, future, or impossible dates, § 273.
10th. Cases where date is material, § 275.
11th. Venue, § 277.

VI. Statement of the offence, § 285.

1st. Offence must be made judicially to appear, § 285.
2d. Statement must be technically exact, § 287.
3d. Not enough to charge a conclusion of law, § 288.
4th. Common barrator and common cheat, § 289.
5th. Matters uuknown, § 290.
6th. Bill of particulars, § 291.
7th. Surplusage need not be stated, § 291.
8th. Alternative or disjunctive statements, § 294.
9th. Knowledge and intent, § 297.
10th. Inducement and aggravation, § 298.
11th. Objects for which particularity is required, § 299.
(*a*) Identification, § 300.
(*b*) Protection, § 301.
(*c*) Indulgence, § 302.
(*d*) Preparation, § 303.
(*e*) Sentence, § 304.

VII. Written instruments, § 305.

1st. Where the instrument, as in forgery and libel, must be set out in full, § 305.
(*a*) In such case literal exactness is necessary, § 306.
(*b*) "Tenor," "purport," and "substance," § 307.
(*c*) What variance is fatal, § 309.
(*d*) Quotation marks, § 310.
(*e*) Lost, destroyed, obscene, or suppressed writings, § 311.
(*f*) When any part may be omitted, § 312.
(*g*) Where the instrument is in a foreign language, or is on its face insensible, § 313.

2d. Where the instrument, as in larceny, &c., may be described merely by general designation, § 314.
(*a*) U. S. courts, § 315.

(*b*) Massachusetts, § 319.
(*c*) Connecticut, § 320.
(*d*) New York, 321.
(*e*) Pennsylvania, 325.
(*f*) New Jersey, 331.
(*g*) Maryland, § 332.
(*h*) North Carolina, § 333.
(*i*) Georgia, § 335.
(*j*) Alabama, § 336.
(*k*) Mississippi, § 337.
(*l*) Missouri, § 338.
(*m*) Tennessee, § 339.
(*n*) Ohio, § 349.

3d. What general legal designation will suffice, § 341.
(*a*) "Purporting to be," § 342.
(*b*) "Receipt," § 343.
(*c*) "Bill of Exchange," § 344.
(*d*) "Promissory Note," § 345.
(*e*) "Bank Note," § 346.
(*f*) "Money," § 347.
(*g*) "Goods and chattels," § 348.
(*h*) "Warrant, order, or request the payment of money," § 349.
(*i*) "Piece of paper," § 349.

VIII. WORDS SPOKEN, § 351.

IX. PERSONAL CHATTELS, § 353.

1st. Indefinite, insensible, or lumping descriptions, § 354.
2d. Value, § 362.
3d. Money or coin, § 363.

X. OFFENCES CREATED BY STATUTE, § 364.

1st. Generally sufficient, and always necessary, to use words of statute, § 364.
2d. Common law offences made indictable by statute, § 371.
(*a*) Statutory directions must be pursued, § 371.
(*b*) Not enough to charge offence as a mere conclusion of law, § 372
(*c*) When common law and statutory indictments are cumulative, § 373.

3d. Technical averments in statutes, § 374.
4th. Description of animals in statute, § 377.
5th. Provisos and Exceptions, § 378.

XI. DUPLICITY, § 381.

1st. Generally, joinder in one count of two distinct offences, is bad, § 381
2d. Exceptions to the rule, § 383.
(*a*) Burglary—adultery—seduction, § 383.
(*b*) Assaults with intent, &c., § 385.

(*c*) Misdemeanors constituent in felonies, and herein of how far the term "feloniously" may be rejected, § 388.
(*d*) Where successive stages in an offence are united in statute, § 390.
(*e*) Double articles in larceny, § 391.
(*f*) Double overt acts or intents, § 392.
(*g*) Double batteries, libels or sales, § 393.
(*h*) Surplusage, § 394.

3d. How duplicity may be objected to, § 395.

XII. Repugnancy, § 396.

XIII. Technical averments, § 398.

1st. "Traitorously," § 398.
2d. "Feloniously did kill," "Malice aforethought," "Strike," § 399.
3d. "Feloniously,"—when necessary, and when it may be discharged as surplusage, § 400.
4th. "Ravish," "Carnally knew," "Forcibly," "Falsely," § 401.
5th. "Burglariously," "Feloniously took," "Against the will," "Piratically," "Unlawfully," "With a strong hand," § 402.
6th. "Vi et armis," § 403.

XIV. Clerical errors, § 405.

XV. Conclusion of indictments, § 410.

1st. What conclusions are required by the constitution and statutes of the several states, § 410.
2d. When the conclusion is to be statutory, § 411.
3d. When the statutory conclusion must be in the plural, § 412.
4th. When the statutory conclusion may be rejected as surplusage, § 413.

XVI. Joinder of offences, § 414.

1st. Where such joinder is permissible, § 414.
2d. Where an election will be compelled, § 422.
3d. Advantages of alternative statements in distinct counts, § 424.
4th. How second and subsequent counts are to be prefaced, § 426.
5th. Effects of one bad count upon others, and herein of the transposition of counts, § 427.

XVII. Joinder of defendants, § 429.

1st. Who may be joined, § 429.
2d. Where a particular number of defendants is necessary, as in riot or conspiracy, § 431.
3d. How misjoinder may be excepted to, § 432.
4th. Severance on trial, § 433.
5th. Verdict and judgment, § 434.

XVIII. LIMITATION OF PROSECUTIONS, § 436.

1st. As to finding of bill, § 436.
- (a) United States, § 436.
- (aa) Massachusetts, § 436.
- (b) New York, § 437.
- (c) Pennsylvania, § 438.
- (d) Virginia, § 442.
- (e) Ohio, § 443.
- (f) Practice under the statutes, § 445.

2d. As to time of trial, § 450.

CHAPTER VI.

OF THE FINDING OF INDICTMENTS, AND HEREIN OF GRAND JURIES.

I. POWER TO INSTITUTE PROSECUTIONS, § 452.

1st. That grand juries may on their own motion institute all prosecutions whatever, § 453.

2d. That grand juries may act upon and present such offences as are of public notoriety, and within their own knowledge, such as nuisauces, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate, § 458.

3d. That grand juries are in all instances limited in their actions to cases in which there has been such a primary hearing as enables the defendant, before he is put on trial, to be confronted with the witnesses against him, and meet his prosecutor face to face, § 459.

II. SUMMONING GRAND JURIES, § 464.

III. SELECTION OF FOREMAN AND OATH, § 466.

IV. DISQUALIFICATION OF GRAND JUROR, AND HOW IT MAY BE EXCEPTED to, § 468.

V. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY, § 474.

VI. SUMMONING OF WITNESSES, AND INDORSEMENT OF THEIR NAMES ON BILL, § 476.

VII. EXAMINATION OF TESTIMONY, § 488.

1st. How witnesses are to be sworn, § 488.
2d. How defects in this respect may be excepted to, § 489.
3d. Evidence confined to the prosecution, § 490.
4th. Probable cause enough, § 491.
5th. Legal proof only to be received, § 493.
6th. Attendance of prosecuting attorney, § 495.
7th. Defendant and others not entitled to attend, § 496.

VIII. Finding and attesting of bill, § 497.

IX. Misconduct of grand juror, § 507.

X. How far grand juror may be compelled to testify, § 508.

CHAPTER VII.

NOLLE PROSEQUI, MOTION TO QUASH, DEMURRER AND PLEAS.

I. Nolle prosequi, § 513.

II. Motion to quash, § 518.

III. Demurrer, § 525.

IV. Pleas, § 530.

1st. Guilty and not guilty, § 530.
2d. Plea to the jurisdiction, § 534.
3d. Plea in abatement, § 536.
4th. Special pleas generally, § 538.
5th. Autrefois acquit or convict, § 539.
(*a*) When judgment on former acquittal or conviction is necessary, § 540.
(*b*) Former acquittal should have been regular, § 541.
(*c*) Proceedings for contempt, § 542.
(*d*) Habeas corpus, § 543.
(*e*) Ignoramus, or Nolle prosequi, § 544.
(*f*) Discharge under limitation statute, § 545.
(*g*) Fraud, § 546.
(*h*) Pendency of other indictment, § 547.
(*i*) Acquittal on prior nuisance, § 548.
(*j*) Pendency of civil proceedings, § 549.
(*k*) New trial after conviction for minor offence, § 550.
(*l*) Insufficiency of former indictment, § 551.
(*m*) Acquittal as accessary or principal, § 552.
(*n*) Acquittal on one of several counts, § 553.
(*o*) Erroneous acquittal unreserved, § 554.
(*p*) Acquittal in wrong county, § 555.
(*q*) Acquittal from misnomer, § 556.
(*r*) " variance as to intent, § 558.
(*s*) " " " time, § 559.
(*t*) Acquittal on an indictment for a greater offence, no bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less, § 560.
(*u*) Acquittal on minor offence generally no bar to greater, § 563.
(*v*) Acquittal from a supposed merger, § 564.
(*w*) When two offences are committed by the same act, 565.
(*x*) Practice under plea of autrefois acquit, § 568.
(*y*) Judgment on plea of autrefois acquit, § 572.

6th. Once in jeopardy, § 573.
- (*a*) Constitutional provision, § 573.
- (*b*) Construction given by the several courts, § 574.
  - (1.) Pennsylvania, § 575.
  - (2.) Virginia, § 576.
  - (3.) North Carolina, § 577.
  - (4.) Tennessee, § 578.
  - (5.) Indiana, § 579.
  - (6.) Federal Courts, § 680.
  - (7.) Massachusetts, § 580.
  - (8.) New York, § 582.
  - (9.) Mississippi, § 583.
  - (10.) Illinois, 584.
  - (11.) Kentucky, § 585.
  - (12.) Missouri, § 586.
- (*c*) No jeopardy on defective indictment, § 587.
- (*d*) Generally speaking, death or illness of juror, form a sufficient ground for discharge, § 588.
- (*e*) Intermediately discovered incapacity of juror,
- (*f*) Sickness of prisoner,
- (*g*) Surprise at breaking down of prosecution,
- (*h*) Close of term,
- (*i*) Sickness of jndge,
- (*j*) Sickness of witness,
- (*k*) Until jury are "charged," jeopardy does not begin, § 590.
- (*l*) Consent of prisoner to discharge, § 591.
- (*m*) In misdemeanors, the jury may be allowed to separate at any period.
- (*n*) Form of plea.

BOOK II.

OF EVIDENCE ON TRIAL.

CHAPTER I.

WHAT MUST BE PROVED, § 592.

I. General doctrine of variance, § 592.

II. Names of prosecutors and third persons, § 595.

III. Time and place, § 599.

IV. Written instruments and records, § 606.

V. Goods, numbers, and sums, § 610.

VI. Negative averments, § 614.

VII. DIVISIBLE AVERMENTS, § 616.

VIII. SURPLUSAGE, § 622.

1st. Unnecessary words, § 622.

2d. Aggravation or inducement, § 624.

3d. Allegations which make up the difference between a minor offence of which the defendant is convicted, and a major, with which he is charged, § 627.

4th. Allegations of number, quantity, and magnitude, § 628.

5th. Descriptive averments, § 629.

IX. KNOWLEDGE AND INTENT, § 631.

X. CHARACTER, § 636.

1st. Defendant's good character as a general defence, § 636.

2d. Defendant's prior misconduct as part of the case of the prosecutor, to prove malice or guilty knowledge, § 639.

3d. Character of deceased, or prosecutor, § 641.

4th. Weight to be attached to character, § 643.

CHAPTER II.

METHOD OF PROOF, § 647.

I. EVIDENCE TO BE CONFINED TO ISSUE, § 647.

II. SECONDARY EVIDENCE, § 652.

1st. As a general rule secondary evidence is inadmissible, § 652.

2d. Exceptions to rule, § 653.

(*a*) Public officer acting as such, § 653.

(*b*) Exemplifications of records, § 654.

(*c*) Copies of writings or marks which cannot be brought into court, § 655.

(*d*) Voir dire, § 656.

(*e*) Papers in the possession of the opposite side, or papers lost or destroyed, § 657.

3d. Oral evidence inadmissible to prove, § 658.

(*a*) Records, § 659.

(*b*) Contracts, § 660.

(*c*) Disputed writings generally, § 661.

III. HEARSAY, § 662.

1st. Hearsay generally inadmissible, § 662.

(*a*) Declarations of third parties, § 662.

2d. Exceptions, § 663.

(*a*) Information going to make up the bona fides of an act, § 663.

(*b*) Opinions as to condition of a party's mind, &c., and his own representations on the subject, § 664.
(*c*) Declarations of prosecutrix in rape, § 665.
(*d*) Pedigree, § 666.
(*e*) Testimony of a deceased or absent witness, § 667.

3d. Where the indictment charges a common and gross offence, *e. g.* a nuisance, § 668.

IV. DYING DECLARATIONS, § 669.

1st. Must be made under a sense of impending dissolution, § 669.
2d. Only admissible when death is the subject of the charge, § 675.
3d. Admissible by husband against wife, and vice versa, § 676.
4th. The deceased must have been competent as a witness, § 677.
5th. The evidence must have been admissible had the deceased been sworn, § 678.
6th. When part of the res gestæ, § 680.
7th. Admissibility is for the court, § 681.
8th. How to be examined and impeached, § 682.
9th. When in prisoner's favor, § 682.

V. CONFESSIONS AND DECLARATIONS, 683.

1st. General weight of confessions and degree of caution with which they should be received, § 683.
2d. How far the admissibility of confessions is affected by,
(*a*) Threats, § 685.
(*b*) Promises, § 686.
(*c*) Duress, § 689.
(*d*) Interrogations, either voluntary or under oath, § 690.
(*e*) Artifice, § 691.
(*f*) Authority or influence of the party by whom the confession is elicited, § 692.

3d. How far an original improper influence vitiates subsequent confessions, § 694.
4th. How far extraneous facts deduced through an inadmissible confession may be received, § 695.
5th. How far confessions of one are evidence against another, and herein of the defendant's silence under statements of others implying his guilt, § 696.
6th. How confessions are to be construed, § 697.
7th. By whom the admissibility of confession is to be determined, § 698.
8th. How far a defendant's declarations in his own favor can be received, § 699.
9th. Confessions of slaves, § 701.

VI. DECLARATIONS OF CO-CONSPIRATORS, § 702.

VII. PRESUMPTIONS, § 707.

1st. Presumption of innocence, and herein of presumption of sanity, § 707.

2d. Presumption of intent, § 712.

3d. Presumption that everything is rightfully done until the contrary appears, § 713.

4th. Presumption arising from attempts to escape or evade justice, or from deportment when charged with offence, § 714.

5th. Presumption arising from forgery of evidence, § 715.
  (a) With a view to self-exculpation, § 716.
  (b) Maliciously, with the intention of injuring the accused or others, § 718.
  (c) In sport, or in order to effect some moral end, § 721.

6th. Presumption arising from suppression or destruction of evidence, § 722.

7th. Presumption arising from antecedent preparations and previous attempts, § 725.

8th. Presumption arising from declarations of intentions and threats from which the presumption of guilt may be drawn with great strength when there is preliminary ground laid, § 727.

9th. Presumption arising from possession of fruits of offence, § 728.

10th. Presumption arising from extrinsic and mechanical inculpatory indications, § 731.

VIII. CIRCUMSTANTIAL EVIDENCE, § 732.

1st. The onus of proving everything essential to the establishment of the charge lies on the prosecutor, though the non-production of explanatory evidence, clearly in the power of the defendant, must weigh against him, § 744.

2d. There must be clear and unequivocal proof of the corpus delicti, § 745.

CHAPTER III.

WITNESSES.

I. WANT OF DISCRETION, § 752.

1st. Idiots and lunatics, § 752.

2d. Intoxicated persons, § 753.

3d. Deaf and dumb persons, § 754.

4th. Infants, § 755.

II. INFAMY, § 758.

1st. What convictions disable, § 758.
  (a) Home convictions, § 759.
  (b) Foreign convictions, § 762.

2d. Verdict without judgment, § 763.

3d. Defective conviction, § 764.

4th. Pardon, § 765.

III. Relationship, § 767.

1st. Husband and wife, § 767.
2d. Other relations, § 772.

IV. Privilege, § 773.

1st. Attorney or counsel, § 773.
2d. Medical attendants, § 774.
3d. Clergymen, § 775.
4th. Public officers, § 776.
5th. Judges and jurors, § 777.

V. Interest, 778.

VI. Accomplices and co-defendants, § 783.

1st. How far accomplices are competent for the prosecution, § 783.
2d. Accomplices and co-defendants for the defence, § 790.

VII. Want of religion, § 795.

VIII. Number of witnesses necessary, § 801.

IX. When a witness will be excused from answering, on the ground of self-crimination or disgrace, § 805.

X. How character of witness may be attacked, § 814.

XI. How witness may be contradicted, § 817.

XII. How witness may be sustained, § 817.

BOOK III.

PREPARATION OF EVIDENCE.

CHAPTER I.

GENERAL INQUIRIES, § 822.

I. Character, § 824.

II. Intent, § 825.

III. Attempts to escape or evade justice, § 826.

IV. Forgery of evidence, § 827.

V. Suppression or destruction of evidence, § 828.

VI. Antecedent preparations and previous attempts, § 828.

VII. Fruits of the Offence, § 829.

VIII. Extrinsic and mechanical inculpatory indications, § 830.

CHAPTER II.

PREPARATION OF EVIDENCE IN HOMICIDE, § 831.

I. Marks of violence on the person, § 831.

1st. The weapon used, § 832.

2d. Whether the wounds are accidental, self-inflicted, or given by another, § 833.

3d. Whether the wound, if given by another, is to be considered as the result of a momentary passionate impulse, or of premeditation, § 835.

II. Instrument of death, § 836.

III. Poison, § 837.

IV. Materials appropriate to be converted into instruments of crime, § 845.

V. Position of deceased, § 847.

VI. Traces of blood, § 848.

VII. Liability of deceased to attack, § 849.

1st. Possession of money or valuable articles, § 849.

2d. Old grudge, § 849.

3d. Jealousy, § 849.

CHAPTER III.

PREPARATION OF EVIDENCE IN LARCENY, EMBEZZLEMENT, BURGLARY, ETC., § 853.

CHAPTER IV.

PREPARATION OF EVIDENCE IN ARSON, § 857.

CHAPTER V.

IDENTIFICATION OF OFFENDER, § 858.

I. Facts leading to the supposition that a particular person was the criminal, § 860.

II. Facts concerning the effects of the crime, § 861.

III. Facts concerning the conditions of the crime, § 862.

CHAPTER VI.

FORGERY AND COUNTERFEITING, § 864.

I. Similitude of hands, § 865.

II. Chemical tests, § 867.

III. Circumjacent tests, § 868.

IV. Proof that the paper was written by a third party, § 870.

CHAPTER VII.

INFANTICIDE AND FŒTICIDE, § 872.

I. Condition of the body of the child, § 873.

II. Person suspected, § 877.

III. Cause of death, § 879.

IV. Quickening, § 883.

BOOK IV.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

A. Statutory homicide.

United States, § 884.

Murder on the high seas, § 884.

Manslaughter on the high seas, § 885.
Murder on high seas where death is on land, § 886.
Murder or manslaughter on dock-yard, &c., § 887.
Manslaughter by negligence of steamboat officer, § 888.

Massachusetts.
Murder, § 889.
Death by duel, § 890.
Seconds by duel, § 891.
Manslaughter, § 893.

New York.
Murder, § 894.
Death by duel, § 895.
Justifiable and excusable homicide, § 898–9.
Manslaughter in the first degree, § 900.
Manslaughter in the second degree, § 901.
Manslaughter in the third degree, § 902.
Manslaughter in the fourth degree, § 904.
Punishment, § 911.
Murder in first and second degrees as provided by act of 1860, § 912(*a*).

Pennsylvania.
Murder in the first and second degree, § 913–14.
Involuntary manslaughter, § 915.
Murder in second degree; punishment, § 917.
Voluntary manslaughter; punishment, § 918.

Virginia.
Murder in the first and second degree, § 919.
Involuntary manslaughter, § 920.
When death occurs out of State, § 921.
Poisoning well, § 922.
Abortion, &c., § 923.

Ohio.
Murder in first degree, § 924.
Murder in second degree, § 925.
Manslaughter, § 926.
Trial to be where blow was struck, § 927.
Jury to ascertain degree of crime, § 928.
Death by duel, § 929.

B. Homicide at common law.

I. General definitions, § 930.

1st. Murder, § 930.

2d. Manslaughter, § 931.
(*a*) Voluntary, § 932.
(*b*) Involuntary, § 933.

3d. Excusable homicide, § 934.
(*a*) *Per infortuniam*, § 934.
(*b*) *Se defendendo*, § 935.

4th. Justifiable homicide, § 936.
(*a*) Execution by officer of law, § 936.
(*b*) Killing by officer of justice, of person resisting him, § 937.
(*c*) In prevention of a forcible and atrocious crime, § 938.

II. Requisites of homicide generally, § 939.

1st. There must be proof of the corpus delicti, § 939.

2d. It must be shown that the deceased was living when the alleged mortal blow was struck, § 940.

3d. The death must be traced to the blow, § 941.

4th. If an infant, the child must have been born alive, § 942.

5th. The homicide must be other than in the course of legitimate public war, § 943.

III. Homicide viewed in respect to the intent, § 944.

1st. From malice aforethought express, where the deliberate purpose of the perpetrator is to deprive another of life, or to do him some great bodily harm, § 944.
(*a*) From a particular malice to the person killed, § 950.
(*b*) Homicide from a particular malice to one, which falls by mistake or accident upon another, § 965.
(*c*) Homicide from a general malice or depraved inclination to do evil, fall where it may, § 967.

2d. Homicide from transport of passion, in heat of blood, § 969.
(*a*) What is a sufficient provocation, and up to what extent, to extenuate the guilt of homicide, § 970.
(*b*) How far the law regards heat of blood in mitigation of homicide, independently of the question of reasonable provocation, as in case of mutual combat, § 987.
(*c*) How long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled before the mortal blow given, § 990.

3d. Homicide in the prosecution of an unlawful act, when the death is collateral, § 997.

4th. Homicide arising from impropriety, negligence, or accident, in the prosecution of an act lawful in itself, or intended as a sport or recreation, § 1002.
(*a*) General rule as to negligence, § 1002.
(*b*) Death from carelessness, where the death was by no means a likely consequence of the careless act, § 1003.
(*c*) Carelessness on the public road, § 1005.
(*d*) Acts of omission, as well as commission, on the part of those charged with specific duties, § 1011.
(*e*) Unlawful or dangerous sports, § 1012.
(*f*) Undue correction by persons in authority, § 1014.
(*g*) Medical malpractice, § 1015.
(*h*) Negligence on both sides, § 1016.

5th. Homicide from necessity in defence of a man's own person or property, or of the person or property of others, § 1019.
(*a*) General nature of right, § 1019.
(*b*) As a general rule, the danger must be actual and urgent, § 1020.
(*c*) Where the defendant may slay without retreating to the wall, § 1021.
(*d*) An attack provoked or renewed by the defendant will be no defence, § 1022.
(*e*) Right extends to defence of master, servant, parent, child, husband, wife, or property, against a felonious attack, § 1024.
(*f*) But not to a defence against a trespass, § 1025.
(*g*) If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defence, § 1026.
(*h*) Where one or more persons must be sacrificed in order to preserve the life of others, § 1028.

6th. Homicide of or by officers of justice or others keeping the peace, § 1030.
(*a*) Of officers under legal process, § 1030.
(*b*) By officers under legal process, § 1031.
(*c*) Of officers or others when the arrest is illegal, § 1034.
(*d*) By officers of a foreign government, § 1038.
(*e*) By or of private citizens when attempting to prevent felony, 1039.
(*f*) What is sufficient notice of an officer's authority, § 1041.

IV. Homicide as affected by slavery, § 1043.

V. Indictments, § 1052.

1st. Time and place, § 1052.
2d. "In the peace of God," § 1055.
3d. Name, § 1056.
4th. "Force and arms," § 1057.
5th. Clerical and grammatical errors, § 1058.
6th. Instrument of death, § 1059.
7th. Assault, § 1065.
8th. Scienter in poisoning, § 1066.
9th. "Strike and beat," § 1067.
10th. Description of wound, § 1069.
11th. "Feloniously" and "malice aforethought," § 1071.
12th. Averment of time and manner of death, § 1073.
13th. Principals and accessaries, § 1074.

VI. Murder in the first and second degree, § 1075.

VII. Verdict, § 1119.

CHAPTER II.

RAPE.

A. Statutes.

United States.
Rape on the high seas, § 1124.
Entering vessel with intent to commit rape, § 1125.

Massachusetts.
Rape on female of ten or more, and carnal knowledge of child under ten, § 1126.

New York.
Rape on female of ten years or more, or carnal knowledge of child under ten, § 1127.
Rape through stupefaction, § 1128.

Pennsylvania.
Rape and its punishment, § 1129.
Proof of carnal knowledge, § 1129(a).
Assaults, &c., § 1129(b).

Virginia.
Rape by white person on female of ten years or more, § 1130.

Ohio.
Rape upon daughter or sister, § 1131.
Rape on woman of ten or more, or carnal knowledge of female under ten, § 1132.
Carnal knowledge of insane woman, § 1133.

B. Rape at common law.

I. Defendant's competency to commit offence, § 1134.

1st. Infancy, § 1134.
2d. Impotency, § 1135.
3d. Relationship, § 1136.

II. In what carnal knowledge consists, § 1137.

III. In what want of will consists, § 1141.
1st. Acquiescence obtained by fear, § 1142.
2d. Acquiescence obtained by ignorance of nature of act, § 1143.
3d. Acquiescence obtained by mistake or imposition as to the person, § 1144.
4th. Acquiescence obtained by artificial stupefaction, § 1146.

IV. Party aggrieved as a witness, § 1149.
1st. Her admissibility and weight, § 1149.
2d. How far she may be corroborated by her own statements, § 1150.
3d. How she may be impeached, § 1151.
4th. Presumption of acquiescence from prior unchastity, § 1148.

V. PLEADING, 1153.

VI. ASSAULTS WITH INTENT TO RAVISH, § 1155.

CHAPTER III.

SODOMY.

A. STATUTES.
Massachusetts, § 1157.
New York, § 1158.
Pennsylvania, § 1159.
Virginia, § 1160.

B. AT COMMON LAW.

CHAPTER IV.

MAYHEM.

A. STATUTES.
United States.
Cutting ear, tongue, nose, etc., or limb, on the high seas, or abetting in same, § 1162.
Massachusetts.
Cutting tongue, eye, ear, lip, limb, etc., or aiding in same, § 1163.
New York.
Cutting tongue, eye, lip, or limb, etc., § 1164.
Pennsylvania.
Cutting tongue, eye, nose, or limb, or pulling out eye, § 1165.
Punishment for the same, § 1166.
Virginia.
Shoot, stab, cut, or wound, or causing bodily injury, with intent to maim, disfigure, disable, or kill, § 1167.
An attempt to commit felony unlawfully, shoot, stab, cut, or wound an other person, § 1168.
Unlawfully shooting at another person, § 1169.
Ohio.
Maiming or disfiguring another with intent, etc., § 1170.

B. MAYHEM AT COMMON LAW.

CHAPTER V.

ABDUCTION AND KIDNAPPING.

A. STATUTES.
Massachusetts.
Secretly confining or imprisoning any other person, or forcibly carrying or sending such person out of State, § 1176.

Offences mentioned in preceding section—where they may be tried, § 1177.
Fraudulently enticing or taking away an unmarried woman of chaste life, § 1178.
Time of commencing prosecution, § 1179.

New York.
Compelling a woman to marry a man by force, menace, or duress, § 1180.
Taking any woman unlawfully with intent to compel her by force, etc., to marry him or other person, § 1181.
Taking away any female child under fourteen years, from her father, mother, guardian, &c., 1182.
Forcibly seizing or confining any person, § 1183.
Trial of offence in last section, § 1184.
Consent of person kidnapped or confined no defence, § 1185.
Necessary after fact, to kidnapping or confining, § 1186.
Selling or transferring the services of any black, who has been forcibly taken away, § 1187.
Where offence prohibited in last section may be tried, § 1188.
Forcibly or fraudulently leading, taking, or carrying away, any child under twelve years, § 1189.
Exposing child with intent to abandon it, § 1190.
Abduction of female under twenty-five years, of previously chaste character, § 1191.

Pennsylvania.
Taking or enticing a child away from its parents, § 1192.
Kidnapping, § 1193.
Sale of fugitive slaves to be void, § 1194.

Virginia.
Taking or detaining a white female against her will, with intention of marrying or defiling her, § 1197.
Free person selling a free person as a slave, § 1198.

Ohio.
Kidnapping a white person, 1199.
Kidnapping, &c., negroes; prohibited, § 1200.
Punishment, &c., § 1201.

B. Offence at common law.

CHAPTER VI.

ABORTION.

A. Statutes.

Massachusetts.
Procuring the miscarriage of a woman, § 1214.
Advertising, &c., for purpose of informing where medicine, &c., may be obtained for the causing of miscarriage, § 1215.

New York.

Administering to woman pregnant with quick child, any medicine, &c., for the destroying of child, § 1216.

Administering medicine, &c., for purpose of procuring miscarriage, § 1216.

Solicitation of woman for purpose of procuring miscarriage, § 1917.

Virginia, see antea, § 923.

Ohio.

Administering medicine, &c., to produce abortion, § 1218.

Of taking life of pregnant woman or an unborn child—shall be guilty of misdemeanor, § 1219.

B. Offence at common law.

CHAPTER VII.

CONCEALING DEATH OF BASTARD CHILD.

A. Statutes.

Massachusetts.

Concealing death of any infant, which would otherwise have been a bastard, § 1231.

Indictment for the murder of an infant bastard child, § 1232.

Pennsylvania.

Concealing death of an infant bastard child, whether it was born alive or not, § 1233.

Concealment of death of child, not conclusive evidence to convict party of murder, § 1234.

B. Decisions under English and American statutes.

CHAPTER VIII.

ASSAULTS.

I. Assaults generally, § 1240.

A. Statute.

Ohio, § 1240.

B. Offence generally.

1st. What constitutes an assault, or an assault and battery, § 1241.

2d. Defence, § 1252.

(*a*) Pendency of civil proceedings, § 1252.

(*b*) Words of provocation, § 1253.

(*c*) Misadventure, &c., § 1254.

(*d*) Retaking or defence of property, § 1255.
(*e*) Prior assault, § 1258.
(*f*) Correction by persons in authority, § 1259.
(*g*) Guilt of major offence, § 1261.
(*h*) Assent of prosecutor, § 1262.

3d. Indictment and verdict, § 1263.

II. ASSAULTS WITH FELONIOUS INTENT.

A. STATUTES.

United States.
Assault upon high seas, &c., § 1264.
Breaking or entering ship, vessel, or raft, § 1265.

Massachusetts.
Assault with intent to murder, maim, or disfigure, § 1266.
Assault by person not armed with dangerous weapon, § 1267.
Assault with intent to commit rape, § 1268.
Assault with intent to commit burglary, robbery, rape, § 1269.

New York.
Shooting at another, or an assault and battery upon another, with intent to kill, &c., § 1270.
Conviction of a person of an assault with intent to commit robbery, burglary, &c., § 1271.
No person shall be convicted of an assault with intent, when such has been perpetrated, § 1272.
Administering poison to another, where death shall not ensue, § 1273.
Assault with knife, dirk, or dagger, § 1274.
Indictment of person for assault with intent to kill, § 1275.

Ohio.
Assault with intent to commit murder or robbery, § 1276.
Maliciously shoot at or stab a person with intent to kill, § 1277.
Administering poison to another with intent to take life, § 1278.

B. OFFENCE GENERALLY, § 1279.

III. ASSAULT ON OFFICERS, &c., WHEN IN THE EXECUTION OF THEIR DUTIES.

A. STATUTE.

United States, § 1288.

VOLUME II.

BOOK V.

OFFENCES AGAINST PROPERTY.

CHAPTER I.

FORGERY.

A. STATUTORY FORGERY.

United States.

Making, altering, forging, &c., any certificate, indent, or other public security of United States, § 1296.

Stealing, taking away, &c., any writ or other proceedings in any of the courts of United States, § 1297.

Counterfeiting, &c., any note in imitation of, or purporting to be a treasury note, § 1298.

Counterfeiting with intent to injure or defraud the United States, § 1299.

Forgery of bounty land warrants, § 1299(*a*).

Counterfeiting post-office stamps, § 1299(*b*).

Counterfeiting letter-stamps, § 1299 (*c*).

Forging stamps on envelopes, dies, or plates, fraudulent delivery, &c., § 1299(*d*).

Falsely making, &c., any power of attorney, &c., for the purpose of falsely receiving from the United States any sum of money, § 1300.

Possession of any forged deed, power of attorney, &c., for the purpose of defrauding the United States, § 1301.

Counterfeiting or assisting to counterfeit, § 1302.

Counterfeiting any paper, &c., for the purpose of selling or conveying any share in public stock or debt of United States, § 1303.

Making, &c., any false sea letter, Mediterranean passport, &c., § 1304.

Counterfeiting any instrument purporting to be an official copy or certificate of recording, registry or enrolment of any vessel, &c., § 1305.

Issuing, re-issuing, &c., as money, any note, bill, &c., by corporation or officer, whose charter has expired, § 1306.

In a corporation whose charter has expired, the several Circuit Courts of United States shall have jurisdiction to grant injunctions to prevent re-issuing, &c., of any notes, § 1307.

Forging, &c., any coin, either gold or silver, in resemblance of gold or silver coin, which has or may be coined at mint, &c., § 1308.

Forging or counterfeiting copper coin of United States, § 1309.

Debasing any coin, either gold or silver, which may be coined at mint, by any of the officers employed there, § 1310.

Debasing, &c., for gain's sake, any gold or silver coins which have been or shall be coined at mint of United States, § 1311.

Nothing in the act shall deprive courts of individual States of jurisdiction, § 1312.

Massachusetts.

Falsely making or forging, &c., any public record, wherein such return or certificate may be received as legal proof, &c., § 1313.

Punishment for the above, &c., § 1314.

Falsely making or forging any note, &c., issued by treasurer of commonwealth, § 1315.

Forging or counterfeiting any bank bill or promissory note, § 1316.

Possession of same time of ten or more forged notes, § 1317.

Uttering or passing as true, any forged note for any debt of commonwealth, § 1318.

Second conviction for like offence, § 1319.

Bringing into State any forged note, § 1320.

Engraving, making, &c., any plate, block, or instrument for forging or making any counterfeit note, § 1321.

In prosecutions for forgery, the testimony of president and cashier may be dispensed with, &c., § 1322.

In prosecutions for forgery, the certificate under oath of treasurer, admitted as evidence, 1323.

Connecting together different parts of several bank notes, § 1324.

Fictitious signature, purporting to be signature of an officer, § 1325.

Cases where intent to fraud is required to constitute offence of forgery, § 1326.

Counterfeiting gold or silver coin, or possessing at same time ten or more pieces of false money, § 1327.

Possession of any number of pieces less than ten, § 1328.

Second conviction of offence mentioned in preceding section, § 1329.

Casting or stamping any mould, pattern, &c., for making false coin, either gold or silver, § 1330.

Rewards allowed for informing and prosecuting in cases hereafter mentioned, § 1331.

Counterfeiting private labels or stamps of mechanic or manufacturer, § 1332.

Vending goods or merchandise with counterfeited stamps or labels on, § 1333.

When act shall take effect, § 1334.

Fraudulent use of trade marks, § 1334(*a*).

New York.

Counterfeiting, &c., any will of real or personal property, § 1335.

Certificate or endorsement of acknowledgment, § 1336.

Certificate of proof of deed or will, § 1337.

Punishment for preceding, § 1337.

Forging certificate purporting to have been issued under authority of State, § 1338.

Certificate or share in public stock, § 1339.

Endorsement purporting to transfer right of interest in security, § 1340.

Punishment for preceding, § 1341.

Forging privy seal of State, or of any other public office, § 1342.

Altering, destroying, &c., record of will, § 1343.

Record of judgment in court of record, § 1344.

Punishment, § 1345.

Forging entry in book of records, § 1346.

Wilfully certifying that any instrument was acknowledged, § 1347.
Counterfeiting gold or silver coin, § 1348.
Counterfeiting foreign coin, § 1349.
Engraving plate in form of promissory note, § 1350.
Possession of plate without authority of bank, § 1351.
Possession of impression taken from such plate, § 1352.
Engraving upon plate figures or words, for altering evidence of debt, § 1353.
When plate deemed in similitude of genuine instrument, § 1354.
Conviction for selling forged note, § 1357.
Offering forged note for sale, § 1358.
Receiving forged note, § 1359.
Punishment, § 1360.
Forging any process issued by court, § 1361.
Forging instrument or writing, § 1362.
Punishment for the above, § 1363.
Making false entry in book kept in office of comptroller, § 1364.
Making false entry in book kept by moneyed corporation, § 1365.
Possession of forged note, knowing it to be so, with intention to utter, § 1366.
Possession of forged instrument with intent to utter, § 1367.
Possession of counterfeit gold or silver coin, § 1368.
Uttering and publishing as true any forged instrument or gold or silver coin, § 1369.
Receiving forged instrument or coin for consideration, § 1370.
Making instrument in one's own name, with intent to create, &c., any obligation, § 1371.
Punishment for forgery in first degree, § 1372.
Punishment for forgery in second degree, § 1373.
Punishment for forgery in third degree, § 1374.
Punishment for forgery in fourth degree, § 1375.
Erasure of instrument of writing, same as alteration of it, § 1376.
Connecting different parts of genuine instruments, § 1377.
Instruments within meaning of the act, § 1378.
Intent to defraud, § 1379.
Counterfeiting any evidence of debt, § 1380.
Amendment of act to prevent frauds, by use of false stamps, § 1381.
Forging private stamps, &c., § 1382.
Possession of any die, plate, or engraving, or printed label, or stamp, for purpose of fraud, § 1383.
Vending goods or merchandise, having forged stamps on, § 1384.
When act take effect, § 1385.
Forging railway tickets, § 1385 (*a*).

Pennsylvania.
Counterfeiting coin, § 1386.
Coloring counterfeit coin or any pieces of metal with intent to pass the same, § 1387.
Impairing the coin, § 1388.
Buying and selling counterfeit coin, § 1389.
Uttering counterfeit gold and silver coin, § 1390.
Making, mending, or having possession of coining tools, § 1391.

Offences relating to the copper coin, § 1392.
What shall be sufficient proof of being counterfeit, § 1393.
Counterfeiting bank notes and checks, and altering, passing, and selling the same, § 1394.
Having in possession plates, bank notes or bank note paper, § 1395.
Connecting parts of notes so as to produce more, § 1396.
Having in possession more than ten forged notes, with intent to defraud, § 1397.
Passing notes of fictitious banks, § 1398.
Fraudulent making or altering any written instrument, § 1399.
Forging public seals, § 1400.
Embezzling or corrupting records, § 1401.
Counterfeiting public brands, § 1402.
Counterfeiting trade marks, § 1402 (*a*).
Having possession of dies, plates, &c., with intent so to use them, § 1402 (*b*).
Vending goods fraudulently marked, § 1402(*c*).
Forged telegraphic messages, § 1402(*d*).
Making false entries and abstracting public record, § 1402(*e*).

Virginia.
Forgery by free person of public record, &c., § 1403.
Keeping or concealing instrument for forging seal of courts, § 1404.
Forging coin, note, or bill, or fraudulently making the same, § 1405.
Making, &c., any press or thing, for forging any writing, or possession of instrument for that purpose, § 1406.
Forging writing to prejudice of another's right, § 1407.
Possession of forged notes or coins, either more or less than ten, § 1408.
Destroying or concealing will or codicil, § 1409.
In prosecution for forgery, not necessary to set forth a fac simile of the thing, § 1410.
Sufficient in an indictment to allege an intent to defraud, &c., without naming person intended to be injured, § 1411.

Ohio.
Forging, &c., record of public nature, charter, letters patent, &c., § 1412.
Counterfeiting coin, altering or putting off such coin, or making or keeping instruments to counterfeit coin, § 1413.
Disposing of counterfeited notes, the same not being filled, or signatures forged or affixed, the same being filled up, &c., § 1414.
Gilding of silver coin, § 1415.
Engraving or keeping plate for counterfeiting or altering, &c., bank bills, § 1416.
Attempting to pass counterfeit coin or bank notes, § 1417.
Fraudulent stamps, trade marks, &c., § 1417(*a*).

B. FORGERY AT COMMON LAW, § 1418.

I. WHAT MAY BE THE SUBJECT OF FORGERY, § 1418.

II. UTTERING, &c., § 1445.

III. GUILTY KNOWLEDGE AND INTENT, § 1452.

IV. Handwriting, § 1462.

V. Indictment, § 1466.

1st. How far the different stages in the offence can be coupled in the same count, § 1466.

2d. How the instrument may be generally designated, § 1467.

3d. How the instrument is to be set forth, § 1468.

4th. How far the incorporation of a bank must be set out, § 1488.

5th. Averment of knowledge and intent to defraud, § 1492.

6th. Averment of damage or injury, § 1498.

7th. Averment of person on whom instrument was passed, § 1499.

VI. Coining, § 1500.

CHAPTER II.

BURGLARY.

A. Statutes.

United States.

Burglary in a vessel, boat or raft, § 1511.

Massachusetts.

Burglary in dwelling-house in night, &c., and armed with dangerous weapons, § 1512.

Same not armed with dangerous weapons, § 1513.

New York.

Burglary, § 1514.

In the first degree, § 1515.

In the second degree, § 1516.

In the third degree, § 1517.

Punishment, § 1518.

Pennsylvania.

Burglary generally, § 1519.

Entering dwelling-house in day-time with intent, &c., § 1520.

Virginia.

Burglary, punishment and definition, § 1524.

Entering, without breaking, dwelling-house, office, ship, banking-house, &c., ship, or vessel, § 1525.

Punishment, § 1526.

Ohio.

Burglary in dwelling-house, kitchen, church, school, &c., § 1527.

Entering, in day or night, dwelling, &c., with intent to commit certain offences, 1528.

Breaking open house in the night, and committing or attempting to commit personal violence, § 1529.

Committing like offences in the day, § 1530(*a*).

Burglary defined, § 1530(*b*).

B. Burglary at common law.

I. Breaking, § 1532.

1st. Entering door or window partially open, § 1532.
2d. Where the place broken into is not part of the dwelling-house, § 1533.
3d. Breaking through outer covering, § 1535.
4th. Breaking on the inside, § 1536.
5th. Breaking chest or trunk, § 1537.
6th. Manual violence not necessary, § 1538.
7th. Entrance by trick, § 1539.
8th. Conspiracy with servant, § 1540.
9th. Breaking by pulling, pushing, or lifting, § 1541.
10th. Entrance by chimney, § 1543.
11th. Where there is an aperture already open, § 1544.
12th. Entering by the master's connivance, § 1545.
13th. Breaking out of a house, § 1546.
14th. Evidence of breaking, § 1547.
15th. Terror, without breaking, producing surrender of goods, 1548.

II. Entry, § 1549.

III. Dwelling-house, § 1555.

IV. Ownership, § 1577.

V. Time, § 1592.

VI. Intention, § 1598.

VII. Indictment, § 1607.

CHAPTER III.

ARSON.

A. Statutes.

United States.
Arson in any fort, dockyard, &c., § 1621.
Burning any armory, arsenal, ship-house, &c., not parcel of dwelling-house, or timber, stores, &c., § 1622.
Burning any vessel, &c., § 1623.
Burning any vessel with intent to prejudice underwriters, § 1624.

Massachusetts.
Arson generally, § 1626.
Burning in day-time, dwelling-house, &c., § 1627.
Burning in night-time, dwelling-house, court-house, store, mill, &c., § 1628.
Same in day-time, § 1629.

Burning in day or night, banking or warehouses, stores, stables, &c., of a particular class, § 1630.
Burning piles of wood, fence, haystack, vegetable produce, &c., § 1631.
Married woman responsible, burning her husband's property, § 1632.
Burning with intent to defraud underwriters, § 1633.

New York.
Arson in first degree, § 1634.
Ibid., second degree, § 1636.
Ibid., third degree, § 1637.
Ibid., fourth degree, § 1638.
Punishment, § 1639.

Pennsylvania.
Arson, dwelling-house, &c., § 1640.
Burning out-houses, &c., and setting fire with intent to burn, § 1641.
Setting fire to same, with intent to defraud insurers, § 1642.
Firing woods, § 1643.
Attempting to blow up building, § 1644.

Virginia.
Arson generally, § 1649.
Burning in day-time, § 1650.
What is dwelling-house, § 1651.
Burning meeting-house, college, banking-house, mill, etc., § 1652.
Burning pile of wood, tobacco-house, stack of wheat, etc., § 1653.
Punishment, § 1654.
Burning bridge, lock, dam, etc., § 1655.
Setting fire to woods, &c., § 1656.
Burning with intent to defraud underwriter, § 1657.

Ohio.
Arson generally, § 1657(*a*).
Attempt to commit arson, § 1657(*b*).
Definition of arson, § 1657(*c*).
Attempt, § 1657(*d*).

B. ARSON AT COMMON LAW.

I. BURNING, § 1659.

II. PROPERTY BURNED, § 1667.

III. INDICTMENT, § 1673.

CHAPTER IV

ROBBERY.

A. STATUTES.

United States.
Massachusetts.
Robbery with larceny, the robber being armed, &c., and striking the person robbed, § 1678.

Robbery, not being armed, &c., § 1679.
Attempt to extort by threats, &c., § 1680.

New York.
Robbery in the first degree, § 1681.
Same in second degree, § 1681.
Punishment, § 1683.
Attempt to extort by threats, &c., § 1684.

Pennsylvania.
Robbery when armed, § 1685.
Robbery by threats, &c., § 1686.
Robbery unarmed, &c., § 1687.

Virginia.
Robbery with dangerous weapon, § 1692.
Extortion by threats, § 1691.
Secreting child, &c., with intent to extort, &c., § 1693.

Ohio.
Robbery, § 1694.

B. ROBBERY AT COMMON LAW.

CHAPTER V.

LARCENY.

A. STATUTES.

United States.
Larceny in exclusive jurisdiction of U. S., or on high seas, § 1705.

Massachusetts.
Breaking, &c., in night, office, ship, and not adjacent dwelling-house with intent, &c., § 1706.
Entering same without breaking, in night-time, or breaking, &c., in day, § 1707.
Same as to any dwelling-house, &c., or office, shop, ship, &c., with intent, &c., § 1708.
Stealing in day-time in dwelling-house, &c., or breaking and entering in night any meeting house, &c., and stealing therein, § 1709.
Stealing in any building on fire, § 1710.
Stealing from the person, § 1711.
Stealing notes, bills, deeds, receipts, &c., § 1712.
Stealing railway tickets, § 1712(*a*).
Jurisdiction, &c., § 1713.
Second conviction, § 1714.
Breaking and entering in night-time, § 1715.
Stealing in dwelling-house in night-time, § 1716.
Unless specially averred, presumed to be in night, § 1717.
Larceny of beast or bird, § 1718.
Punishment generally, § 1719.
Trespass with intent to steal, § 1720.

Accessories, § 1721.
Stealing of real property, § 1722.
Property of person deceased, § 1723.
Breaking and entering in night-time any building with intent, &c., § 1724.
Entering in the night-time without breaking, or in the day-time with breaking, any building with intent, &c., § 1725.
Breaking and entering in day-time, any building, &c., with intent, § 1726.
Punishment, &c., § 1727.

New York.
Larceny generally, § 1728.
In dwelling-house or ship, § 1729.
In the night-time from the person, § 1730.
Under twenty-five dollars, § 1731.
Bonds, notes, &c., § 1732.
Lottery tickets, &c., § 1733.
Severance from realty, § 1734.
Record, paper, &c., § 1735.

Pennsylvania.
Larceny, § 1736.
Stealing, choses in action, &c., made larceny, § 1737.
Horse stealing, § 1738.
Stealing lead, iron, &c., from houses, § 1739.
Clerks, servants, or other employees, stealing property of their master employer, § 1740.
Larceny by bailee, § 1741.
Larceny of dogs, § 1741 (*a*).

Virginia.
Simple larceny, § 1742.
Bank note, check, etc., § 1743.
Severance from the realty, 1744.
Stealing slave, § 1745.
Taking oysters, etc., § 1746.

Ohio.
Larceny generally, § 1747.
Destroying bank notes or bills, etc., § 1748.
Larceny under thirty-five dollars, § 1749.
Horse stealing, receiving or buying stolen horse, concealing such horse or a horse thief, § 1750.

B. Larceny at common law.

I. Subjects of larceny, § 1751.

II. Felonious intent, § 1769.

III. Taking and carrying away, § 1802.

IV. Ownership, § 1818.

V. Value, § 1837.

VI. TAKING WHERE THE OFFENDER HAS A BARE CHARGE, § 1840.

VII. TAKING WHERE THE POSSESSION OF THE GOODS HAS BEEN ACQUIRED ANIMO FURANDI, § 1847.

VIII. TAKING WHERE THE POSSESSION OF THE GOODS HAS BEEN OBTAINED WITHOUT ANY FRAUDULENT INTENTION IN THE FIRST INSTANCE, § 1860.

IX. INDICTMENT, § 1869.

CHAPTER VI.

RECEIVING STOLEN GOODS.

A. STATUTES.

United States.
Receiving stolen goods, § 1870.

Massachusetts.
Receiving stolen goods, § 1871.
First conviction of offence in preceding section, § 1872.
Conviction for buying, receiving, &c., stolen goods, § 1873.
Jurisdiction of courts in regard to trial of offence, § 1874.
Not necessary to prove the conviction of thief, § 1875.

New York.
Receiving stolen goods, § 1876.
Not necessary to prove that principal had been convicted, § 1877.
Trial of offence, § 1878.

Pennsylvania.
Receiving stolen goods, &c., § 1879.
How to be prosecuted, § 1880.

Virginia.
Receiving stolen goods, § 1884.

Ohio.
Receiving stolen goods of value of thirty-five dollars and upward, § 1885.
Receiving stolen bank bills, bills of exchange, &c., § 1886.
Concealing stolen goods of less value than thirty-five dollars, § 1887.
Receiving stolen bank notes of less value than thirty-five dollars, § 1887(*a*).
Receiving stolen goods and chattels of less value than thirty-five dollars, § 1887(*b*).

B. OFFENCE GENERALLY.

I. IN WHAT THE OFFENCE CONSISTS, § 1888.

II. INDICTMENT, § 1899.

CHAPTER VII.

EMBEZZLEMENT.

A. STATUTES.

United States.

Embezzling instruments of war and victuals of the soldiers of U. S. § 1905.

Punishment, § 1906.

Massachusetts.

Embezzling bullion, money, note, bill, obligation, &c., of incorporated bank, § 1907.

Embezzlement of clerk in treasury of commonwealth, § 1908.

Embezzlement of officer, agent, clerk, or servant, &c., § 1909.

Embezzlement of carrier, § 1910.

Sufficient in prosecution to allege embezzlement to certain amount without particulars, § 1911.

Prosecution for embezzlement of real or personal estate, § 1912.

Embezzlement of officer of incorporated bank, § 1913.

Sufficient to allege in indictment, fraudulent conversion with such intent certain amount, without particulars, § 1914.

Prosecution for taking or receiving of bullion, money, note, bill, &c., § 1915.

Embezzlement of town, city, or county officer, § 1916.

New York.

Embezzlement of clerk, servant, officer, or agent, &c., 1917.

Embezzlement of evidence of debt, § 1918.

Buying or receiving embezzled money, goods, right in action, &c., § 1919.

Embezzlement of carrier, § 1920.

Fraudulent issue and sale of bonds by officers, &c., § 1920(*a*).

Pennsylvania.

Loaning money by public officers, § 1921.

Depositing public money for gain by officers, § 1921 (*a*).

Cashiers of banks prohibited from following any other business or occupation, § 1922.

Embezzlement by public officers, § 1923.

Malversation by corporation officers, § 1924.

Solicitation to commit said offence, § 1925.

Issuing certificates as currency by corporation officers, § 1926.

Embezzlement, by trustees, of trust property, § 1927.

Embezzlement by bankers, § 1927(*a*).

Embezzlement by attorneys in fact, § 1927 (*b*).

Embezzlement by officers of banks and other corporations, § 1927(*c*).

Keeping fraudulent accounts, § 1927(*d*).

Wilfully altering, destroying or mutilating books of a corporation, § 1927 (*e*).

False statements by officers and members of corporations, § 1927(*f*).

Receiving property fraudulently disposed of, § 1927(*g*).

Punishment for the foregoing misdemeanors, § 1927(*h*).
Construction of the preceding sections, § 1927(*i*).
No person exempt from answering questions in court, § 1927(*j*).
Definition of the words "trustee" and "property," in this title, § 1927(*k*).
Embezzlement by consignees and factors, § 1927(*l*).
Embezzlement by transporters, &c., § 1927(*m*).
Distinct acts chargeable in same indictment, § 1927(*n*).

Virginia.
Embezzlement by director or officer, or officer of public trust, &c., § 1928.
Embezzlement of carrier, § 1929.
Altering or omitting to make entry in account, &c., § 1930.

Ohio.
Clerk or servant, &c., embezzling, using or secreting, &c., money, goods, &c., § 1931.
Embezzlement of evidence of debt, &c., § 1932.
Buying or receiving embezzled goods, or money, &c., § 1933.
Embezzlement, &c., of goods, &c., by a common carrier, § 1934.
Embezzlement of public moneys, § 1934(*a*).
Loan of public moneys, § 1934(*b*).
Depositing funds for bonus, § 1934(*c*).
Fraudulent disposition of securities, § 1934(*d*).

B. Offence generally, § 1935.

CHAPTER VIII.

MALICIOUS MISCHIEF.

A. Statutes.

United States.
Intent to kill, rob, steal, commit a rape, etc., breaking into vessel upon high seas, etc., § 1943.

Massachusetts.
Mingling poison with food, etc., § 1944.
Maliciously killing or maiming horse, cattle, etc., § 1945.
Breaking down, injuring, removing or destroying dam, reservoir, etc., § 1946.
Destroying, etc., public or toll-bridge, railroad, etc., § 1947.
Maliciously girdling, lopping or destroying trees, breaking glass, etc., § 1948.
Maliciously destroying monument erected for designating boundaries of town, etc., § 1949.
Maliciously committing trespass, § 1950.
Trespassing on grounds of another with intent to destroy or take away trees, etc., § 1951.
Jurisdiction of justice of peace, etc., § 1952.
Beating or torturing horse, ox, or other animal, § 1953.
Maliciously destroying personal property of another, § 1954.

Jurisdiction of justice of peace, etc., § 1955.
Maliciously destroying building by gunpowder or other explosive substance, § 1956.
Maliciously throwing into or against building, dwelling-house, ship, etc., any explosive instrument, § 1957.
Throwing oil of vitriol, coal tar, etc., against dwelling-house, office, shop or vessel, § 1958.
Killing birds in cemetery, § 1978(*a*).

New York.
Removing dead body, etc., § 1959.
Purchasing dead body, etc., § 1960.
Opening grave, either to remove dead body or to steal coffin or vestments, § 1961.
Administering poison to horse, cattle, sheep, etc., § 1962.
Committing trespass, etc., § 1963.
Physician prescribing poison in state of intoxication, § 1964.
Selling poisonous substance with label, without word "poison" thereon, § 1965.
Overloading vessel so that life is endangered, § 1966.
Ignorantly or by gross neglect raising steam in order to excel any boat, etc., § 1967.
Maliciously killing, maiming, etc., horse, ox or other cattle, § 1968.
Reading sealed letter addressed to another, § 1969.
Maliciously publishing any part of such letter, § 1970.
Extent of two last sections, § 1971.
Maliciously destroying public or toll-bridge, § 1972.
Destroying mill-dam, etc., § 1973.
Removing monument erected to designate the extent of any lot, etc., § 1974.
Removing or destroying milestone, obliterating or defacing marks on monument, § 1975.
Mingling poison with food, or poisoning spring or reservoir, § 1976.
Destroying monument or work of art, or ornamental trees, etc., § 1977.
Person liable after conviction to an action in favor of party injured, § 1978.

Pennsylvania.
Cruelty to animals, § 1979.
Violation of sepulchre, § 1980.
Malicious injury to railroads, § 1981.
Casting wood, stone, &c., upon a car, § 1982.
Malicious injury to artificial navigation, § 1983.
Wantonly opening or shutting any lock, etc., § 1984.
Destroying any bank or wall, § 1984(*a*).
Destroying or damaging bridges, buoys, flag-staff, houses, etc., § 1985
Breaking windows, tearing off knockers, etc., § 1986.
Injury to the grounds of the Capitol Hill, § 1987.
Drowning any mine or filling up any shaft, § 1988.
Maliciously injuring fire engines or hose, § 1989.
Cutting down timber trees, § 1989(*a*).
Removing or destroying land-marks, § 1989(*b*).

Killing, maiming or wounding cattle, § 1989(*c*).
Malicious injury to works of art, § 1989(*d*).

Virginia.
Wilfully destroying ship or vessel, § 1990.
Administering or exposing poison for beast, § 1991.
Maliciously removing or injuring canal, railroad bridge, etc., § 1992.
Unlawfully but not feloniously defacing or injuring property, real or personal, § 1993.
Torturing beast, § 1994.

Ohio.
Burning or setting fire to certain personal property, etc., § 1995.
Maliciously setting fire to wood, etc., § 1996.
Maliciously destroying animal, property of another, § 1997.
Maliciously destroying fruit or other trees in nursery, garden, etc., § 1998.
Felling, boxing or injuring trees of another, § 1999.
Malicious destruction of ornamental trees in a street or upon public ground, § 2000.
Demolishing mile-stone, etc., or guide-board, § 2001.
Poisoning domestic animals, § 2001(*a*).
Same, under $35, § 2001(*b*).
Intent to poison, § 2001(*c*).
Killing or injuring animal to amount of $35, § 2001(*d*).
Same, less than $35, § 2001(*d*).
Trespassing animals, § 2001(*e*).
Prosecution, § 2001(*f*).

B. Malicious mischief at common law, § 2002.

CHAPTER IX.

FORCIBLE ENTRY AND DETAINER.

A. Offence generally.

B. Statutes.

Pennsylvania.
Forcible entry, § 2019.

Virginia.
Forcible entry, § 2020.
Entry with strong hand and multitude of people, § 2021.
Restitution to be awarded, § 2022.

C. Forcible entry, &c., at common law.

I. Who may commit the offence, § 2026.

II. Who may be the subject of it, § 2030.

III. What force is necessary, § 2032.

IV. What possession the prosecutor must have, § 2042.

V. Indictment, § 2047.

CHAPTER X.

CHEATS.

A. Cheats at common law, § 2051.

B. Statutory cheats by false pretences.

Massachusetts.

Obtaining by false pretence, or privy, or false token, goods, &c., on the signature to a written instrument, &c., § 2072.

New York.

Obtaining by false token, or writing, or false pretence, the signature to a written instrument, or money, personal property, &c., § 2073.
Same when the thing obtained is a bank note, &c., § 2074.
Same where the pretended purpose is charitable or benevolent, § 2075.

Pennsylvania.

Obtaining by false token, writing, or pretence, property, &c., § 2076.
Obtaining credit at hotel by same, &c., § 2077.

Virginia.

Obtaining by false pretence or token, property, &c., or signature to paper, § 2078.

Ohio.

Obtaining money by false pretences, making fraudulent transfer of property to cheat creditors, § 2079.
Selling or conveying land without title, § 2080.

I. Character of the pretences, § 2085.

1st. As to defendant's means, § 2085.

2d. As to defendant's character and personalty, § 2092.

3d. As to the nature and value of goods or paper, § 2102.

4th. The pretences at the time must have been false, § 2110.

5th. They need not be in words, § 2113.

6th. They need not be by the defendant personally, § 2114.

7th. They must relate to a present state of things, § 2118.

8th. They must have been the operative cause of the transfer, § 2120.

II. Position of prosecutor at the time, as to carelessness, or culpability, § 2138.

III. Property included by statutes, § 2134.

IV. Where the offence is triable, § 2142.

V. INDICTMENT, § 2144.

1st. "That A. B." etc. (defendants), did falsely, etc., pretend, § 2144.
2d. "To A. B." etc., § 2145.
3d. "That," etc. (statement of pretences), § 2148.
4th. Description of property, § 2155.
5th. "Whereas, in truth and fact" (negation and pretence), § 2158.
6th. Scienter and intention, § 2159.
7th. "By means," etc., of which pretences, § 2162.

CHAPTER XI.

SECRETING PROPERTY WITH INTENT TO DEFRAUD. FRAUDULENT INSOLVENCY.

A. STATUTES.

New York, § 2073.
Pennsylvania, § 2076.
Ohio, § 2079.

B. OFFENCE GENERALLY.

1st. There must be an actual secreting, or assigning of the goods, § 2167.
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, § 2168.

BOOK VI.

OFFENCES AGAINST SOCIETY.

CHAPTER I.

PERJURY.

A. STATUTES.

United States.
Wilfully and corruptly committing perjury, § 2169.
Knowingly and willingly swearing or affirming falsely, § 2170.
Who shall administer oaths, § 2171.
Where oath or affirmation is required from master of vessel, &c., § 2172.
Falsely taking oath or affirmation, § 2173.
Falsely swearing in regard to expenditure of public money, § 2174.
In regard to the public lands, § 2174(a).

Massachusetts.
Perjury, § 2175.

Subornation of perjury, § 2176.
Inciting others to commit perjury, § 2177.
When oath of person guilty of perjury, &c., shall subsequently be received, § 2178.
Presumption of perjury, § 2179.
Detaining books by court, in case of perjury, § 2180.

New York.
Perjury, 2181.
Punishment, § 2182.
Procuring witnesses to commit perjury, § 2183.
Consequences of conviction for subornation of perjury, § 2184.
Reasonable presumption of perjury, § 2185.
Proceedings in court in regard to perjury, § 2186.
Detaining documents, &c., necessary to be used in prosecution for perjury, § 2187.
Bribing another to commit perjury, § 2188.

Pennsylvania.
Perjury, § 2189.
Perjury of officer or agent of bank, 2190.
Requisites of indictment, § 2191.
Dissuading witness from testifying, § 2191(*a*).

Virginia.
Perjury, § 2192.
Punishment, § 2193.
Incapable of being juror or witness, § 2194

Ohio.
Perjury, § 2195.
Subornation of perjury, § 2196.
Subornation, § 2197.

B. PERJURY AT COMMON LAW.

I. WILFUL, § 2199.

II. FALSE, § 2201.

III. OATH, § 2205.

IV. BY ONE, § 2208.

V. IN A COMPETENT COURT, § 2211.

VI. IN ANY JUDICIAL PROCEEDING, § 2221.

VII. IN A MATTER MATERIAL, § 2228.

VIII. INDICTMENT, § 2233.

1st. Wilful, § 2234.
2d. Sworn before a competent jurisdiction, § 2236.
3d. In a judicial proceeding, § 2248.

4th. How and to what extent the alleged false matter is to be set out, § 2253.

5th. How the false matter is to be negatived, § 2259.

6th. Materiality, § 2263.

IX. Evidence, § 2266.

X. Subornation of perjury, § 2283.

CHAPTER II.

CONSPIRACY.

A. Statutes.

New York.

Conspiracy to falsely indict or sue another, or cheat, or commit an act injurious to public morals, § 2288.

When overt acts are necessary, § 2289.

When overt acts are to be averred, § 2290.

Pennsylvania.

Conspiracy to indict, § 2290(*a*).

Conspiracy to defraud, § 2290(*b*).

B. Conspiracies at common law.

I. Conspiracies to commit an indictable offence, § 2292.

1st. Conspiracies to commit felonies, § 2292.

2d. Conspiracies to commit misdemeanors, § 2295.

(*a*) Conspiracies to cheat, § 2297.

(*b*) Conspiracies to violate the Lottery Laws, § 2310.

(*c*) Conspiracies to commit breaches of the peace and seditious conspiracies, § 2311.

(*d*) Conspiracies to make or to utter forged or illegal notes, § 2312.

II. Conspiracies to make use of means themselves the subject of indictment, to effect an indifferent object, § 2313.

III. 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, § 2314.

1st. To commit an immoral act, such, for instance, as the seduction of a young woman, or to produce an abortion, § 2317.

2d. To prejudice the public or the Government generally, as, for instance, by unduly elevating or depressing the prices of wages, of toll, or of any merchantable commodity, or by defrauding the revenue, or impoverishing and defrauding any individual or class of men by combination of workmen, etc., § 2322.

3d. To falsely accuse another of crime, or use other improper means to injure his reputation or extort money from him, § 2327.

4th. To prevent the due course of justice, § 2333.

IV. General requisites of indictment, § 2334.

1st. Executed conspiracies and herein of overt acts, § 2334.

2d. Unexecuted conspiracies, § 2337.

3d. Joinder of counts, § 2338.

4th. Joinder of defendants, § 2339.

5th. Enumeration of parties injured, § 2349.

6th. Venue, § 2350.

V. Evidence, § 2351.

1st. Proof of conspiracy, § 2351.

2d. Declarations of co-conspirators, § 2361.

CHAPTER III.

NUISANCE.

I. Indictment, evidence, and judgment in general, § 2362.

II. Offences to health and comfort, § 2370.

III. Disorderly house, § 2382.

IV. Notorious lewdness and drunkenness, § 2396.

V. Obstructing and not repairing highways, § 2402.

VI. Lotteries, § 2411.

A. Statutes.

Massachusetts.

Setting up or promoting lottery, &c., § 2412.
Selling tickets, &c., § 2413.
Double conviction, § 2414.
Advertising lottery ticket, § 2415.
Having ticket in possession, or attempting to sell same, &c., § 2416.
Ticket to be deemed false, unless proved to the contrary, § 2417.
Reward to informer, § 2418.
Prizes to be forfeited, § 2419.

New York, § 2420.

Pennsylvania, § 2421.

Virginia.

Setting up or permitting a lottery or a raffle, § 2422.
Selling or keeping, &c., ticket, &c., in lottery in last section, § 2423.

Selling or keeping, &c., ticket in any false lottery, &c., § 2424.
Ticket presumed to be false until proved to the contrary, § 2425.
Prizes forfeited, § 2426.
Law remedial, § 2427.
Attorney's fee, § 2428.

VII. TIPPLING HOUSE, § 2433.

1st. License, its averment, proof, and effect, § 2434.
2d. What is evidence of a tippling house, § 2435.
3d. Principal responsible for act of agent or partner, § 2436.
4th. Agent's responsibility for principal, § 2437.
5th. What may be considered spirituous liquors under the statutes, § 2438.
(*a*) Common cordial, § 2438.
(*b*) Brandy or gin mixed with sugar and water, § 2438.
(*c*) Unadulterated gin, brandy, or rum, without proof that they are intoxicating, § 2438.
6th. How far medical use is a defence, § 2439.
7th. Autrefois acquit, § 2440.
8th. Feme coverts, § 2442.
9th. Averment and proof of vendee, § 2443.
10th. Averment and proof of sale, § 2445.

VIII. GAMBLING, § 2446.

CHAPTER IV.

RIOT; ROUT; UNLAWFUL ASSEMBLY, AND AFFRAY.

A. STATUTES.

Massachusetts.
Duty of mayor, &c., to disperse riot, § 2456.
Persons not dispersing to be deemed rioters, § 2457.
Responsibility of peace officer, not doing his duty, § 2458.
Power to arrest, § 2459.
Armed force to obey orders, &c., § 2460.
Homicide caused by such orders justifiable, § 2461.
Pulling down building, &c.; punishment, § 2462.

Pennsylvania.
Riot, § 2463.
Destruction of buildings, &c., § 2463(*a*).
Furious driving, &c., § 2463(*b*).
Disturbing congregations, &c., § 2463(c).

Virginia.
Duty of justices, &c., to disperse riots, § 2464.
Persons arrested, &c., to be committed, &c., § 2465.
Justice, &c., failing to do his duty, how to be punished, § 2466.

Justice may call in posse, § 2467.
Homicide by officers under such acts justifiable, of officers all rioters responsible for, § 2468.
Pulling down building, &c., § 2469.
Carrying concealed weapons, § 2470.

Ohio.
Riot, § 2471.
Judges and other peace officers to warn rioters to disperse, and may call to their aid the power of the county, § 2472.
Carrying concealed weapons, § 2472(*a*).

B. Riot, unlawful assembly, and affray at common law.

I. Offence generally, § 2473.

II. Indictment, § 2501.

CHAPTER V.

COMPOUNDING FELONY.

CHAPTER VI.

EXTORTION AND MISCONDUCT IN OFFICE.

I. Extortion, § 2508.

II. Misconduct in office, § 2514.

CHAPTER VII.

LIBEL.

A. Statutes.

Pennsylvania, § 2523(*a*).

Ohio.

[The Statutes of Massachusetts, New York, and Pennsylvania in reference to giving the truth in evidence, will be found under another head, post § 2584, &c.]

B. Offence generally.

I. Libel in general, § 2525.

II. Libels affecting individuals, § 2526.

III. Libels affecting the public, public officers and bodies of men, § 2536.
1st. Blasphemous libels, § 2536.

2d. Obscene libels, § 2547.
3d. Seditious libels, § 2550.

IV. PUBLICATION, § 2556.

V. WHAT COMMUNICATIONS ARE PRIVILEGED, § 2561.
1st. From the relation of the parties, § 2561.
2d. From public policy, § 2572.

VI. TRUTH WHEN ADMISSIBLE, § 2523.

VII. MALICE, HOW PROVED AND REBUTTED, § 2594.

VIII. INDICTMENT, § 2598.

CHAPTER VIII.

ESCAPE AND BREACH OF PRISON.

CHAPTER IX.

POLYGAMY, BIGAMY, INCEST, ETC.

A. STATUTES.

Massachusetts.
Polygamy, § 2616.
Exceptions, § 2617.

New York.
Bigamy, § 2618.
Exceptions, § 2619.
Punishment, § 2620.
Incest, § 2621.

Pennsylvania.
Bigamy, § 2622.

Virginia.
Bigamy, § 2623.
Exceptions, § 2624.

Ohio.
Bigamy, § 2625.
Incest, § 2626.

B. OFFENCE GENERALLY.

I. SECOND MARRIAGE MUST BE WITHIN THE JURISDICTION, § 2627.

II. WHERE THE FIRST MARRIAGE WAS VOIDABLE OR VOID, § 2628.

III. PARTIES BEYOND SEAS OR ABSENT, § 2629.

IV. Proof of marriage, § 2631.

V. Consummation not necessary, § 2635.

VI. Subsequent divorce, § 2636.

VII. Second wife, when admissible witness, § 2637.

VIII. Indictment, § 2638.

CHAPTER X.

ADULTERY.

A. Statutes.

Massachusetts, § 2639.

Pennsylvania.
Adultery, § 2640.
Birth of child during husband's absence, evidence of, § 2641.
Fine for, where to go, § 2641.
Imprisonment, § 2641.

Virginia.
Adultery, § 2642.
Lascivious cohabitation, § 2643.
Intermarriage with negro, § 2644.
Officiating at such marriage, § 2645.

Ohio.
Living and cohabiting in adultery, § 2646.
Fornication, § 2647.

B. Offence generally.

I. In what adultery consists, § 2648.

II. Evidence, § 2652.

III. Customs of the country no defence, § 2656.

IV. Indictment, § 2657.

V. Solicitation, § 2666.

CHAPTER XI.

FORNICATION.

A. Statutes.

Massachusetts.
Lascivious cohabitation, § 2668.
Fornication, § 2669.

Pennsylvania.
Fornication, § 2670.
Evidence, &c., § 2671.

Virginia, § 2642.

CHAPTER XII.

SEDUCTION.

A. Statutes.

New York, § 2672.

Pennsylvania, § 2673.

CHAPTER XIII.

CHALLENGING TO FIGHT.

CHAPTER XIV.

FALSE PERSONATION.

A. Statutes.

United States.
False personation of holder of public security, &c., § 2681.
False acknowledgment of bail, &c., § 2682.

Massachusetts.
False presenting of another and receiving property, § 2683.
Pretending to be public officer, § 2684.

New York.
False personation generally, § 2685.
Complaint of party injured, § 2686.
Receiving property by same, § 2687.
False production of infant, § 2688.
Substitution of same, § 2689.

Ohio, § 2690.

B. Offence generally, § 2691.

CHAPTER XV.

ATTEMPTS TO COMMIT OFFENCES.

A. Statutes.

United States.
Attempts to kill, without malice, whereby death ensues on land, § 2692.

Punishment, § 2692(a).
Attempts to kill, death not ensuing, § 2692(b).

Massachusetts.
Attempts generally, § 2692(c).
Punishment, § 2693.

New York.
Attempts generally, § 2694.
Punishment, § 2695.

B. OFFENCE GENERALLY, § 2696.

CHAPTER XVI.

OFFENCES AGAINST THE POST OFFICE.

I. ROBBERY OR LARCENY FROM MAIL, § 2703.

A. STATUTES.

United States.
Robbery of carrier, &c., of mail, or stealing from mail, § 2703.
Injuring mail bag, &c., § 2704.
Stealing or forging a mail key or lock, § 2704(*a*).
Stealing mail bags, § 2704(*b*).

B. OFFENCE GENERALLY, § 2705.

II. LARCENY OR EMBEZZLEMENT FROM THE MAIL BY EMPLOYEE, OR RECEIVING GOODS SO TAKEN, § 2709.

A. STATUTES.

United States.
Employee in post office detaining, &c., letter, or secreting or embezzling same, § 2709.
Receiving articles stolen or embezzled, &c., § 2710.

B. OFFENCE GENERALLY, § 2711.

1st. Embezzlement, etc., § 2711.
(*a*) In what it consists, § 2711.
(*b*) Indictment, § 2713.

2d. Receiving embezzled money, etc., § 2714.

BOOK VII.

OFFENCES AGAINST GOVERNMENT.

CHAPTER I.

TREASON.

I. TREASON AGAINST THE UNITED STATES, § 2715.

A. CONSTITUTION AND STATUTES.

United States.
- Treason—in what it consists, § 2715.
- Evidence and punishment, § 2716.
- Concealment of treason, § 2717.

B. OFFENCE GENERALLY, § 2718.

1st. Levying war, § 2719.

2d. Adhering to the enemies of the United States, giving them aid and comfort, § 2737.

II. TREASON AGAINST THE SEVERAL STATES.

A. STATUTES.

Massachusetts.
- Legislature have no power to declare subject guilty of treason, § 2744.
- In what treason consists, § 2745.
- Punishment, § 2746.
- Concealing treason, § 2747.
- Evidence, § 2748.

New York.
- Punishment, § 2749.
- In what treason consists, § 2750.
- Forfeiture, § 2751.
- Evidence, § 2752.

Pennsylvania.
- In what treason consists, § 2753.
- Punishment, § 2758.

Virginia.
- In what treason consists, § 2762.
- Concealing same, § 2763
- Attempting same, § 2764.
- Aiding slave to rebel, &c., § 2756.

B. OFFENCE GENERALLY, § 2766.

CHAPTER II.

VIOLATION OF NEUTRALITY LAWS.

A. Statutes.

United States.

Serving foreign prince against another with whom U. S. are at peace, § 2778.

Enlisting in service, &c., § 2779.

Fitting out vessel, &c., to be employed in service of foreign prince, § 2780.

Fitting out or being concerned in vessel to commit hostilities upon people of the U. S., § 2781.

Increasing force of ship of war in service of foreign prince, &c., § 2782.

Setting on foot military expedition, &c., against foreign prince, § 2783.

B. Offence generally, § 2784.

CHAPTER III.

CUTTING TIMBER ON LANDS RESERVED TO THE UNITED STATES.

A. Statutes.

United States.

Cutting timber on lands reserved or purchased for the U. S., § 2808.

Loading ship with same, § 2809.

Penalty to informer, § 2810.

B. Offence generally, § 2811.

CHAPTER IV.

BRIBERY.

Offence generally, § 2815.

BOOK VIII.

OFFENCES ON THE HIGH SEAS.

CHAPTER I.

PIRACY.

A. Statutes.

United States.

Piracy. Mutiny. Where triable, § 2816.

Under color of foreign commission, § 2817.
Accessaries before the fact, § 2818.
Accessaries after the fact, § 2819.
Manslaughter. Attempt to commit piracy, &c. Corresponding with pirates. Endeavoring to make a revolt, § 2820.
Casting away vessels, § 2821.
By owners, with intent to defraud underwriters, § 2822.
Robbery; to be deemed piracy. Where triable. Jurisdiction State courts, § 2823.
Murder, where the party dies on land, § 2824.
Offences in foreign ports, § 2825.
Attacking vessels, with intent to plunder, § 2826.
Entering vessels, with intent to commit a felony. Maliciously destroying moorings, &c., § 2827.
Plundering vessels in distress, &c. Obstructing escape from wrecks. Wrecking vessels, § 2828.
Forcing seamen ashore in a foreign port, § 2829.
Burning vessels, § 2829(*a*).
Assault with intent to commit a felony, § 2829(*b*).
Definition of revolt and mutiny. Punishment, § 2829(c).
Endeavoring to make a revolt, § 2829(*d*).
Maltreating crews of vessels, § 2829(*e*).
Piratically running away with vessels, or yielding them voluntarily to pirates, § 2829(*f*).
When aliens to be deemed pirates, § 2829(*g*).
Wilfully attempting to destroy vessels at sea, § 2829(*h*).
Jurisdiction, § 2829(*i*).

B. Offence generally, § 2830.

CHAPTER II.

MALTREATMENT OF THE CREW.

A. Statutes.

United States, § 2861.

B. Offence generally, § 2862.

CHAPTER III.

REVOLT AND ENDEAVOR TO MAKE A REVOLT.

A. Statutes.

United States, § 2829(c).

B. Offence generally, § 2868.

CHAPTER IV.

FORCING ON SHORE OR DESERTING IN A FOREIGN PLACE, A SUBORDINATE BY THE MASTER.

A. STATUTES.

United States, § 2873.

B. OFFENCE GENERALLY, § 2874.

CHAPTER V.

ENGAGING IN THE SLAVE TRADE.

A. STATUTES.

United States.
- Seizing negroes on foreign shores, § 2879(*a*).
- Detaining negroes in ships, &c., § 2879(*b*).
- Serving on board home slaver, § 2880.
- Serving on board foreign slaver, § 2881.
- Vessel having on board negroes for the purpose of being sold as slaves, § 2882.

B. OFFENCE GENERALLY, § 2883.

CHAPTER VI.

PLUNDER OF, OR ATTACK WITH INTENT TO PLUNDER A VESSEL OR WRECK.

A. STATUTES.

United States.
- Maliciously attacking vessel with intent, &c., § 2901.
- Plundering wrecked vessel or obstructing escape of passengers, showing false lights or extinguishing lights, &c., § 2902.

B. OFFENCE GENERALLY, § 2903.

CHAPTER VII.

DESTROYING A VESSEL WITH INTENT TO DEFRAUD THE UNDERWRITERS.

A. STATUTES.

United States.
- Casting away vessel generally, § 2907.
- Same with intent to defraud underwriters, § 2908.
- Conspiring to do the same, § 2909.

Massachusetts.
Casting away vessel with intent to defraud owner or insurer, § 2910.
Lading the same with same intent, § 2911.
Getting up fraudulent invoices, &c., with same intent, § 2912.
Making false papers with same intent, § 2913.

New York, § 1637.

Pennsylvania, § 1641(*a*).

Virginia, § 1657.

B. OFFENCE GENERALLY, § 2914.

BOOK IX.

TRIAL AND ITS INCIDENTS.

CHAPTER I.

MOTION FOR CONTINUANCE.

I. ON APPLICATION OF THE PROSECUTION, § 2922.

II. ON APPLICATION OF THE DEFENDANT, § 2929.

1st. Absence of material witness, § 2930.
(*a*) Testimony must be within process of court, § 2931.
(*b*) There must have been no laches, § 2932.
(*c*) The evidence must be material, § 2934.
(*d*) The opposite party must refuse to admit that the witness would have testified as is alleged, § 2937.
(*e*) The absent witness must, if he had notice, have secreted himself.

2d. Inability of defendant, or his counsel to attend, § 2937.

3d. Improper means to prejudice the public mind or swerve the jury, § 2940.

4th. Inability of witness to understand the obligation of an oath, § 2941.

CHAPTER II.

CHALLENGES.

I. OF THE SEVERAL KIND OF CHALLENGES, § 2945.

1st. To the array, § 2947.
(*a*) Principal challenge to the array, § 2948.
(*b*) Challenges to the array for favor, § 2953.

2d. To the polls, § 2954.
(*a*) Peremptory, § 2955.
(1) By government, § 2956.
(2) By defendant, § 2958.

(b) Principal, § 2975.
(1) Preadjudication of case, § 2976.
(2) Relationship, interest, infamy, &c., § 3016.
(3) Irreligion, § 3019.
(4) Conscientious scruples, § 3020.
(5) Secret associations, § 3021.
(c) Challenges to the polls for favor, § 3022.

II. Mode and time of taking the challenge, § 3026.

III. How challenges are to be tried, § 3036.

CHAPTER III.

MOTION IN ARREST OF JUDGMENT.

When allowable, § 3043.

CHAPTER IV.

WRIT OF ERROR.

I. How far one bad count affects a general conviction on error, § 3047.

II. Bill of exceptions, § 3049.

III. In whose behalf a writ of error lies, § 3050.

CHAPTER V.

MOTION FOR NEW TRIAL.

I. In what trials consist, § 3053.

II. In what cases courts have authority to grant new trials, § 3054.
1st. After acquittal, § 3054.
2d. After conviction, § 3060.

III. For what reasons new trials will be granted, § 3079.
1st. Misdirection by the court trying the case, § 3080.
2d. Mistake in the admission or rejection of evidence, § 3089.
3d. Verdict against law, § 3093.
4th. Verdict against evidence, 3110.
5th. Irregularity in conduct of jury, § 3111.
(a) Separation of jurors, § 3111.
(b) Improper reception of papers or books not iu evidence, § 3136.
(c) Irregular communications from court, § 3139.

(*d*) Conversing with others, and reception of information as to the case, § 3140.

(*e*) Inattention of juror, § 3146.

(*f*) Intoxication of juror, § 3147.

(*g*) Casting lots by jurors or other irregularity in their consultations, § 3148.

(*h*) Preadjudication by juror or judge, § 3152.

(*i*) Other incompetency of juror, § 3153.

(*j*) Admissibility of juror to impeach verdict, § 3155.

6th. Misconduct by the prevailing party, § 3157.

7th. After discovered evidence, § 3161.

(*a*) The evidence must have been discovered since the former trial, § 3166.

(*b*) It must be such as could not have been secured at the former trial by reasonable diligence on part of the defendant, § 3170.

(*c*) It must be material in its object, and not merely cumulative and corroborative, or collateral, § 3179.

(*d*) It must be such as ought to produce on another trial, an opposite result on the merits, § 3189.

(*e*) It must go to the merits, and not rest on a merely technical defence, § 3191.

8th. Acquittal of co-defendant alleged to be a material witness for defendant convicted, and herein of the misjoinder of defendants, § 3192.

9th. Absence, want of notice, mistake, and surprise, § 3197.

(*a*) Absence, § 3197.

(*b*) Want of notice, § 3203.

(*c*) Mistake, § 3204.

(*d*) Surprise, § 3211.

10th. Irregularity in impanelling the jury, § 3216.

IV. At what time, by whom, to whom, and in what form motion for new trials must be made, § 3225.

1st. At what time, § 3225.

2d. By whom, § 3228.

3d. To whom, § 3232.

4th. In what form, § 3235.

TABLE OF CASES.

TABLE OF CASES.

A.

SECTIONS.

Aaron, State *v.*, 1 Southard (N. J. 1818); 65
Abbey *v.* Sill, 5 Bing; 47
State *v.*, 3 Williams (29 Vt.) 60; 378
Abbott, People *v.*, 19 Wend; 1152
State *v.*, 20 Vt; 377
11 Foster (N. H.); 364, 378, 379
Abernathy, State *v.*, 1 Busbee; 412
Abitbol *v.* Beniditto, 2 Taunt; 258, 597
Abel *v.* Shields, 7 Mis; 819
Abram, State *v.*, 4 Ala; 578
9 Ala; 1174
Abraham *v.* State, 6 Iowa, 117; 423, 2392
Abrahams *v.* Bunn, 4 Burr; 780
Absence, State *v.*, 3 Porter; 372
Ackley *v.* People, 9 Barb. S. C; 637
Adams *v.* Barrett, 5 Geo; 2, 400, 1175
Com. *v.*, 7 Metc; 312
1 Gray; 265
4 Gray (Mass.) 27; 266
Jones, 12 Peters; 201
People *v.*, 3 Denio; 115, 154
17 Wendell; 266
1 Comstock; 112, 154, 278, 535, 604
R. *v.*, 3 C. & P; 728
State *v.*, 4 Black; 185
1 Haywood; 728, 855
Murphey; 279
6 N. Hamp; 378
Adcock's Case, 8 Grattan; 545, 551
Addington, State *v.*, 2 Bailey; 766
Adwards, People *v.*, 5 Mich. 22; 564
Ady, R. *v.*, 6 C. & P; 618
Agnew *v.* Commissioners, 12 S. & R; 513
Ahithol *v.* Beniditto, 2 Taunt; 258, 597
Aickles, R. *v.*, 1 Leach; 657, 766

SECTIONS.

Ailstock, Com. *v.*, 3 Grat; 405, 650
Ainsworth *v.* Sessions, 2 Caines; 216
State *v.*, 11 Verm. R; 567
Alberti, Com. *v.*, 2 Par; 1196
Albricht *v.* State, 6 Wis. 74; 640
Alderman, Com. *v.*, 4 Mass. R; 541, 546
v. People, 4 Mich. 414; 808
Alexander *v.* Knox, 7 Ala; 809
Alfred, Com. *v.*, 4 Dana; 599
Algheri *v.* State, 25 Miss; 732
Allen, People *v.*, 5 Denio; 364
R. *v.*, 7 C. & P; 1011
9 C. & P; 1138
1 Moody C. C; 707
1 C. & P; 360
v. State, 5 Wis. 329; 274
State *v.*, Charlton, Geo. R; 335, 362, 503
5 Yerg; 970
Allison, R. *v.*, 8 C. & P; 122, 963
State *v.*, 3 Yerger; 431
Almeida, U. S. *v.*, Wh. Prec; 285, 372
Almon, R. *v.*, 5 Burrows; 153
Alyett, R. *v.*, 6 Ad. & Ell; 228
American Fur Co. *v.* W. S., 2 Peters; 702, 703
Ames, State *v.*, 10 Mis; 282
1 Mis; 289
U. S. *v.*, 9 Bos. Law Rep; 182
Ammond, State *v.*, 3 Murphy; 351
Amos, R. *v.*, 1 Eng. R; 611
Anderson *v.* Com., 5 Rand; 7
Hamilton, 2 Brod. & B; 776
People *v.*, 14 Johnson; 1022
2 Wheel C. C; 674
R. *v.*, 2 M. & R; 350, 564
1 Russ; 989
State *v.*, 19 Mo. (4 Bennett), 241; 1152
1 Hill's S. C. R; 1032

SECTIONS.

Anderson, State *v.*, 3 Rich; 255, 393
1 Strobh; 445, 418
2 Tenn. R; 1084, 1114, 1279
5 Pike; 410, 474, 1071
Andre *v.* State, 5 Iowa (Clarke); 389
Andrews, Com. *v.*, 3 Mass; 135
2 Mass. R; 409, 565
v. State, 2 Sneed (Tenn.), 550; 541
U. S. *v.*, 2 Paine C. C. 451; 364
Angel *v.* Com., 2 Virg. Cases; 295, 368
Angus *v.* Smith, 1 M. & W; 819
Ann *v.* State, 11 Hump; 685, 1045
Anthony, State *v.*, 7 Iredell; 234
1 M'Cord; 410, 768
1 Hump; 671
1 Meigs; 669, 1084, 1085, 1114
Antonio, State *v.*, 2 Tr. Con. R; 631
Apothecaries' Co. *v.* Bentley, 1 C. & P; 614
Appleby, R. *v.*, 3 Stark; 683, 696, 703
Appleton *v.* Boyd, 7 Mass. R; 809
Archer, R. *v.*, R. & M; 75
Arden, State *v.*, 1 Bay; 434
Armory *v.* Delamirie, 1 Strange; 722
Armstrong *v.* Simmons, 3 Harring; 752
U. S. *v.*, J. Curtis C. C. 446; 944
Arnold *v.* Arnold, 13 Verm; 795
Com. *v.*, 4 Pick; 625
R. *v.*, 3 Yeates; 294
State *v.*, 13 Iredell; 64
Aro, People *v.*, 6 Cal. 207; 1054, 1073
Arrington, State *v.*, 3 Murph; 591
Arscott, R. *v.*, 6 C. & P; 344
Aspinwall, R. *v.*, 2 Starkie, Ev; 1151
Atcheson *v.* Everett, Cowp; 764, 795
R. *v.*, C. & M.; 350
1 Russ; 70, 74
1 Salk; 429
State *v.*, 9 Humph; 546
Athea, R. *v.*, R. & M; 329
Atkins *v.* State, 16 Ark; 591, 953, 974, 1027
Attorney General *v.* Good, M'Clel. & Y; 486
Hitchcock, 1 Exch; 817
La Merchant, 2 T. R; 657
Atwood, Com. *v.*, 11 Mass; 630

SECTIONS.

Atwood *v.* Welton, 7 Conn. R; 795, 797
Austin, People *v.*, 1 Parker, C. C; 423, 817, 1026
R. *v.*, 7 C. & P; 522
1 C. & K; 450
State, 14 Ark; 528, 689, 701, 772, 782
Avery, State *v.*, 7 Connect; 7
Avenson *v.* Lord Kinnaird, 6 East; 664, 675, 771
Axt, State *v.*, 6 Iowa, 511; 497
Ayer, State *v.*, 3 Foster (N. H.); 383
Ayes, R. *v.*, R. & R; 988
Aylett, R. *v.*, 1 T. R; 261

B.

Bachelor, Com. *v.*, 4 Am. Jur; 797
Backus, People *v.*, 5 Cal; 591
Badcock, R. *v.*, Russ. & R. C. C; 126
Badgley, People *v.*, 16 Wend; 311, 608, 657, 683
Bagby, Com. *v.*, 7 Pick; 82
Bagg, R. *v.*, 1 Ro. Rep; 351
Baglay, Com. *v.*, 7 Pick; 292, 594, 598
Baifield, State *v.*, 8 Ired. Rep; 344, 641
Bailey's Case, 1 Virg. Cases; 541
Bailey, Com. *v.*, 1 Mass; 306
R. *v.*, R. & R; 82
2 Stir; 519
State *v.*, 11 Foster (N. H.), 521; 622
21 Miss. (6 Bennett), 484; 282
21 Missouri; 272
1 Pennsylvania; 809
v. State, 4 Ohio (N. S.), 440; 423
U. S. *v.*, 9 Peters; 201
Bainbrigge *v.* Bainbrigge, 4 Cox, C. C; 46
Bainton, R. *v.*, 2 Stir; 518
Baird *v.* Cochran, 4 S. & R; 809
Baker, R. *v.*, 2 M. & Rob; 675
State *v.*, 1 Jones; 941
20 Mo; 506, 508, 509, 510
24 Miss. (3 Jones), 437; 667
4 Redding; 261, 599
4 Pike's (Ark); 414
v. U. S., 1 Minnes; 207, 790
Bakerman *v.* Rose, 18 Wend; 814
Baldry, R. *v.*, 12 Eng. Law & Eq; 685, 686
Baldwin's Case, 2 Tyler; 469
v. Com., 2 Casey; 446
State *v.*, 1 Dev. & Bat; 519

SECTIONS.
Baldwin, State *v.*, 12 Missouri; 48
Ball *v.* Com., 8 Leigh; 591
Ball, R. *v.*, R. & R; 635
Ballard *v.* Noakes, 2 Pike; 794
State *v.*, 2 Murphey; 292
Ballan *v.* Alexander, 6 Humph; 549
Balls, R. *v.*, 1 Moody C. C; 631
Balme, R. *v.*, 1 Cowp; 19
Bangs, Com. *v.*, 9 Mass; 1220
Bank of Salina *v.* Henry, 2 Denio; 805, 807, 808
U. S. *v.* Danbridge, 12 Wheat; 653
Green, 6 Peters; 202
Banker, People *v.*, 2 Parker C. R; 26, 690
Bankus *v.* State, 4 Indiana; 84
Barber, R. *v.*, 1 Car. & T; 432
Barden, State *v.*, 1 Devereux; 131
Barfield, State *v.*, 7 Iredell; 957
Barge, Com. *v.*, 3 Penn. & Watts; 528, 572
Barham, State *v.*, 7 Conn; 565
Barker *v.* Com., 7 Harris; 6
2 Virg. Cases; 778
R. *v.*, 3 C. & P; 1151
State *v.*, 18 Ver. (3 Wash); 379
Barkman *v.* State, 8 Eng. (13 Ark); 251
Barlow, Com. *v.*, 4 Mass; 1269
Barmana, R. *v.*, 1 Crawf. & Dix C. C; 377
Barnard, Com. *v.*, Thach. Crim. Cases; 795
Barnes *v.* People, 18 Ill., 52; 597
State *v.*, 32 Maine, 2 Red; 568
Barney *v.* State, 12 S. & M; 465, 468, 472
Baron *v.* People, 1 Parker, C. C; 135
Barran, R. *v.*, Jebb; 377
Barret, People *v.*, 2 Caines; 513, 544, 588
1 Johnson R; 277, 551, 587, 565
R. *v.*, 2 Boston R; 1213
4 C. & P; 686
6 C. & P; 615
Barroune, State *v.*, 25 Miss; 472
Barry, State *v.*, 21 Miss. (6 Bennett) 504; 435
Bartlet, R. *v.*, 7 C. & P; 683
Bartlett *v.* Humphreys, Hardin; 485
R. *v.*, 2 Moody & R; 344
7 C. & P. 832; 690
Barton *v.* Morphes, 2 Dev; 814
R. *v.*, 3 Cox C. C; 15, 16
1 Moody C. C; 313
Basey, Com. *v.*, 11 Cush. (Mass.) 417; 677

SECTIONS.
Bashik, State *v.*, 4 Harr; 687, 692
Batchelder, U. S. *v.*, 2 Gall; 364
Bates, People *v.*, Parker C. R. (N. Y.) 27; 1160
Batt, R. *v.*, 6 C. & P; 635
Battes, Com. *v.*, 1 Mass; 54
Battle, State *v.*, 7 Ala; 588, 589
Batton, R. *v.*, 8 C. & P; 1249
Baxter *v.* People, 3 Gilman; 143
Beak *v.* Thyrwhit, 3 Mod; 541
Beale, Com. *v.*, Philada. MSS; 637, 1139, 1146
Bean, State *v.*, 19 Vt; 258, 309, 597
Beaney, R. *v.*, R. & R; 611, 377
Beard, State *v.*, 1 Dutch (N. Y.) 384; 519
Beasley *v.* State, 18 Ala; 1281
Beauchamp *v.* State, 6 Black; 821
Beaudein *v.* State, 8 Ohio State R. (N. Y.) 634; 928
Bechtell, Com. *v.*, 1 Am. L. J; 232
Beck, State *v.*, 1 Hill, S. C; 1262
Becker *v.* State, 8 Ohio State R. (N. S.) 391; 379
Beckwith, State *v.*, 1 Stewart; 261, 264
v. Sydebotham, 1 Camp; 47
Becker *v.* State, 8 Ohio State R. (N. S.); 379, 391
Beere, R. *v.*, 2 M. & Rob; 589
Beeton, R. *v.*, 2 Car. & K; 425
Beets *v.* State, 1 Meigs; 679, 998
Bell's Case, 1 Brown; 809
Bell *v.* Com., 8 Gratt; 519
Penn. *v.* Add; 232, 413, 630
People *v.*, 10 Johns R; 790
R. *v.*, 5 C. & P. 163; 692, 697
State *v.*, 3 Iredell; 412
1 Swan, Tenn; 6, 351
Bellinger, People *v.*, 8 Wendell; 661, 806
Belton, R. *v.*, 1 Salk; 519
Ben *v.* State, 22 Ala; 391, 393
Bendett, R. *v.*, 4 Barn. & Ald; 744
Benedict, State *v.*, 11 Verm; 1246
Benefield, R. *v.*, 2 Bur; 393, 415
R. *v.*, 2 Bur; 430
Benham, State *v.*, 7 Conn; 50, 565
Benjamin *v.* Hathaway, 3 Conn. R; 807
Benner, U. S. *v.*, Baldwin; 83
Bennett's Case, 11 Leigh; 1113
Bennett, Com. *v.*, 2 Virg. Cases; 421, 1154
8 Leigh; 1084, 1099
State *v.*, 2 Const. R; 728
v. State, 8 Humph; 497, 637
4 Indiana; 412
Mart. & Y; 412, 635

SECTIONS.
Bennett, *v.* State, 2 Yerger; 520, 528
Benson *v.* Oppley, 2 Shaw; 130
People *v.*, 6 Cal 221; 1149, 1152
Benth, State *v.*, 3 Brevard; 855
Bentley's Case, R. & M; 708
Bentony, State *v.*, 2 Dev. & Bat; 965
Bentz, State *v.*, 11 Missouri; 69, 78
Bergen *v.* People, 17 Ill. 426; 662, 663, 683
Berigan, R. *v.*, 1 Irish Circ. R. 177; 686
Berkley Peerage Case, 4 Camp; 666
Bernie *v.* State, 19 Ala; 618
Berrian *v.* State, 2 Zebr; 265, 408, 530
Berriman, R. *v.*, 5 C. & P; 250, 251
Berry, Com. *v.*, 5 Gray (Mass.) 493; 547
v. State, 10 Georgia; 685, 696, 698, 701
Berryman *v.* Wise, 4 T. R; 653
Betton, Com. *v.*, 5 Cush; 497
Bevan, R. *v.*, Ry. & M; 782
Bevans, U. S. *v.*, 3 Wheat; 162, 168
Beveridge *v.* Minter, 1 C. & P; 771
Bevett *v.* Braham, 4 T. R; 47
Bickel *v.* Fasig, 9 Casey, 463; 761
Biddle *v.* Proprietors, 1 Mass; 90
Bigelow, Com. *v.* 8 Metc; 634
Bigg *v.* People, 8 Barbour; 303
Bingham *v.* Dickie, 5 Taunt; 258, 597
Bingley, R. *v.*, R. & R; 123, 126
Birch, R. *v.*, 1 Leach, C. C; 342
Bird, R. *v.*, 15 Jur; 561, 572, 823, 1064
R. *v.*, 2 Eng. Law & Eq. 473; 400
State *v.*, 14 Georgia; 944, 949
Birkett, R. *v.*, R. & R; 344, 785
Birm. & Glou. Railway Co., R. *v.*, 3 Ad. & El; 3 Q. B; 86, 88, 89, 233, 527, 528
Birmingham, State *v.*, 1 Busbee; 558, 565
Bishop, R. *v.*, Andr; 519
15 Maine (3 Shepley); 345, 346, 536
Bivens *v.* State, 6 Eng. (Ark); 944
Black *v.* State, 2 Md; 10, 400
Blackson, R. *v.*, 8 C. & P; 422
Blackwell, State *v.*, 9 Ala; 513, 544
Blair *v.* Seaver, 23 Penn., 2 Casey, 274; 795
Blake, People *v.*, 1 Wheeler's C. C; 5, 1249
State *v.*, 39 Maine (4 Heath), 322; 1154
Blanchard *v.* Russell, 13 Mass; 184
Bland *v.* State, 2 Carter (Ind); 699
Blanding, Com. *v.*, 3 Pick; 605
Blankenship, State *v.*, 21 Mo; 597
Blatch *v.* Archer, Cowper; 708

SECTIONS.
Bledgett, Com. *v.*, 12 Metc; 1176
Blennerhasset, State *v.*, Walker; 549, 778, 790, 1252
Bliss, R. *v.*, 8 C. & P; 251
Blocker *v.* Burnes, 2 Ala; 795
Blood, Com. *v.*, 4 Gray (Mass), 31; 598
Bloomer *v.* State, 3 Sneed (Tenn.), 66; 493
Blue *v.* Kirby, 1 Monr; 814
Blumenthal, Com. *v.*, Whr. Prec; 297
Blyth, State *v.*, 1 Bax; 549
Boardman, R. *v.*, 2 Mood. & R; 343
Bob, Com. *v.*, 4 Dall; 710, 932, 944, 1084
v. State, 29 Ala. 20; 1049
32 1. W. Shepherd, Ala. 560; 701
Bodine, People *v.*, 1 Denio; 637
Bogart, People *v.*, 3 Parker C. R. (N. Y.), 143; 10
Boles *v.* State, 9 S. & M; 968
Bolhem, Com. *v.*, 3 Pick; 625
Bollman *v.* Swartwout, 4 Cranch; 207
Bon *v.* State, 22 Ala; 390
R. *v.* 1 Den. C. C; 358, 611
4 Cox, C. C; 611
Bone *v.* State, 18 Ark. 109; 379
Bonner, R. *v.*, 6 C. & P; 671
Bonney, State *v.*, 34 Maine; 307, 311
Book, U. S. *v.*, 2 Cranch, C. C. R; 556
Boon's Case, 1 Greenl. Ev; 74
Boott, Com. *v.*, Thacher's C. C; 702
Borthwick, R. *v.* Doug; 124, 129
Borroum *v.* State, 25 Miss. 203; 473
Boston, R. *v.*, 4 East; 780
Bostwick, State *v.*, 4 Harrington; 60, 692, 795
Boswell, State *v.*, 2 Dev; 814, 815
Bosworth, Com. *v.*, 22 Pick; 783
6 Gray, 479; 783
Bottomley *v.* U. S., 1 Story; 649
Bottoms *v.* Kent, 3 Jones Rep; 154, 641
Bovard *v.* State, 30 Miss. (1 George); 23, 600
Bowden, Com. *v.*, 9 Mass; 581
Bowen, Com. *v.*, 13 Mass; 122, 964
R. *v.*, 1 Den. C. C; 390
Bower *v.* State, 3 Miss; 697
5 Mo; 1115
Bowler's Case, 67 Hans. Par. Deb; 15
Bowles *v.* State, 17 Ohio, R. P; 1276
Bowling, State *v.*, 10 Humph; 386, 445, 1280
Bowman, R. *v.*, 7 C. & P; 568
Allison, C. L; 728
6 C. & P; 541
v. Smith, 1 Strobhart; 800
v. Woods, 1 Iowa R. 441; 50

SECTIONS.
Bowman, U. S. v., 2 Wash. C. C. R; 261, 271, 559
4 Wash. C. C. R; 609
Boyall, R. v., 2 Burr; 10
Boyd v. State, 17 Geo. 194; 130, 1030, 1037
State v., 2 Hill's C. R; 489, 509
2 Humph; 5, 685, 686, 698
U. S. v., 5 How. U. S. R; 653
Boyden, State v., 13 Iredell; 1286, 1287
Boyer, Com. v., 1 Binn; 325, 345
Boyes & Stukes, State v., 1 M'Mullan; 419
Boyington v. State, 2 Porter; 572
Boyles v. Com. 2 Serg. & Raw; 1234
Bradford, People v., 1 Wheeler, C. C; 712
Bradley, State v., 1 Hay; 306, 351
10 S. & M; 1282
State v., 3 Rich. Law (S. C.), 168; 429
Brady, State v., 14 Ver. R; 383, 408
Brain, R. v., 6 Car. & Paine; 748
Brakefield v. State 1 Sneed; 671
Braley, Com. v., 1 Mass; 54
Brandreth, R. v., 32 How. St. Tr; 703
Braner, R. v., 6 Car. & Payne; 708
Bratton v. State, 10 Humph; 1086, 1100, 1114
Bray, State v., 1 Missouri R; 402, 1263
Braynard, Com. v., Thacher, C. C; 599, 806
Brazier, R. v., 1 Leach; 755
1 East, P. C; 755, 1150
Brennan v. People, 15 Illinois; 127, 540, 550, 998
Brettrel, R. v., Car. & M; 565
Brewer, State v., 8 Mo; 510
Brewster, State v., 7 Ver. R; 855
Brick, State v., 2 Har; 685, 695
Brickell, State v., 1 Hay, N. C. R; 220
Brien, State v., 10 La. R; 641
Briggs, Com. v., 7 Pick; 513
5 Pick; 135
v. People, 8 Barbour; 285
R. v., 1 Mood. C. C; 832, 1059
State v., 1 Aiken; 3, 5
Briley, State v., 8 Porter; 366
Brimilow, R. v., 2 Mood, C. C; 61
Bringer, State v., 5 Alab. 244; 561
5 Alab; 711
Brister v. State, 26 Ala; 529, 698, 794
Britain v. State, 3 Humph; 153, 594
Britton, U. S. v., 2 Mason, 306, 311, 608

SECTIONS.
Brixey, R. v., Ben. & Heard's Lead. Cases; 22
Broad v. Pitt, 3 C. & P; 774, 775
Brock v. Milligan, 1 Wilcox, 10 Ohio; 795
State, 26 Ala; 647, 648
22 Geo. 98; 447
Brockius, U. S., 3 Wash. C. C. R; 761
Brockway, People v., 2 Hill, N. Y; 8
Brogy v. Com., 10 Grattan; 1150
Brooks, R. v., 14 Eng. Law & Eq; 80
1 Den. C. C; 450
State v., 9 Ala; 472, 537
v. State, 2 Yerger; 7
State v., 3 Humph. 70; 588
Brotherton, R. v., 1 Str; 519
Brougher, State v., 3 Blackf; 294, 372
Broughton, State v., 7 Iredell; 508, 690
R. v., 2 Stra; 780
Trem. P. C; 414
Brown's Case, 3 Greenleaf; 5, 411
9 Leigh; 697
Brown v. Bellows, 4 Pick; 817
Brown, 5 Mass; 805
Com. v., 3 Rawle; 591
2 Gray; 595
11 Leigh; 783
v. People, 4 Gilm; 634
State, 32 Miss. (3 George), 433; 671
R. v., M. & M; 275
5 Car. & P; 982
State v., 1 Williams (Vt); 311
12 Conn; 541, 546
16 Conn; 554, 570
2 Speers; 297
8 Humph; 474, 622
2 Murphy; 266
1 Devereux; 358
7 Humph; 501
8 Eng. (13 Ark); 411
U. S. v., 3 M'Lean; 630
3 Cranch, C. C. R; 781
Browning v. State, 33 Miss. (4 George), 48; 696
Brownlow, State v., 7 Humph; 307
Brownson, State v., 2 Bailey; 7
Bruce, State v., 11 Shep; 814, 856
Brummer v. Long Wharf, 5 Pick; 214
Brunette, State v., 13 La Ann; 669
Bryan, R. v., 2 Strange; 9
v. State, 26 Alab; 529
Bryant, State v., 10 Yerger; 472
2 Car. Law Rep; 362
Buchanan, State v., Iredell; 522
Bucher v. Jarrett, 3 Bos. & Pul; 311, 608, 657

SECTIONS.
Buck, R. *v.*, 1 Str; 10
v. State, 2 Harr. & John; 419, 1153
State, 1 Ohio St. R; 418
Buckingham, Com. *v.*, Thacher's C. C; 606
Buckland *v.* Com., 8 Leigh; 306, 607
Buckley *v.* State, 2 Greene; 364
Buckman, State *v.*, 8 N. Hamp; 5, 413, 630
Buckminster *v.* Perry, 4 Mass; 48
Buckner *v.* Beck, Dudley, S. C; 549, 1252
Buckwater *v.* U. S., 11 S. & R; 191
Buffington, Resp. *v.*, 1 Dall; 519
Bufman's Case, 8 Greenleaf; 412
Bugbee, Com. *v.*, 4 Gray (Mass.), 206; 272
Bull *v.* Loveland, 10 Pick; 809
State *v.*, 6 Jones, Mo; 550
Bullock *v.* Babcock, 3 Wend; 62
Koon, 9 Cowen; 660
State *v.*, 13 Alab; 40, 44, 364
Burdett, R. *v.*, 1 Ld. Raym; 619
4 B. & Ald; 603, 708, 728, 1052
v. State, 9 Texas, 43; 541
Burgess, Com. *v.*, 2 Va. Cases; 497, 499, 727, 1099, 1113
Burk *v.* State, 2 Har. & J; 400
Burke, State *v.*, 38 Maine; 513, 519
39 Maine (4 Heath), 359; 513
Burkett, R. *v.*, Andr; 518
Burley, R. *v.*, 1 Phil. Ev; 691
Burlingham, State *v.*, 3 Shep; 767
Burnett, R. *v.*, 4 M. & Sel; 3
Burnham *v.* Hatfield, 5 Blackf; 511
Burns, Com. *v.*, 4 J. J. Marshall; 131
v. People, 1 Parker; 563
U. S. *v.*, 5 M'Lean, C. C; 631
Burr *v.* Com., 4 Grat; 647
U. S. *v.*, 4 Cranch; 125, 132, 135, 168
Burrough, State *v.*, 2 Halsted; 5
Burroughs, U. S., 3 M'Lean; 318, 626
Burrow's Case, 1 Lewin, C. C; 15, 39
v. Unwin, 3 Carr. & P; 310
Burskadden *v.* Poorman, 10 Watts; 666
Burt, R. *v.*, 5 Cox, C. C. 284; 637
State *v.*, 25 Vt. (2 Deane); 285, 385, 413, 624, 624, 1293
Burton, Com. *v.*, 4 Leigh; 467
R. *v.*, 24 Eng. Law & Eq; 745
Bush, People *v.*, 4 Hill, N. Y. R; 144, 293, 2293, 2695
R. *v.*, R. & R; 251

SECTIONS.
Bush, Resp. *v.*, 2 Texas; 364
Bushell *v.* Barrat, Ry. & M; 759
Butler *v.* Moore, M'Nally's Evid; 773
People *v.*, 3 Parker, C. R. (N. Y.), 377; 900
8 Cal. 435; 970
R. *v.*, 6 C. & P; 8
v. State, 22 Alab; 606, 635
3 M'Cord; 365
Butterwick, R. *v.*, 2 Mood. & R; 344
Butterworth, R. *v.*, 11 Cl. & F; 620
R. & R; 432, 434, 513
Button, R. *v.*, 11 Ad. & El. N. S; 563, 564
Butts *v.* Swartwood, 2 Cowen; 795
Bykerdyke, R. *v.*, 1 M. & Rob; 392, 619
Byrd *v.* State, 1 How. Miss; 474

C.

Cabrera Ex parte, 1 Wash. C. C. Rep; 209
Cadle, State *v.*, 19 Ark. 613; 410, 411
Cady *v.* Com., 10 Grattan; 265
Cæsar, State *v.*, 9 Iredell, Law R; 1049
Caffy's Case, 2 East's P. C; 781
Cain, R. *v.*, 1 Crawford & Dix, C. C. 37; 695
Calder *v.* Bull, 3 Dall; 184
Caldwell, Com. *v.*, 14 Mass; 411
Calhoun, State *v.*, 1 Dev. & Bat; 498
Call, Com. *v.*, 21 Pick; 7, 292, 598, 647, 696
Callaghan, R. *v.*, 1 M'Nally; 679
Calloway *v.* State, 1 Missouri; 1261
Calvin, State *v.*, 1 Charlton; 364, 601, 607, 783, 790
2 Zabr, N. J; 331, 348
Cameron *v.* State, 8 Eng. (13 Ark); 251, 384, 400, 624, 627
Camm, State *v.*, 1 Hawks; 458, 463, 489
Camoy's Peerage, 6 Cl. & Fin; 666
Camp *v.* State, 3 Kelly; 364, 1152
Campbell, People *v.*, 16 Ill. 67; 641, 1027
R. *v.*, 4 Bost. Law Rep; 958, 970, 996
v. R., 11 Ad. & El. N. S; 426
State, 23 Ala; 699, 714, 733, 752, 762, 847, 861, 862
11 Georgia; 660, 681
9 Yerger; 553
Twemlow, 1 Price; 771

SECTIONS.

Campbell, U. S. *v.*, 6 Hall's L. J; 186
Camplin, R. *v.*, 1 Car. & K; 1146
Cannel *v.* Curtis, 2 Bing; 653
Canney, State *v.*, N. H. 135; 629
Cantrill *v.* People, 3 Gilman; 285, 1293
Cantry, State *v.*, 2 Dev; 782
Capps *v.* State, 4 Iowa, 302; 402
Capron *v.* State, 20 Geo. 752; 3135
Card, State *v.*, 34 N. H. 510; 297, 364, 401
Carey, Com. *v.*, 2 Pick; 47
Carlile, R. *v.*, 3 B. & Ald; 10
Carlton *v.* Com., 5 Metc; 532
Carmichael, People *v.*, 5 Mich. 10; 564
Carnly, R. *v.*, 1 Mood; 350
Com. *v.*, 4 Grat; 410
Carpenter *v.* Crane, Blackf; 794
Nixon, 5 Hill; 760
People, 4 Scam; 617
8 Barb; 1191
State *v.*, 20 Vermont; 297
v. State, 23 Alab; 385
Carr, R. *v.*, 8 C. & P; 1011
v. State, 5 N. Hamp; 306
Carradice, R. *v.*, Rus. & R; 10
Carrico, U. S. *v.*, 5 Cranch, C. C. R; 779
Carrigan, State *v.*, 24 Conn. 286; 622
Carrol, R. *v.*, 7 C. & P; 43
Carroll, People *v.*, 3 Parker, C. R. (N. Y.) 73; 808
v. State, 23 Ala; 690, 1025, 1026
3 Humph; 636
Carson, R. *v.*, R. & R; 619
Carter, Com. *v.*, 2 Virg. C; 638
State *v.*, 3 Dutch, 498; 1052
Conf. Rep; 307, 406
2 Carter, (Ind;) 50, 412
12 Texas; 35, 41, 500
Cartwright *v.* Cartwright, 1 Phillimore; 56
Casborus, People *v.*, 13 Johnson R; 551
Case, R. *v.*, 1 Eng. Law & Eq; 1143, 1145, 1249, 1262
1 Den. C. C; 1156
Casey, Com. *v.*, 11 Cush (Mass.), 417; 682
State *v.*, 1 Busbee; 546
Cash *v.* State, 10 Humph; 416
Casial, State *v.*, 2 Harr. & Gill; 332
Cass, R. *v.*, 5 C. & P; 686
Cassady, State *v.*, 1 Richard; 623
Cassel, State *v.*, 2 Har. & Gill; 412

SECTIONS.

Cassety, State *v.*, 1 Richardson; 567
Castel Careinon, R. *v.*, 8 East; 763
Cates *v.* Hardacre, 3 Taunt; 805
Cawood, Com. *v.*, 2 Virg. cases; 500
State *v.*, 2 Stewart; 3
Cent. Military Tract R. R. Co. *v.* Rockafellow, 17 Ill. 541; 795, 798
Chabbock, Com. *v.*, 1 Mass; 685
Chaffin, State *v.*, 2 Swan; 565
Chirac *v.* Reinicker, 11 Wheaton; 773
Chamberlain *v.* Wilson, 12 Ver; 805
Chambers *v.* People, 4 Scam; 364
State, 26 Alab; 697
Champneys, R. *v.*, 2 Mood. & R; 557, 565
Chancellor, State *v.*, 1 Strob; 766
Chandler, Com. *v.*, 11 Mass; 195
Chandler, State *v.*, 24 Miss (3 Jones) 371; 292
State *v.*, 3 Hawks; 762
2 Harrington; 6
2 Hawkes; 418
v. State, 2 Texas Rep; 1046
Chanit *v.* Parker, 1 Rep. Con. Ct; 131
Chantz, State *v.*, 2 Devereux; 772
Chapman *v.* Chapman, 2 Conn; 666
Com. *v.*, 11 Cush (Mass.) 422; 524, 1069, 1074
7 Bost. Law Rep. N. S. 1069, 1269
23 Metc; 3
Phil. Pamp; 69
v. Com., 5 Wharton; 375, 411
State, 18 Geo. 736; 597
Chapple, R. *v.*, R. & R; 377
v. State, 8 Yerger; 501
Chard, R. *v.*, R. & R; 377
Charles, U. S. *v.*, 2 Cranch, C. C; 508
Chase *v.* Blodgett, 10 N. H; 762
Lincoln, 3 Mass; 48
State *v.*, 1 Walker; 1260
Chauncey, Com. *v.*, 2 Ashmead; 408, 965
Checkets, R. *v.*, 6 M. & S; 245
Cheek, State *v.*, 13 Ired; 131
Cheers, R. *v.*, 7 D. & R; 285
Cheeseman, R. *v.*, 7 C. & P; 710, 1014
Cheney, Com. *v.*, 6 Mass; 214
Cherry, Com. *v.*, 2 Virg. Case; 245, 472
State *v.*, 2 Murphy; 272
3 Murphy; 272, 1071
v. State, 6 Florida, 679; 498
Chestnut Hill Turnpike *v.* Ruttee, 4 S. & R; 87
Chess *v.* Chess, 17 S. & R; 667
Chick *v.* State, 7 Humph; 1174
Chittem, State *v.*, 2 Devereux; 149

TABLE OF CASES.

SECTIONS.

Choisier, People *v.*, 10 Cal. 310; 1114
Chovin, State *v.*, 7 Iowa (Clarke), 204; 1255
Christie, People *v.*, Parker, C. R. (N. Y.), 579; 816
Church, Com. *v.*, 1 Barr; 11, 373
Churchill, Com. *v.*, 2 Metc; 294
11 Metc; 814
Churchill Ld. *v.* Hart, 3 Sumner; 623
State *v.*, 25 Maine; 614
City *v.* King, 4 McCord; 240
Clancy's Case, Fortesc. R; 759
Clarisa, State *v.*, 11 Ala; 471, 472, 473, 701
Clark's Case, 6 Grat; 292, 327
Clark, Com. *v.*, 2 Metcalf; 707, 1256
2 Ashmead; 1234
2 Browne; 469
Clark's Lessee *v.* Hall, 2 Har. & McH; 762
Clark, People *v.*, 3 Selden; 944, 947, 1113
R. *v.*, 29 Eng. Law & Eq; 1144
R. & R; 251, 362
State *v.*, 3 Foster (N. H.); 626
2 Bailey; 685
v. State, 1 Carter (Ind); 232
23 Missis; 513, 524
12 Ohio; 45, 46, 48
8 Humph; 1084, 1085
12 Geo; 147, 385, 1280
U. S. *v.*, 2 Cranch, C. C. R; 16
Clarke's Case, 6 Grat; 8
Clarke, R. *v.*, 1 Bulst; 270
2 Stark; 636, 665, 814, 1250, 1151
1 East; 432
v. State, 23 Missis; 544
U. S. *v.*, 2 Cranch, C. C. R; 35, 36, 40
Clarey *v.* Clarey, 2 Iredell; 48
Claud, R. *v.*, 1 Bred. & B; 551
Clay, R. *v.*, Cox, C. C; 1151
Clayton *v.* Anthony, 6 Randolph; 702
R. *v.*, 1 C. & K; 131
Claxton *v.* State, 2 Humph; 1025
Clearly *v.* Desselin, 1 McCord; 213
Cleaver, Resp. *v.*, 4 Yeates; 519
Clementine *v.* State, 14 Miss; 668
Clendon, R. *v.*, 2 Ld. Ray; 415
Clerk, R. *v.*, Salk; 399
Clews, R. *v.*, 4 C. & P; 697, 746
Click, State *v.*, 2 Ala; 364
3 Texas; 519, 1211
Clifford, R. *v.*, 2 Car. & Kir; 112
Close *v.* Olney, 1 Denio; 808
Clow *v.* Wright, Brayt; 83
Clue, Com. *v.*, 3 Rawle; 574, 575, 587, 591

SECTIONS.

Clumnes *v.* Pezzy, 1 Camp; 717
Cobb, State *v.*, 1 Dev. & Bat; 365
Cobia *v.* State, 16 Ala; 544
Cochrane *v.* State, 6 Md. 400; 551
Cocker, State *v.*, 3 Harring. R; 635
Cockin, R. *v.*, 2 Lewin, C. C; 728
Cocks *v.* Purday, 2 C. & K; 49, 50
Coe, State *v.*, 6 Iredell; 498
Coffin *v.* Anderson, 4 Blackf; 821
Jones, 13 Pick; 771
Coffee, State *v.*, 3 Yerger; 710, 944, 948
N. C. Term R. N. 306, 351
Cogan, R. *v.*, 2 Leach; 556
1 Leach; 572
Cohens *v.* State of Virginia, 6 Wheat; 184, 204, 205, 207, 209
Cohe *v.* Com. 28 Pa. St. R. 297; 766
Cole *v.* Com., 5 Gratten; 639, 647
Coles's Lessee *v.* Cole, 1 Har. & Johns; 762
Coleman *v.* Moody, 4 H. & M; 147
State *v.*, 5 Porter; 124, 419, 1153
Collier *v.* Simpson, 5 C. & P; 49, 50
Collins, Com. *v.*, 3 S. & R; 298
State *v.*, 3 Devereux; 498
Collyer U. S. *v.*, Whar. on Hom. App; 433
Colson *v.* State, 7 Blackf; 378
Colt, People, *v.*, 3 Hill; 1061
Coltou *v.* State, 31 Miss. (2 George), 504; 641, 710
4 Texas, 260; 1258
Colver *v.* Haslam, 7 Barbour; 48
Colvin, State, *v.*, 11 Humph; 544, 546
Combe *v.* Pitt, 3 Burr; 270
Commissioners, R. *v.*, 2 M. & S; 86
Compton, R. *v.*, 7 C. P; 376
Conley, State *v.*, 39 Maine (4 Heath), 78; 219, 223, 279, 433, 1069, 1071, 1073
Connell, R. *v.*, 1 C. & K; 611
U. S., 2 Mason; 710
Connelly, Com. *v.*, 1 Br. App; 768
Conner, R. *v.*, 7 C. & P; 1014
v. State, 4 Yerger; 710, 973
14 Mis; 393
v. Brady, Anthon; 809
Conolly's Case, 3 Lewin; 74
Conover *v.* Bell, 6 Monroe; 809
Connaughty *v.* State, 1 Wisc. 169; 116
Conrad, State *v.*, 21 Mis. (6 Bennet), 271; 519
Cook, Com. *v.*, 6 Serg. & R; 574, 575, 587
12 Metc; 1179
1 Overton, 809

SECTIONS.
Cook v. Maxwell, 2 Stark; 776
People v., 14 Barb; 228, 249
2 Parker, C. R. 21; 411
v. State, 11 Georg; 261, 262, 266, 364
4 Zabr. (N. J.) 843; 421, 1153
Cooke, R. v., 8. C. & P; 344, 505, 509, 712
2 East, P. C; 377, 611
Cooley, Com. v., 10 Pick; 6, 411
6 Gray, 350; 1291
Coolidge, U. S. v., 1 Wheat; 164
1 Gall; 168
2 Gall; 489, 580, 588
Coombe v. Pitt, 3 Burr; 626
Coombs, State v., 32 Maine; 562, 565
Coon, People v., 15 Wend;
Cooper's Case, 1 Whar. St. Tr; 776
Cooper, Com. v., 15 Mass; 388, 1126
R. v., 5 C. & P; 134
State v., 1 Green, N. J. Rep; 541, 560, 565, 712, 965, 1221
Copeland, State v., 2 Swan; 530, 538
Copp, State v., 15 N. Hamp; 293, 629
v. Upham, 3 N. Ham., R; 809
Coppenburg, State v., 2 Strob; 662
Corbett v. State, 31 Ala. 329; 699
Cord v. Com., 14 B. Monroe, 386; 435
State v., N. H. 510; 375
Cornelius v. Com., 15 B. Monroe, 539; 702
Cornell v. Greene, 10 S. & R; 667
U. S. v., 2 Mason; 40, 209, 887, 944, 948, 1113
Corning, People v., 2 Comstock; 529
Cornwall, R. v., R. &. R; 1235
v. State, Mar. & Yer; 35, 40, 44, 226
Corporation of Albany, People v., 11 Wen; 10, 86
Corse v. Patterson, 6 Har. & Johns; 767
Cort v. Stackweather, 8 Conn; 249
Cory v. State, 3 Port; 415
Costello, People v., 1 Denio; 414, 422, 778, 783
Cotton v. State, 31 Miss. (2 George) 50; 1026
4 Texas, 260; 595
State v., 4 Foster (N. H); 272, 279, 281, 531, 602
Cottrel, People v., 18 Johnson; 712
Cottril v. Mason, 3 Fairf; 23, 47
Coulson, R. v., 1 Eng. R; 309
Coulter v. Com., 5 Metc; 414
State v., 1 Haywood; 778
Council, State v., 1 Overt, 1 Tenn; 5, 712
Court, R. v., 7 C. & P; 692, 787

SECTIONS.
Courvoisier, R. v., Wills on Cir. Ev; 728
Covington, State v., 4 Ala; 431
Cowan, State v., 7 Iredell; 683
Cowell, State v., 4 Iredell; 383
Cowen, State v., 7 Iredell; 690
Cox v. Coleridge, 1 B. & C; 1260
R. v., 1 Car. & Kir; 360
R. & R; 635
State v., N. C. Term. R; 7
Coxhead, R. v., 1 Car. & K; 1234, 1236
Coxon v. Lyon, 2 Campb; 599
Coy, State v., 2 Aiken; 385, 617
Cozens, State v., 6 Iredell; 622
Craddock, R. v., 1 Eng. R; 420, 421
Craft, State v., 1 Walker; 379
Craig on Dem. of Annesley v. Earl of Anglesea, 17 St. Tr; 717
U. S. v., 4 W. C. C. R; 631
Crain v. State, 2 Yerger; 411
Cranage, R. v., Salk; 602
Cranbourn's Case, 4 St. Tr; 398
Cranch, R. v., 1 Cox, C. C; 50
Crane Ex Parte, 5 Peters; 207
R. v., 8 C. & P; 69
Crane, State v., 4 Wis. 400; 406
U. S. v., 4 M'Lean; 92, 136
Crank, State v., 2 Bail; 149, 695, 1043
Crans, Com. v., 3 Penn. Law Jour; 458, 507, 496
R. v., 8 C. & P; 251
Crary v. Sprague, 12 Wend; 667
Crause, Com. v., 3 Amer. Law Jour; 1020, 1084
Craven's Case, 2 East, P. C; 346
Craven, R. v., Lewin, C. C; 673
R. & R; 346
Crawford, State v., 13 La. Ann. 243; 349
v. State, 2 Ired; 412
Crease v. Barrett, 1 Cromp. Mees. & Ros; 666
Creighton, State v., 1 N. & M'Cord; 498, 499
Crenshaw, State v., 22 Mis. (1 Jones) 457; 377
Crespin, R. v., 11 Adolphus & Ellis, N. S; 622
Crisp v. State, 21 Ala; 866
Walpole, 2 Hagg; 368
Crittenden, U. S. v., 1 Hemp. 61; 410, 518
Crocker, R. v., 2 New Rep; 601
State v., 3 Harring; 383
v. State, Meigs; 508
Crockett, R. v., 4 C. & P; 671
Crofts, R. v., 2 Strange; 67
Crone, R. v., Jebb; 348

SECTIONS.
Crookes, R. v., 3 Burr; 519
Crosby v. Berger, 11 Paige; 773
Cross, R. v., Ld. Raymond; 3, 400
3 Salk; 10
State v., 6 Jones. Miss. 332; 41
U. S. v., 4 Cranch, C. C; 6
Crossfield's Case, 8 St. Tr; 495
Crosswell, People v., 3 Johns. C; 294
Crouch, People v., 2 Whe. C. C; 1150
Crow, State v., 1 Iredell; 1241, 1250
10 Wes. L. J; 1276
Crowell, State v., 25 Maine; 614, 708
Crowley v. Com., 11 Metc; 417
Page, 7 C. & P; 819
State v., 13 Ala; 649
Crowninshield, Com. v., 10 Pick; 703
Crowther v. Hopwood, 3 Stark. Rep; 759
Cruise, R. v., 8 C. & P; 71, 120
Cruiser, State v., 3 Harrison, 413, 630
Cruse, R. v., 8 C. & P; 41, 42
2 M. C. C; 75
Cubbeson v. M'Creary, 2 W. & S; 795
Culkin, R. v., 5 C. & P; 732, 1059
Cullen, R. v., 1 Moody; 350
Cundell v. Pratt, 1 M. & Malk; 812
Cunningham, Com. v., 13 Mass; 541, 565, 1269
People v., 1 Denio; 524
Curd v. Com., 14 B. Mon. 386; 435
Curlin v. State, 4 Yerger; 131
Curran, R. v., 1 Mood. C. C; 981, 1035
3 C. & P; 1037
State v., 18 Mis. (3 Bennett); 597
Curran's Case, 7 Gratt; 433
Curry, R. v., 2 Moody; 344
Curtis, Com. v., Thacher's C. C; 565
11 Pick; 571
v. Knox, 2 Denio; 805
People, 1 Breese; 400, 1287
State v., 5 Humph; 589
v. Strong, 5 Day; 797
Cushing, Com. v., 11 Mass; 195
People v., 1 Johns; 620, 632, 635
Cushman v., Loker, 2 Mass; 763
Cutts v. Pickering, Vent; 773

D.

Dabney's Case, Robinson; 783, 792
Dacy v. State, 17 Geo. 439; 571
Daily v. State, 10 Ind. 536; 363
Dale, R. v., Moody, C. C; 123
v. State, 10 Yerger; 1084, 1085, 1114
Daley, Com. v., Whar. on Hom; 1084
4 Penn. Law Jour; 127, 930, 938, 989, 999, 1019, 1024, 1025, 1114
Com. v., 4 Gray (Mass), 209; 569
R. v. (1 Mood. C. C.), 4 C. & P; 250
Dalloway, R. v., 2 Cox C. C; 1006
Dalton, State v., 2 Murphy; 287
6 Missouri (Jones), 12; 636
Dame, Com. v., 8 Cush; 761
State v., 11 N. Hamp; 610, 1263
Damewood v. State, 1 How. Miss. R; 337, 345
Damor, State v., 2 Tyler; 565
Dana, Com. v., 2 Metc; 707, 709
v. State, 2 Ohio, St. R; 307
Danforth, State v., 3 Conn; 1171, 1275
Daniel, U. S. v., 6 Wheat; 202
Dann, R. v., 1 Moody, C. C; 424, 562
Dark, State v., 8 Blackf; 554
Dassett, R. v., 2 C. & K; 649
Daubney v. Cooper, 10 B. & C; 1260
Davidson, State v., 12 Ver; 497
30 Vt. 100; 745
Davies v. State, 2 Humphrey; 948
Davis and Carter's case, 2 Salk; 764
Com. v., 11 Pick; 289
v. Mason, 4 Pick; 47
People v., 21 Wend; 783
Wheeler, C. C; 65
v. People, 1 Harris, C. C; 728, 729
R. v., R. & R; 119, 126
Say; 10
Gow, C. N. P; 530
12 Mod; 546
4 Mod; 690, 759, 760
2 Leach; 375
2 Den. C. C; 25, 597
1 Tyler's R; 270
State v., 1 Iredell; 406, 1241, 1242, 1243
2 Iredell; 465
3 Brevard; 769
1 Hill, S. C. R; 1247
4 Blackf; 546
v. State, 2 Humph; 1084, 1114
10 Georgia; 636, 710
20 Geo. 674; 531
15 Ohio; 71
v. Wood, 1 Wheat; 662
Dawber, R. v., 3 Stark; 784, 785
Dawley v. State, 4 Indiana; 763, 783
Dawson, R. v., 2 Camp; 392, 620
1 Eng. Law & Eq; 349, 350

SECTIONS.

Dayton, State *v.*, 3 Zab; 225, 228, 408, 412, 519
Dead, R. *v.*, 1 Den. C. C; 1156, 1262
Dean *v.* Com., 4 Grat; 651
People *v.*, 6 Cowen; 781
v. State, Martin & Yerger; 223
Deathridge *v.* State, 1 Sneed; 685, 686, 692, 694, 695
Dedham, Com. *v.*, 16 Mass; 536
Deeley, R. *v.*, 1 Mood. C. C. R; 251
Deer *v.* State, 14 Missouri; 761
De la Font, State *v.*, 2 Nott & McCord; 209
Delaval, R. *v.*, 3 Burroughs; 6
Demain, Com. *v.*, Brightly; 6 Penn. Law Jour; 236, 245, 414, 1220
Demarest *v.* Haring, 6 Cowen; 8
Demuth, Com. *v.*, 12 Serg. & Raw; 233
Denkey, Com. *v.*, 5 Harris; 560
Dent, R. *v.*, 1 C. & K; 249
State *v.*, 3 Gill & Johns; 292, 1281
Denton *v.* State, 1 Swan (Tenn.); 680
Derrington, R. *v.*, 2 C. & P; 691
Deshon *v.* Merchant's Ins. Co., 11 Met; 820
Devereaux *v.* Marr, 12 Wheat; 202
Devlin, R. *v.*, 2 Crawford & Dix, C. C; 152; 690
Dew *v.* Clark, 3 Adams; 22
De Whitt *v.* Barley, 13 Barbour; 48
Dewhurst, R. *v.*, 2 Stark, Ev; 728
Dewitt *v.* Greenfield, 5 Ohio; 638
De Wolf, State *v.*, 8 Conn; 754, 755
Dexter *v.* Spear, 4 Mason; 944
Dias *v.* State, 7 Blackf; 1069, 1073
Dibley, R. *v.*, 2 C. & K; 728
Dick *v.* State, 3 Ohio St. Rep; 531, 938, 1115
30 Miss. (1 Geo.), 631; 629
Dickens, State *v.*, 1 Haywood; 265
Dickey, U. S. *v.*, 1 Morris; 364
Dickinson, R. *v.*, R. & R. Crown Cases; 489
1 Saund; 11
U. S. *v.*, 2 McLean's C. C. R; 423, 763, 809, 817, 1140
Dicks, R. *v.*, 1 Russ; 75
Dill *v.* State, 25 Alabama; 1038
Dillane, Com. *v.*, 1 Gray; 261, 599
Dillon, Com. *v.*, 4 Dallas; 694
v. State, 9 Ind. 408; 1069
Dilworth, R. *v.*, 2 Moo. & Rob; 1249
Dingler, R. *v.*, 2 Leach; 671
Dingley, R. *v.*, 1 Car. & Kir; 688, 692
Dinkey, Com. *v.*, 5 Harris; 383
Divoll *v.* Ledbetter, 4 Pick; 771
Dixon *v.* Parmelee, 2 Vt. 185; 774

SECTIONS.

Dixon, R. *v.*, 10 Mod; 69, 90, 78
3 M. & Sel; 712
Dobbin, Com. *v.*, 2 Pars; 391, 416, 472
Dockham, Com. *v.*, Thatch C. C; 534
Dodd *v.* Norris, 3 Camp; 805
R. *v.*, 2 Sessions Cases; 153
Dodge *v.* State, 4 Zabr. (N. J.), 455; 804
Doe *v.* Brawn, 5 B. & A; 553
Bray, 8 B. & C; 666
Clark, 2 H. Bl; 1022
Davies, 11 Jur; 666
Griffin, 15 East; 666
Randall, 2 M. & P; 666
Regan, 5 Blackf; 819
Doebler, U. S. *v.*, 1 Bald; 631
Doherty, Com. *v.*, 10 Cush. (Mass.), 52; 272, 292
State *v.*, 2 Overton; 65
Doker *v.* Hasler, R. & N; 771
Dole, State *v.*, 2 Blackf; 372
Donnel *v.* U. S., 1 Morris; 597
Donnelly, R. *v.*, R. & R; 139
v. State, 2 Dutch (N. J.), 463, 601; 418, 425, 681, 682, 669, 707, 1113
Doom, State *v.* Charlton; 509
Doran, R. *v.*, 1 Esp; 660
Doran's Case, 2 Parsons; 808
2 Porter; 805
Doss *v.* Com., 1 Gratt; 529
Dossett, R. *v.*, 2 Cox, C. C; 635
2 C. & K; 647, 857
Dotan, People *v.*, 9 Cal. 576; 1114
Dougherty, Com. *v.*, in 1 Brown, Appen; 1103
7 Smith's Laws; 966, 968, 990, 1100, 1107, 1114
R. *v.*, 1 Camp; 377
Douglass *v.* Com., 8 Watts; 1234
R. *v.*, 7 Moody's, C. C; 1237
v. Sanderson, 2 Dall; 666
State, 3 Wis. 820; 530
Towsey, 2 Wend; 636
Dove, Com. *v.*, 2 Virg. C; 484
Dover *v.* Maestaer, 5 Esp; 765
State *v.*, 10 N. H; 90
Dovey, R. *v.*, 2 Dennison, C. C. 86; 4 Cox, C. C. 428; 2 Eng. Law & Eq. Rep. 532; 2 Benn. & Heard, Lead. Cases, 138; 434, 620
Dowd, State *v.*, 19 Conn; 1114
Dowdy *v.* Com., 9 Gratt; 418, 422, 423
Dowell, State *v.*, 3 Harr. & John, Md; 355
Dowling *v.* State, 5 S. & M; 465, 640
Downer *v.* Danna, 19 Verm; 819

SECTIONS.
Downing, Com. v., 4 Gray (Mass.), 29; 789
R. v., 1 Den. C. C; 428
Doyle v. State, 17 Ohio; 472
Dozier v. Joyce, 8 Porter; 817, 818
Drake, Com. v., 15 Mass; 685, 775
Com. v., 16 Mass. 161; 688, 775
R. v., Salk; 309
Drury, R. v., Cox, C. C. 544; 551
Dranquet v. Prudhomme, 3 Louisiana, R; 744
Dredge, R. v., 24 Eng. Law & Eq; 745
Drenneu v. Lindsay, 15 Ark. 358; 819
Drew, Com. v., 4 Mass; 975, 981, 710, 944, 1025, 1033
3 Cush; 521, 538, 544, 547
R. v., 8 C. & P; 686, 692
U. S. v., 5 Mason, U. S. Rep; 35
Drinkley, State v., 3 Iredell; 1054
Drum, Com. v., 19 Pick; 388, 621
Drummond's Case, 1 Leach; 679
Drummond v. Resp, 2 Texas; 364
Du Barree v. Livette, Peake's Cas; 775
Duckham v. People, 4 Scam; 556, 565
Dudley v. Bolles, 24 Wend; 820
Com. v., 5 Leigh's, Va. R; 142
Dudley, State v., 7 Wis. 664; 771
Due, State v., 7 Foster; 695
Duffy, R. v., 4 Cox, C. C; 527, 537
Duncan v. Com., 6 Dana; 565, 569, 572
4 Serg. & R; 284
State v., 7 Yerger; 271
State v., 6 Iredell; 135, 136, 149, 472, 642, 662
9 Port; 364
7 Iredell; 403, 469
& Trott, State v. 7 Yerger; 472
Dunham, Com. v., 1 Bost. Law R; 547
Dunn, R. v., 2 Leach; 348
4 C. & P; 680
State v., 1 Rice's D; 1290
18 (Mo., 3 Bennet); 1113
v. State, 2 Pike; 541, 638, 647, 649, 669, 671
Dunnanent, State v., 3 Brev; 377, 611
Dupuy, Com. v., 6 P. L. J; BrightlyR; 6
Durham, Com. v., 1 Bost. L. R; 551
Durst, State v., 7 Texas; 410
Dusenberry v. State, 3 Stew. & Port; 641
Dustoe, State v., 1 Bay; 406
Dutton v. State, 5 Ind; 521, 547
Duter v. Troy R. R. Co., 2 Hill; 87
Dye v. Com., 7 Gratt; 591
Dyer, R. v., 3 East., P. C; 1095
6 Mod; 519
Dyke, R. v., 8 C. & P; 785

SECTIONS.
Dyson, R. v., Russ. & Ry., C. C. R; 122, 963

E.

Eagan, State, v., 10 La. R; 265, 431
Earhart's Case, 9 Leigh; 699
Earle, Com. v., 1 Wharton; 1066, 1115, 1121
State v., 3 Harrington; 423
Earned v. Com., 12 Metc; 617
East v. Chapman, 1 M. & Malk; 808
Eastern Counties R. Co. v. Broom, 2 Eng. R; 87
Eastland, Com. v., 1 Mass; 768
Eastman, Com. v., 1 Cush; 519
2 Gray; 348, 361, 619
v. Com., 4 Gray (Mass.), 416; 346
People v., 4 Kernan (14 N. Y.), 562; 41
Eastwood v. People, 3 Parker C. R. (N. Y.), 25; 41
Eccles, R. v., 1 Leach; 298
Eckert, Com. v., 2 Browne; 5
Eckford, People v., 7 Cowen; 519, 520
Eddy, Com. v., 7 Gray (N. S.); 809, 711
9 Law Rep. (N. S.), 611; 55
Edge v. Com., 7 Barr; 85, 390, 414, 1292
Edgell v. Bennet, 7 Ver; 771
Edmonds v. Rowe, Ry. & M. C. N. P; 799
Edmunds, R. v., 6 C. & P. 164; 696
Edsall, R. v., 2 East, P. C; 342
Edson, State v., 10 La. R; 358
Edwards, Com. v., 1 Ashmead; 5
4 Gray (1 Mass.) 1; 223, 282, 520
R. v., 4 T. R; 809
R. & Ry; 589
R. & R; 359, 610
3 Camp; 589
3 C. & P; 661
6 C. & P; 1060
8 C. & P; 1011
State v., 2 Nott & M'C; 805
19 Mo; 407, 790
Elden, State v., 41 Maine, 165; 540
Eldershaw, R. v., 3 C. & P; 61, 1134
Elijah, State v., 1 Humph; 591, 772, 782
Elkin v. Janson, 13 Mees. & W; 614
Elkins, State v., 1 Meigs R; 497
v. State, 13 Georgia; 379

SECTIONS.
Ellicombe, R. *v.*, 1 M. & R; 657
Ellicott *v.* Pearl, 1 M'Lean; 820
Elliott, Com. *v.*, 4 Boston Law Rep; 60
v. Piersol, 1 Peters; 666
State *v.*, 7 Blackf; 403
14 Texas, 423; 622
26 Alab; 430
11 N. Hamp; 1255
v. State, 26 Ala. 78; 430
Ellis, R. *v.*, 2 Car. & Kir; 1063
R. & M., N. P; 690
2 Stra; 780
State *v.*, 4 Miss; 294, 368
Ellow, State *v.*, 1 Devereux; 6
Else, R. *v.*, Russ. & R. C. C; 119, 126
Elwell, Com. *v.*, 2 Metc; 297, 429
Ely *v.* Peck, 7 Conn; 189
Embden, R. *v.*, 9 East; 565
Emden, R. *v.*, 9 East; 551
Emmons *v.* Stahlnecker, 1 Jones Pa. R; 707
Engleman *v.* State, 2 Carter (Ind); 265, 414, 423, 728
English, State, *v.*, 2 Missouri R; 520
v. State, 4 Texas, 125; 219, 232
Enoch, People *v.*, 13 Wend; 411, 998
15 Wend; 371
R. *v.*, 5 Car. & Payne; 941
Entrehman, R. *v.*, 1 C. & Man; 799
Epes' Case, 5 Grattan; 590
Ephraim *v.* Murdock, 7 Blackf; 667
State *v.*, 2 Dev. & Bat; 577
Epps *v.* State, 19 Geo. 102; 644
Errington, R. *v.*, 2 Levin, C. C; 1012
Erswell, R. *v.*, 3 T. R; 662
Erwin, State *v.*, 1 Hay; 690
Eskridge, State *v.*, 1 Swan (Tenn.); 263
Esmon *v.* State, 1 Swan, Tenn; 550
Esop, R. *v.*, 7 C. & P; 82
Evans *v.* Birch, 3 Camp; 615
Com. *v.*, 13 Serg. & R; 11, 373, 528
3 Met; 214, 528
Evans, 8 Hagg. C. R; 745
Hittich, 7 Wheat; 752
R. *v.*, 5 C. & P; 564
3 Stark; 616
2 Cox, C. C; 728
v. Smith, 3 Monr; 814
State *v.*, 8 Hump; 474
7 Gill & Johnson; 411
1 Hayw; 1172
v. State, 8 Ohio State R. (N.Y.), 196; 349
Everett, R. *v.*, 8 B. & C; 285
Everson *v.* Carpenter, 17 Wend; 819
Eyre, Com. *v.*, 1 Serg. & Raw; 1241

F.

SECTIONS.
Fachina *v.* Sabine, Stra; 795
Faderman, R. *v.*, 4 Cox, C. C. R; 527
Fagent, R. *v.*, 7 C. & P. 238; 671, 682
Fairfax *v.* Hunter, 7 Cranch; 205
Fairlee *v.* People, 11 Ill; 1015
Falmouth *v.* Moss, 11 Price; 773
Fannin *v.* State, 14 Miss; 638, 714
Farkin, Com. *v.*, 3 Penn. L. J; 15, 16
Farler, R. *v.*, 8 C. & P; 785
Farley, Com. *v.*, Thacher's C. C; 778
Farrand, State *v.*, 3 Halsted; 306
Farrell *v.* State, 31 Ala. 557; 708
Farrer *v.* State, 2 Ohio St. R. (N. S.); 647
Farmer, State *v.*, 4 Iredell; 1154
Farrier, State *v.*, 1 Hawks; 8, 605
Farring, U. S. *v.*, 4 Cranch, C. C. R; 513
Farrington, R. *v.*, R. & R; 631, 712
Farrow, R. *v.*, 40 Eng. Law & Eq; 1230
Fassitt, State *v.*, 16 Conn; 488, 496, 508, 509
Fayetteville, State *v.*, 2 Murphey; 565, 567
Fearnly, R. *v.*, 1 Leach; 221
Fearshire, R. *v.*, 1 Leach; 667
Fells, Com. *v.*, 6 Leigh; 576, 589
Fellows, State *v.*, 2 Hayw. R; 489, 493, 782
Fenner, R. *v.*, 1 Siderfin, R. (2 Keble); 67
Fenwick *v.* Bell, 1 C. & K; 47
Ferguson, R. *v.*, 29 Eng. Law & Eq; 415
State *v.*, 2 Hill's S. C. R; 679, 949, 952, 971, 983, 1037, 1040
3 Hill's S. C. Rep; 983
Fiddler *v.* State, 7 Hump; 565, 567
Field, R. *v.*, Berks Spring Assizes; 785
State *v.*, 14 Maine; 641
Fielding, R. *v.*, 2 Burr; 516
State *v.*, 32 Maine (2 Red); 387
Fields, Com. *v.*, 4 Leigh; 1144
State *v.*, Peck's R; 219, 683
Fife *v.* Com., 29 Penn. State R. 429; 434, 686, 698, 708
State *v.*, 1 Bailey; 565
Finch, People *v.*, 5 Johns; 345
v. State, 6 Blackf; 265
Finn *v.* Com., 5 Rand; 667
Finnegam, People *v.*, 1 Parker, C. C; 820

SECTIONS.
Firey, R. v., 1 Car. & K; 631
Fischblatt, Com. v., 4 Met; 591
Fish, State v., 4 Iredell; 283
Fisher, Com. v., 7 Gray, 492; 224
R. v., 8 C. & P; 984
U. S. v., 2 Cranch; 162
R. v., 1 Leach, C. C; 310, 311, 697
State v., 6 Jones (N. C.) Law, 498; 694
Fitch v. Smallbrook, T. Raymond; 763
Fitzgerald, R. v., C. & K; 588
v. State, 4 Wis. 395; 226
Flavel's case, 8 W. & S; 766
Flannagan, Com. v., 8 Watts & Ser; 1115
State v., 6 Med; 384, 1119
Fleming, State v., 7 Humph; 513
2 Strobh; 1044, 1046, 1050
Fletcher v. State, 7 Eng; 531
State v., 18 Mis. (3 Bennett); 390
5 N. Ham; 10
Fley & Rochelle, State v., 2 Bravard; 129, 130, 543, 598, 630, 1074
Flint, R. v., Hardw; 294
Floyd, State v., 15 Miss; 728
Foley v. State, 9 Ind. 363; 385
Folkes v. Chadd; 4 Dougl; 47
Forbes, R. v., 7 C. & P; 633
U. S. v., Crabbe; 35, 40
Ford, Com. v., 5 Gray (Mass), 475; 1258, 1268
v. Ford, 7 Humph; 815
R. v., R. & R; 1036
2 Salk; 759, 765
v. State, 12 Md. 514; 1121
Forde v. Skinner, 1 Moode. C. C; 1247
Forsyth, R. v., R. & R; 362
Forsythe v. State, 6 Ohio; 631
Fort v. State; 3 Haywood; 474
Foster's Case, 11 Rep; 77
1 Lewin, C. C. 46; 697
Foster v. Com., 8 Watts & Serg; 528, 572
Hall, 12 Pick; 773
Pierce, 11 Cush. (Mass.) 437; 808
State v., 3 M'Cord; 347, 364, 781, 806
9 Texas; 520
R. v., 29 Eng. Law. & Eq; 632, 633, 640
R. & R; 258, 597
Foulke, U. S. v., 6 M'Lean, C. C. R; 707

SECTIONS.
Fox, State v., 15 Ver; 367
Com. v., 7 Gray, 585; 1062
7 Gray; 263, 1062
State v., 1 Dutch (N. J.) 566; 1059
Foxby, R. v., 6 Mod; 67
Foxworthy, R. v., 7 Mod; 766
Foye, U. S. v., 1 Curtis, C. C; 629
France, State v., 1 Overton (Tenn;) 258, 597
Frances, R. v., 4 Cox, C. C; 46
v. State, 6 Florida, 306; 244
Francisco, v. State, 1 Carter; 412
Frank v. State, 27 Ala; 703, 989
Franklin v. State, 29 Ala. 14; 641
R. v., 2 Ld. Raym; 245
Bank v. Nav. Co., 11 Gill. & J; 819
People v., 3 Johnson's C; 306
Freels, State v., 3 Humph; 418
Freely, Com. v., Virg. Cases, Vol. 1; 187
Freeman v. Jacob, 4 Campb; 271, 599
People, 4 Denio; 15, 16, 54
State v., 4 Jones, Law (N. C.) 5; 635
21 Miss. (6 Bennet), 481; 282
6 Blackf; 472
13 N. H; 497, 498
1 Speers; 674, 689, 1068
U. S. v., 4 Mason's C. C. R; 962, 1014
French, Com. v., Thacher's C. C; 60
U. S. v., 1 Gal; 209
Frere v. Peacocke, 1 Robertson; 22
Friar v. State, 3 How. Mis; 502
Friend's Case, 4 St. Tr; 809
Frost, State v., 1 Brev; 549
Frout, State v., 8 Ohio St. R. (N. S.) 98; 686
Fry, R. v., R. & R; 363
Fuller, Com. v., 8 Metc; 192
People v., 2 Parker, C. R. 16; 1010
R. v., R. & R; 631, 712
1 B. & P; 376, 392
State v., 1 M'Cord; 766
33 N. H. 259; 378
Fulton v. M'Afee, 16 Peters; 205
Furlong, U. S. v., 5 Wheat; 884
Furneaux's Case, R. & R; 619
Furser, R. v., Say; 546
Fursey, R. v., 6 Car. & P; 631

G.

Gabe v. State, 1 Eng. (Ark); 297, 1183

SECTIONS.

Gable, Com. *v.*, 7 Serg. & R; 10, 381, 400, 560, 630, 918, 848, 1084, 1220
Gaffney, State *v.*, Rice; 385, 400, 419, 1153
Galbraith *v.* Eichelberger, 3 Yeates; 806, 809
Gallagher, U. S. *v.*, 2 Paine, C. C. R; 1264, 1285
Gallears, R. *v.*, 2 C. & R; 357
Gammon, R. *v.*, 5 C. & P; 1138
Garbett, R. *v.*, 1 Denison, C. C. 236; 690
2 Cox, C. C; 448
3 C. & Kir; 808, 813
Gardenhier *v.* State, 6 Texas; 1280
Gardiner, R. *v.*, 2 Burr; 764
State *v.*, Wright's Ohio R; 15, 251, 257, 683, 925
Gardner *v.* People, 3 Scam; 497, 699, 703
R. *v.*, 1 Mood., C. C; 1042
State *v.*, 1 Root; 760
v. State, 4 Ind. 632; 518
Garner, R. *v.*, 2 Car. & Kir; 692, 698
Garnett *v.* Ferrand, 6 B. & C; 1260
Garney, State *v.*, 37 Maine (2 Heath.) 149; 364, 378, 379
Garretson, People *v.*, 2 Wheeler, C. C; 987, 1022
Garrett, R. *v.*, 22 Law & Eq; 115, 154, 278
v. State, 6 Mis; 790, 817
State *v.*, 1 Busbee; 809, 813
Garrigues, State *v.*, 1 Hayw; 574, 577, 587
Garthwaite, State *v.*, 3 Zab. (N. J;) 545
Gary, State *v.*, 36 N. H. 359; 219, 294
Gass *v.* Stinson, 2 Sum; 815
Gates, People *v.*, 13 Wend; 775
Gay, R. *v.*, 7 C. & P; 679
State *v.*, 10 Mis; 429, 435
Gaylor, Regina *v.*, 40 Eng. Law & Eq. 556; 932
Geach, R. *v.*, 9 C. & P; 635
Gearhart *v.* Dixon, 1 Barr; 10
Gehrke *v.* State, 13 Texas, 568; 50, 1115
Gening *v.* State, 1 M'Cord; 614, 708
George, State *v.*, 7 Ired., N. C; 702
5 Jones, N. C. 233; 701
Gerard *v.* People, 3 Scammon; 565
Gibbon, R. *v.*, 1 C. & P. 97; 686
Gibbons *v.* Pepper, 2 Salk; 1254
R. *v.*, 1 C. & P; 680, 774
State *v.*, 1 Southard; 364
Gibbs, Resp. *v.*, 3 Yeates; 809
Gibert, U. S. *v.*, 2 Summer; 530, 573, 580, 734
Gibney, R. *v.*, Jebb., C. C. 15; 690
Gibson *v.* Com., 2 Virg. Cases; 1067, 1071
v. Gibson, 9 Yerger; 48
R. *v.*, 8 East; 537, 572
Gilbert, Com. *v.*, 2 Va. Cases; 1115
v. State, 13 Ver. R; 220, 265, 294, 408
State *v.*, 24 Mis. (3 Jones), 365; 399
Gilchrist *v.* Bale, 7 Watts; 664
R. *v.*, 2 Leach, C. C; 342
Gilderstein *v.* State, 10 Ala; 667
Giles, Com. *v.*, 1 Gray R; 291
R. *v.*, 1 Moody, C. C; 58, 112
v. State, 6 Georgia; 707
Gilham, R. *v.*, 6 T. R; 613
R. & M; 687, 692, 775
Giliam *v.* Com., 4 Leigh; 778
Gill, R. *v.*, 1 Stra; 1254
2 B. & Ald; 298
Gillespie, Com. *v.*, 7 S. & R; 115, 131, 153, 258, 278, 288, 306, 414, 418, 513, 535, 594, 597, 604
v. State, 9 Ind. 380; 617
Gillis, State *v.*, 4 Dev; 857
Gillman *v.* State, 1 Humph; 489
Gillow, R. *v.*, 1 Moody; 635
Gilmore, People *v.*, 4 Califor; 550
Gilson, R. *v.*, Rus. & Ry; 660
Girardin, People *v.*, 1 Mann. (Mich;) 311
Girdwood, R. *v.*, 1 Leach; 605
Girkin, State *v.*, 1 Iredell; 1173
Gisson, R. *v.*, 2 C. & K; 400
Glargon, State *v.*, Dudley, S. C; 565
Gleed, R. *v.*, Harrison's Dig; 769
Glen, R. *v.*, 5 B. & Ald; 523
Glenn, People *v.*, 10 Cal. 32; 681
Glory *v.* State, 8 Eng. (13 Ark;) 702
Glover, State *v.*, 3 Iowa, 249; 500
Goadby R. *v.*, 1 C. & P; 400
Goddard, Com. *v.*, 13 Mass; 528, 541, 572, 1269
Goderly, R. *v.*, R. & R; 124
Godfrey, State *v.*, 11 Shep; 379
3 Fairf; 85
v. State, 31 Alab. 323; 58
Golden *v.* State, 19 Ark. 590; 699
Goldshede, R. *v.*, 1 C. & K. 657; 690
Goldstein, R. *v.*, R. & R; 313, 343
Gomes Serra *v.* Muney, 2 Stra; 795, 799
Gompertz, R. *v.*, 9 Q. B; 431
Gongleman *v.* People, 3 Parker, C. R. (N. J.) 15; 401, 1154

SECTIONS.

Good, R. *v.*, 1 Car. & P; 82
Goode, R. *v.*, 7 Ad. & El; 15
State *v.*, 1 Hawk; 131, 135
Goodenough, Com. *v.*, Thach. C. C; 513, 565
Goodhall, R. *v.*, 1 Den. C. C; 1230
Goodhue, Com. *v.*, 2 Metc; 388, 621, 1126
Goodrich *v.* People, 3 Parker, C. R. 622; 47, 251
Goodright *v.* Moss, Cowp; 666
Saul, 4 T. R; 666
Goodwin, People *v.*, 18 John. R; 582, 589
U. S. *v.*, 12 Wheat; 702
Gordon *v.* Caldcleugh, 3 Cranch; 205
R. *v.*, 1 Leach; 134, 615
2 Leach, Cr. C; 653
Gore, Com. *v.*, 3 Dana; 485
Gorham *v.* Carroll, 3 Lit; 809
Goshen *v.* Sears, 7 Conn; 365
Gossett, State *v.*, 9 Rich. Law (S. C.) 428; 692
Gould *v.* Crawford, 2 Barr; 753
Norfolk Co., 9 Cush. 338; 819
R. *v.*, 9 Car. & P; 560, 695, 698
Gove, State *v.*, 34 N. H. 510; 401
Graff, State *v.*, 1 Murphey's R; 135
Graham *v.* Com., 16 B Monr. 587; 711
R. *v.*, 2 Leach; 250
State *v.*, 3 Sneed (Tenn.) 134; 6
Grammond *v.* State, Wilcox; 340
Grand, Com. *v.* Gen. Court of Virg. 1791, Nov; 953
Granger, R. *v.*, 3 Bur; 536
v. State, 5 Yerger; 18, 1026
Warrington, 1 Gilman; 511
Grannis *v.* Brunden, 5 Day; 806
Grant, Com. *v.*, Thatch, C. C; 783
R. *v.*, 1 Ry. & M; 761
State *v.* (9 Shepley), 22 Maine; 249, 685, 687, 761
v. Thompson, 4 Connect; 48
Grap, People *v.*, 25 Wendell; 149
Gray *v.* Pentland, 2 S. & R; 776
People *v.*, 25 Wend; 102
R. *v.*, 7 C & P; 422
State *v.*, 21 M; 1063
Great North of Eng. Railway, R. *v.*, 9 Q. B; 87, 610
Works, State *v.*, 20 Maine R; 233, 685, 686, 637
Green, Com. *v.*, 1 Ashm; 941, 993, 1087
17 Mass; 762
2 Pick; 61, 1134
Green, People *v.*, 1 Denio; 669, 676
1 Parker C. C; 696
R. *v.*, 7 C. & P; 1011
v. State, 13 Mis; 112, 122, 697, 950, 955, 974
23 Mis. (1 Cush.); 154, 394
28 Miss; 710, 944
4 Strobhart; 129
State *v.*, 7 Iredell; 1173
Greenough *v.* Gaskill, 1 M. & K; 773
Greenwood, R. *v.*, 9 Eng. Law & Eq; 119, 131
State *v.*, 1 Hayw; 591
Greepe, R. *v.*, 2 Salk; 765
Greeson *v.* State, 5 Howard's Miss. R; 223, 228, 337
Gregory, Com. *v.*, 2 Dana; 413
State *v.*, 2 Murphey; 713
5 Jones (N. C.), Law, 315; 694
Grey, Com. *v.*, 2 Gray; 294
v. Bennett, 1 T. R; 271, 599
Young, 4 M'Cord; 664
Griffin, Com. *v.*, 3 Cush; 266, 435
21 Pick; 366, 388, 619
People *v.*, 2 Barbour; 472, 473, 605
R. *v.*, R. & R; 695
Griffis, State *v.*, 3 Iredell; 635
Griffith *v.* Eshelman, 4 Watts; 817
Griggs' Case, Sir T. Raym; 770
Grimwood *v.* Barritt, 6 T. R; 613
Grindley, R. *v.*, 1 Russ on Cr. 8 Note *n*; 43
Grisham *v.* State, 2 Yerger; 3
State *v.*, 1 Haywood; 383
Groomridge, R. *v.*, 7 C. & P; 61, 1134
Gross *v.* State, 2 Carter (Ind.); 469
Grounsell, R. *v.*, 7 C. & P; 1059
Grout, R. *v.*, 6 C. & P; 1005
Grundy, U. S. *v.*, 3 Cranch; 809
Grunzig, People *v.*, 2 Harr's C. C; 671
G. S., State *v.*, 1 Tyler; 270, 277
Guernsey, People *v.*, 3 Johnson; 231
Guild, State *v.*, 5 Halstead; 60, 65, 683, 699
Gulick, People *v.*, Hill & Denio (N. Y.), 229; 1291
Gustin, State *v.*, 2 Southard R; 306
Gutch, R. *v.*, Mood & M; 153, 594
Guttridge, R. *v.*, 9 C. & P; 1150

H.

Hackett *v.* Com., 3 Harris; 4, 8, 10, 400, 405, 628
Haddock, State *v.*, 2 Hawks; 223, 265

SECTIONS.

Haddock, State *v.*, 2 Haywood; 250, 251
Hadfield's Case, 67 Hans. Par. Deb; 15
Hagaonen, State *v.*, 1 Greenl; 519
Haggerty, Com. *v.*, Lewis, C. L; 1109
Haile *v.* State, 11 Humph; 44
Haines, Com. *v.*, 6 Penn. L. J; 593, 1059
R. *v.*, 2 C. & R; 1008, 1011, 1016
Haiston *v.* Hixen, 3 Sneed (Tenn.), 69; 697
Halberstadt, U. S. *v.*, Gilpin; 373
Halder, State *v.*, 2 M'Cord; 405
Hale *v.* State, 11 Humph; 41, 1109
U. S., 2 Cranch, C. C. R; 1109
Hall, State *v.*, 4 Halst; 589
v. State, 3 Kelly; 265, 408
8 Ind. 439; 434, 728
Halloway, Com. *v.*, 5 Binn; 195
R. *v.*, 1 C. & P; 359
Halstat, Com. *v.*, 2 Bost. Law R; 565
Hambleton, State *v.*, 22 Mis. (1 Jones), 452; 377
Hamilton, R. *v.*, 7 C. & P; 291
State *v.*, 2 Haywood; 780
U. S. *v.*, 3 Dall; 209
Hammill, People *v.*, 2 Parker, C. R. (N. Y.), 223; 40, 41, 44
Hammon, R. *v.*, R. & R., 2 Leach; 184
Hammond's Case, 2 Greenl; 47
Hammond, R. *v.*, 1 Leach; 69, 75
Hampton, Com. *v.*, 3 Gratt; 364, 366
v. State, 8 Ind. 336; 266
Hancock *v.* Haywood, 3 T. R; 418
Hand, State *v.*, 1 Eng. (Ark.); 235
Handy, State *v.*, 20 Maine; 607
4 Harring; 60, 61, 1134
Haney, State *v.*, 2 Dev. & Bat; 423, 520, 703, 704, 783
Hannah, State *v.*, 10 La. R; 669, 701
Hanson, R. *v.*, 1 C. & Mar; 620
2 C. & R; 5, 1249
Paley on Convictions, by Dow; 614
State *v.* (4 Heath), 337; 261
Hanway, U. S. *v.*, 2 Wal. Jr.; U. S. Circuit Court, Phil. 1852; 790, 802
Hardebeck *v.* State, 10 Ind. 459; 266
Harden, State *v.*, 2 Dev. & Bat; 124, 783
Harding, U. S. *v.*, 6 P. L. J; 1 Wal. Jur; 434, 572
Hardwick, R. *v.*, 6 Peters' Abr; 686
1 C. & P. 98; 686
Hardy, Com. *v.*, 2 Mass; 636
R. *v.*, 24 How. St. Tr; 703

SECTIONS.

Hare, Com. *v.*, Whar. on Hom; 4 Penn. Law Jour; 128, 990, 999, 1084, 1107
v. State, 3 Kelly; 372
U. S. *v.*, 2 Wheel. C. C; 532
Harker *v.* State, 8 Blackf; 513, 544
Harley, Com. *v.*, 7 Metc; 702
R. *v.*, 4 C. & P; 112
Harlow, State *v.*, 21 Mo; 40, 41, 44
Harman, Com. *v.*, 4 Barr; 685, 694, 698, 707, 738, 748, 940
v. Com., 12 S. & R; 401, 414, 419, 1153, 1154
U. S. *v.*, 1 Baldwin; 306, 317, 631, 702, 703
Harper *v.* Burrow, 6 Iredell: 809
Harrall *v.* State, 26 Alab; 474
Harriman *v.* State, 2 Greene (Iowa); 410, 487, 497
Harring *v.* Walrond, 2 Cha. Ca; 3
Harrington *v.* Lincoln, 4 Gray (Mass.), 563; 821
People, 6 Barb; 1256
Harris *v.* Elliott, 10 Peters; 201
State *v.*, 2 Halstead; 229
v. Harris, 2 Hagg. Eccles; 682
R. *v.*, 4 T. R; 10
1 Mood. C. C. 338; 692
Harrison, Com. *v.*, 11 Mass; 195
v. Hodgson, 10 B. & C; 1260
State, 24 Alab; 1025, 1026
Hart, Com. *v.*, 2 Robinson; 780
R. *v.*, 6 C. & P; 344, 350
1 Leach; 306
State *v.*, 4 Ired; 631
U. S. *v.*, 1 Peters' C. C. R; 4
Hartall, R. *v.*, 7 C. & P; 422
Hartman, Com. *v.*, 5 Barr; 418
Hartwell *v.* Parmer, 16 Johns; 753
Harty *v.* State, 3 Blackf. Ia. R; 135
Harvey, R. *v.*, 3 D. & R; 712
R. & R; 343
State *v.*, 3 N. Hamp; 69, 77
Hascall, State *v.*, 6 N. Hamp; 618, 713
Hash, State *v.*, 12 La. Ann, 895; 694
Haskell, U. S. *v.*, 4 Wash. C. C; 580, 589
Haskett, State *v.*, 3 Hill, S. C. R; 513, 544
Haskill *v.* Com., 3 Ben. Mn; 614
Haslip *v.* State, 4 Haywood; 413
Hassell, R. *v.*, 2 C. & P; 70
Hastings, R. *v.*, 7 C. & P; 784
Haswell, R. *v.*, R. & R; 53
Hatton, Com. *v.*, 3 Grattan; 551
Haught *v.* Com., 2 Vir. Cases; 245
Haverly, State *v.*, 21 Miss; 597
6 Bennett; 498

SECTIONS.

Hawkins, Com. v., 3 Gray (Mass.), 463; 40, 41, 44, 522
 2 Gray; 463, 709, 819
 R. v., 10 East; 615
 State v., 8 Porter;
 v. State, 7 Mis; 686
Hawley v. Sharp, 1 Dana; 188
 State v., 4 Harring; 641, 1027
Haworth, R. v., 4 Car. & Payne; 311, 608
 v. State, Peck's Tenn. Rep; 256
 R. v., 1 Mood. C. C; 1039
Hayes, R. v., 2 M. & Rob; 432
 State v., 24 Miss. (3 Jones), 358; 266
Haynes, People v., 11 Wend; 618
 R. v., 4 M. & S; 261
Hays v. People, 1 Hill N. Y. R; 1143, 1155, 1241, 1248
 State v., 23 Mis. (2 Jones), 827; 474, 714
Hayward, R. v., 6 C. & P; 671, 984
 State v., 1 Nott & M'C; 803
 U. S. v., 2 Gallis; 614, 708
Hazard, State v., 2 R. I; 416, 419, 420, 423
Hearn, R. v., 1 Car. & Marsh; 692, 695
Heart, State v., 7 Mo; 482
Heas, State v., 10 La. R; 1071
Hector v. State, 2 Miss; 589, 685, 698
Hedge, State v., 6 Indiana; 405, 406
Heikes v. Com., 2 Casey; 280, 551, 565
Helm, State v., 6 Miss; 364
Hempstead, R. v., R. & R; 432, 513, 620
Henderson, People v., 1 Harris, C. C; 634, 637
 R. v., 1 C. & M; 561
 State v., 15 Miss; 1293
 v. State, 14 Texas, 503; 601, 707, 712
 12 Texas, 525; 641
Hendricks v. Com., 5 Leigh; 631, 633
 State v., C. & N; 266, 273, 396
Hendrickson, People v., 1 Parker, C. C; 690, 850
Hendrie, Com. v., 2 Gray; 251, 598
Hennessey, People v., 15 Wendell; 683
Henry v. Bank of Salina, 1 Const; 807
 3 Denio; 805
 State, 18 Ohio; 1276
 v., 5 Jones, N. C. 65; 644
Henry, U. S. v., 4 Wash. C. C. R; 790
Hensey, R. v., 1 Burr; 530
Hensley, State v., 7 Blackf; 520
Herbert, U. S. v., 5 Cranch, C. C. R; 540, 547, 1281
Hereford, State v., 13 Miss; 364
Herndon, State v., 5 Blackf; 472
Herrick, People v., 13 Wendell; 712, 763
Hess v. State, 5 Ohio; 400
Hevice, R. v., 2 Yeates; 414, 1213
Hewitt v. Prime, 21 Wendell; 774
 R. v., R. & R; 518
Hewson, U. S. v., 7 Bost. Law Rep; 27, 748
Heyden v. State, 4 Blackford R; 1020
Hickman, State v., 3 Halstead; 364
Hicks, R. v., 2 M. & Rob; 251
 State v., 27 Mo. (6 Jones), 588; 1084
 6 Jones, Mo. 588; 641
Higgins' Case, 2 East R; 8
 R. v., 2 East; 292, 1281
 3 C. & P; 697
 Lon. Med. Gaz., Vol. IX; 846
Higginson, R. v., 1 C. & K; 15
Higley, R. v., 4 C. & P; 1235
Hildebrand v. State, 3 Mis; 418
Hildreth, State v., 9 Iredell; 944, 974
Hiler v. State, 4 Blackf; 707
Hill, Com. v., 2 Grat; 671, 681, 710, 1111
 14 Mass; 531, 754, 755
 11 Mass; 112
 11 Cush. (Mass.) 137; 508
 v. Davis, 4 Mass; 214
 R. v., 3 New Sess. Cas; 74
 8 C. & P; 712
 5 Cox, C. C; 752
 R. & R; 347, 618
 2 Moody; 635
 v. State, 6 Indiana; 812
 2 Yerger; 530, 538
 U. S. v., 1 Brock; 461
Hilliard, Com. v., 2 Gray R; 641, 1026
Hills, Com. v., 10 Cush. (Mass.) 530; 416, 655
Hinckley v. Penobscott, 42 Maine; 379
Hindmarsh, R. v., 2 Leach, C. L; 746
Hines v. State, 8 Humph; 597, 1115
Hinkle v. Com., 4 Dana; 390
Hinks, R. v., 2 C. & K; 763
Hinley, R. v., 2 Mood. & R; 728
Hinman, U. S. v., 1 Bald; 309, 597, 606

SECTIONS.
Hirn *v.* State, 1 Ohio St; 572
Hirst's Case, 1 Lewin C. C. 46; 697
Hitchens, State *v.*, 2 Harrington; 4
Hite *v.* State, 9 Yerger;
336, 474, 556, 565, 569, 570
Hoatson, R. *v.*, 2 C. & K; 82, 712
Hobbs, State *v.*, 2 Tyler; 685
Hodgedom, State *v.*, 3 Ver; 265, 408
Hodge's Case, 2 Lew. Cr. Cas; 732
Hodgson's Case, 1 Lewin, C. C; 249
Hodgson, R. *v.*, R. & R;
636, 814, 1151
1 Lewis; 631, 632
Hoffman *v.* Com., 6 Randolph;
407, 607
Coster, 2 Wharton; 762
Hogan, R. *v.*, 5 Eng. Law & Eq;
1011
State *v.*, R. M. Charlton;
422, 423
Hoge *v.* Fisher, 1 P. C. C. R; 56
Hogg, R. *v.*, 2 M. & Rob; 251
Hogue, State *v.*, 6 Jones Law, N. C. 383; 641
Hoit, State R. 3 Foster; 1011
Holbrook, People *v.*, 13 Johnson;
322, 608, 657
Holden, R. *v.*, 8 C. & P; 819
Holland, R. *v.*, 5 T. R; 261, 300
2 Moody & R; 941
Holler *v.* Ffirth, Penning; 761
Holly *v.* State, 10 Humph; 1102
Holmes, Com. *v.*, 17 Mass; 311
v. Com., 25 Penn. State R. (1 Casey) 221; 135
Com., 1 Casey;
135, 138, 141
State, 23 Alab; 1015
U. S. *v.*, 5 Wheat; 884
Holroyd, R. *v.*, 2 Moody & R; 631
Home, R. *v.*, 1 Leach; 129
Honeymen, Penna. *v.* Addison;
710, 930, 944, 1084
People *v.*, 3 Denio; 602
Resp. *v.*, 2 Dallas; 1073
Hood, R. *v.*, 1 Mood. C. C; 767
People *v.*, 6 Cal. 236; 294
Hooker *v.* State, 4 Ohio; 611
State *v.*, 17 Ver; 418
Hope *v.* Com., 9 Met; 362, 613
Com. *v.*, 22 Pick;
388, 416, 617, 630, 855
State *v.*, 2 Bervard; 780
Hopkins, Com. *v.*, 2 Dana;
635, 638, 668
State *v.*, 7 Blackf; 264
Hopper *v.* State, 19 Ark. 143; 708
Hopson, People *v.*, 1 Denio; 649
Hord *v.* Com., 4 Leigh; 538

SECTIONS.
Horton, Com. *v.*, 2 Gray R; 649
9 Pick; 533
People *v.*, 4 Mich. 67;
983, 1025
Hoskins *v.* State, 11 Geo;
381, 390, 414, 620, 712
Hongh, R. *v.*, R. & R. C. C; 631
Houghtaling *v.* Kelderhouse, 1 Parker, C. C; 765
Houseall, State *v.*, 2 Rice's Dig;
368, 390
Houseman, R. *v.*, 8 C. & P; 343
Houser, State *v.*, 26 Mis. (5 Jones) 431; 667
Houston, R. *v.*, 2 Crawf. & Dix; 529
How, Com. *v.*, 1 Mass; 709
R. *v.*, 1 Str; 351
Howard, R. *v.*, C. C. & P; 994
1 M. & R; 653
State *v.*, 9 N. H; 815, 816
U. S. *v.*, 3 Sumner;
253, 595, 614, 622, 623, 630
Howe *v.* Hall, 14 East; 311, 608, 657
Howe's Case, 1 Vent; 589
Howes, Com. *v.*, 15 Pick; 371
Howell *v.* Com., 5 Gratt; 809
People *v.*, 4 Johns;
344, 349, 431
R. *v.*, 9 C. & P; 127
State *v.*, Ga. Decis. Part I;
1285
Howpoole *v.* Harrison, 1 Str; 244
Hoxey, Com. *v.*, 16 Mass; 4, 413
Hubbard, People *v.*, 4 Denio;
489, 505, 509, 865
v. State, 7 Ind. 160; 445
Hucks, R. *v.*, 1 Stark; 681
Hudson *v.* State, 9 Yerger; 695, 855
1 Blakf; 465, 469
et al., U. S. *v.*, 7 Cranch;
156, 164, 165, 200
Huffman *v.* Com., 6 Rand; 129
Penna. *v.* Addison; 540
Huff's Case, 14 Gratt. 648; 518
Hughes, Com. *v.*, 5 Rand; 597
R. *v.*, 2 Lewin; 74
1 Car. & K; 508
5 C. & P; 1061
8 C. & P; 1138
v. State, 12 Ala; 114
8 Humph; 728
State *v.*, 2 Har. & McHen;
243, 536
1 Swan (Tenn.); 238
Huidekoper *v.* Cotton, 3 Watts; 508
Hulbert, People *v.*, 4 Denio;
489, 505, 509, 865
Hull, R. *v.*, Kel; 1005
Hulting, State *v.*, 21 Mo; 16

SECTIONS.
Hume *v.* Scott, 3 A. K. Marsh; 814
R. *v.*, 7 C. & P; 780
Hunscom *v.* Hunson, 15 Mass; 795
Hunt's Case, 5 Eng. (Arkansas); 766
Hunt, Com. *v.*, 4 Pick; 253, 625
4 Metc; 325
v. Com., 13 Gratt (Va.), 757; 728
R. *v.*, 3 Barn. & Ald; 649, 657, 703, 704
1 Mood. C. C; 1037
2 Camp; 616, 620
v. State, 10 Ind. 169; 790
25 Miss; 545, 550, 563
Hunter *v.* Com., 7 Gratt; 703
R. *v.*, 2 Leach, C. C; 343
4 Car. & Payne; 311, 608
State *v.*, 8 Blackf; 631
Peck's Tenn. R; 219
Huntley, State *v.*, 3 Iredell, N. C. R; 4
Hurley, State *v.*, 8 Cal. 390; 1027
Hurton, Penn. *v.*, Addis R; 431
Hussey, State *v.*, 1 Busbee; 769
7 Iowa, 409; 445, 1154
Hussey's Case, 9 Rep; 77
Huston *v.* Moore, 3 Wheat; 205
5 Wheat; 182, 184, 209
R. *v.*, 1 Leach; 754
Hutchinson, Com. *v.*, 1 Mass; 781
10 Mass; 755
2 Par; 445, 446
R. *v.*, 2 B. & C; 675
Hutson, State *v.*, 15 Miss; 258, 597
Hutton, Com. *v.*, 5 Gray (Mass.), 482; 264
Huting, State *v.*, 21 Miss. (6 Bennett), 464; 16, 23, 56, 711
Hye, State *v.*, 26 Maine; 423
Hyler, People *v.*, 2 Parker, C. R. (N. Y.), 566; 458, 491

I.

Ike *v.* State, 23 Miss; 364
Illis *v.* Knight, 3 Texas; 5
Imlay *v.* Harris, 2 Halsted; 508
Inder, R. *v.*, 2 C. & K; 313
Ingraham, Com. *v.*, 7 Gray (Mass.), 46; 696
Inhab. of Clifton, R. *v.*, 5 T. R; 90
Sheffield, R. *v.*, 2 T. R; 90
Warren *v.* Inhabitants of Hope; 3210
Wilts, R. *v.*, Cas. Tem. Holt; 89

SECTIONS.
Innes *v.* Wylie, 1 C. & K; 1256
Irwin, State *v.*, 1 Hayward; 710, 944
5 Blackf; 251
Isham, State *v.*, 6 Howard's Miss. R; 772

J.

J. P., State *v.*, 1 Tyler's R; 518
J. S., State *v.*, 1 Tyler; 513
Jackson *v.* Browner, 18 Johns; 666
Burtis, 14 Johns; 773
Com. *v.*, 2 Virg. Cases; 546, 570
v. Cooley, 8 Johns; 666
Gridley, 18 Johns; 755, 797
Humphrey, 1 John. R; 806
People *v.*, 3 Parker, C. R. 391; 1152
8 Barbour; 323, 324, 345, 346, 355, 610
3 Hill's N. Y. R; 10, 388, 400, 901
v. People, 18 Ill. 269; 272
R *v.*, Cowp; 373
R. & R; 1144
v. State, 11 Texas, 261; 472
State *v.*, 17 Mis. (2 Ben.); 422, 641, 642, 699
12 La. Ann. Rep. 679; 641, 1027
3 Maine (4 Heath), 291; 272
U. S. *v.*, 4 Cranch C. C. R; 5
Jacob, R. *v.*, 1 Leach; 667
State *v.*, 10 La. R; 416, 423
v. State, 3 Humph; 970, 1040, 1047
U. S., 1 Brockenb; 653, 713
Jacobs *v.* Com., 5 Serg. & R; 264, 274, 599
R. *v.*, 1 Leach C. C. 310; 697
R. & R; 1151
State *v.*, 6 Texas, 97; 468
Jagger, R. *v.*, 1 East P. C; 769
James *v.* Com., 12 Serg. & R; 289
People *v.*, 2 Caines; 766
R. *v.*, 8 C. & P; 349
1 Can. & Kir; 1244
v. State, 1 McMullen; 295
Jane (a slave) *v.* State, 3 Missouri, R; 273
Jarnagin *v.* State, 10 Yerg; 474
Jarrett *v.* State, 1 Iredell; 1046
State *v.*, 1 Ired; 712, 1047
Jarvis, R. *v.*, 33 Eng. Law & Eq; 631, 723

SECTIONS.

Jasper, State *v.*, 4 Dev. N. C. R; 4
Jeckson *v.* Rose, 2 Vir. Cas; 762
Jefferson, State *v.*, 6 Iredell; 1152
Jeffreys, State *v.*, 3 Murphey; 306
v. State, 3 Murphey; 591
Jeffs, R. *v.*, 2 Strange, 984; 588
Jenkins, R. *v.*, R. & R; 692, 695
State *v.*, 2 Tyler; 685
5 Jones, N. C; 430
Jenkinson *v.* State, 5 Black; 773
Jenks, Com. *v.*, 1 Gray; 513
Jenner, R. *v.*, 7 Mod; 393
Jenness, People *v.*, 5 Mich, 305; 599
Jenning's Case, 2 Lewin, 130; 832
Jennings *v.* Com., 17 Pick; 373
State *v.*, 18 Mo; 1113
Jesse, State *v.*, 7 Gill & Johnson; 11
3 Dev. & Bat; 558, 562
Jetton *v.* State, 1 Meigs; 467, 488
Jewell *v.* Jewell, 1 How. S. C. R; 666
Jewett *v.* Banning, 23 Barb. (N. Y.), 13; 696
People *v.*, 3 Wend; 220, 469, 472
Jillard *v.* Com., 2 Casey; 480, 488, 489, 497, 622
Jim *v.* State, 15 Georg; 701, 1046
5 Humph; 727, 1113
State *v.*, 3 Murph; 347, 411
1 Dev; 401, 1154
Joe *v.* State, 6 Florida, 591; 837, 843
John, State *v.*, 8 Ired; 40
v. State, 16 Georgia; 1046
John's Case, 1 East P. C; 769
Johnson *v.* Com., 21 Penn. State R. (12 Harris), 386; 1121
Johnson, 14 Wend; 774
Lawson, 2 Bing; 666
People *v.*, 2 Wheel. C. C; 685
1 Parker C. C; 564
1 Harris C. C; 894, 898
v. People, 3 Hill; 14
R. *v.*, State Trials, Vol. 29; 865
1 Wils; 591
11 Mod; 631, 635
6 East; 537
State *v.*, Iredell; 949, 953, 985
3 Hill's S. C. A; 391, 395
3 Jones Law (N. C.), 226; 710, 944
1 Walker, Miss. R; 272, 410
11 Texas, 22; 292, 1281
3 Harring; 1279, 1283

SECTIONS.

Johnson, State *v.*, 2 Wms. (28 Vt.) 512; 1152
5 Jones, 221; 419
v. State, 17 Ala; 635, 639, 649, 678, 1115, 1121
2 Humph; 1259
17 Ohio; 665, 1132, 1150
2 Dutch (N. J.), 313; 265, 564
14 Geo; 384, 560, 627
29 Alab. 62; 414
U. S., 3 McLean; 599
Johnson's Case, 2 Gratt; 763
Johnston *v.* Todd, 5 Beav; 666
Joiner, State *v.*, 4 Hawks; 1238
Joliffe, R. *v.*, 4 T. R; 667
Jolly, State *v.*, 3 Dev. & Batt; 771
Jones *v.* Clay, 1 Bos. & P; 5, 16, 549
Com. *v.*, 1 Leigh; 41, 588, 1083, 1084, 1086, 1114
2 Gratt; 7
v. Harris, 1 Strob; 766, 795
Kennedy, 11 Pick; 744
People, 12 Illinois; 259, 728
R. *v.*, C. Suppl. 13; 697
Russell & Ryan C. C. 152; 692
2 Str; 610
14 Jur; 605
Douglass; 342
Kel; 70
8. C. & P; 418
2 Camp; 414, 784, 785
2 B. & Ad; 631
R. & R; 680, 695
State *v.*, 20 Mo; 1068, 1115
Walker; 1050
4 Halstead; 228, 232, 277, 412
7 Geor; 546
1 M'Mul; 295, 368, 596, 601
14 Missouri; 949, 1034
v. State, 1 Kelly; 433
2 Blackf; 469
5 Blackford; 71
6 Hump; 522
30 Miss. (1 George), 653; 728
26 Missis; 728
13 Texas, 168; 530, 1123
Tarleton, 1 D. P. C., N. S; 655
U. S. *v.*, 2 Wheel. C. C; 765
v. Ward, 3 Jones' Law (N. C.), 24; 667

SECTIONS.

Jordan, R. v., 2 Kel; 67
9 C. & P; 61, 1134, 1138
v. State, 31 Miss. (2 Geo.), 382; 695
22 Geo. 545; 277, 550, 635
State v., 19 Miss. (4 Bennett), 213; 292, 1281
12 Texas, 205; 279
Josephs, People v., 7 Cal. 129; 1084
Josselyn v. Com., 6 Metc; 417, 563
Journey v. State, 1 Missouri; 371
Judd, Com. v., 2 Mass; 298
Judge of Probate v. Green, 1 How. Miss; 809
Jukes, R. v., 8 T. R; 297, 369

K.

K., State v., 4 N. Hamp; 805, 808
Kain v. State, 8 Ohio State R. (N. S.), 306; 925
Kanavan's Case, 1 Greenleaf; 6
Kane v. People, 3 Wend; 85, 423
8 Wend; 412, 415, 416, 423, 429
Kanouse, State v., Spencer; 554
Kay v. Fredrigal, 3 Barr; 819
Kean, State v., 10 N. Hamp; 239, 403, 410
Kearns, Com. v., 1 Virg. C; 309
Kearney, Ex parte, 7 Wheat; 201, 207
Keating. Resp. v., 1 Dallas; 781
Keefe, Com. v., 7 Gray, 332; 265
v. State, 19 Ark. 120; 1244
Keefer v. State, 4 Ind. 246; 414
Keen, U. S. v., 5 Mason's U. S. R; 1291
Keene, U. S. v., 5 McLean's C. C. R; 317, 540, 595
Keener v. State, 18 Geo. 194; 637, 1025, 1027
Keeper of Prison, Com. v., 19 Conn; 1114
v. State, 4 Indiana; 419, 420
Keffer, Penn. v., Addison; 507, 509
Keith, Com. v., 8 Met; 551, 587, 760, 764
Keithler v. State, 10 S. & M; 145, 474, 683, 761, 782
Kell, R. v., 1 Crawford & Dix. 151; 588
Kellenbeck v. State, 10 Md. 431; 401
Keller v. State, 11 Md. 525; 10
Kelley, People v., 6 Cal. 210; 1073
Com. v., 10 Cush. (Mass.) 69; 598
R. v., R. & R; 123, 126

SECTIONS.

Kellogg, Com. v., 7 Cush; 594
Kelly v. Com. 11 S. & R; 631
R. v., 1 Mood. C. C; 1061
2 Car. & Kir; 983
v. State, 3 Sm. & Mars; 40, 44, 265, 408, 518
U. S. v., 11 Wheat; 417
Kendrick, R. v., 5 Ad. & El; 291, 482
Keneborough, State v., 2 Dev; 780
Kennard, Com. v., 8 Pick; 1256
Kennedy, Com. v., 15 B. Mon. (Ky.) 531; 411
State v., 7 Blackf; 233, 385, 400, 617
v. State, 6 Indiana; 485, 1121
U. S. v., 3 McLean; 795
v. Way, Brightly's R; 1002, 1006
Kenney, Com. v., 12 Metc; 696
Kenrick, R. v., 5 Ad. & El. N. S; 291, 432
Kent, Com. v., 6 Metc; 699
People v., 1 Dougl. (Mich.); 348
Kenton, State v., 15 New Hamp; 640
Keogh, State v., 13 La. Ann. 243; 560, 565
Kersh v. State, 24 Geo. 191; 782
Ketchingham v. State, 6 Wisc. 426; 416
Keyes, State v., 8 Vermont; 8, 213, 759
Kidney v. Cockburn, 2 Rus. & Myl; 666
Kilpatrick v. Com., 7 Casey, 198; 671, 944, 990, 1113
People, 5 Denio; 603
Kimball, Com. v., 24 Pickering; 707, 709, 805
7 Gray, Mass. 328; 513
Kimbrough, State v., 2 Dev; 657
Kimmel v. Kimmel, 3 S. & R; 813
Kinchelow v. State, 5 Humph; 647, 783, 791
King, Com. v., 2 Va. Cas; 78, 932, 970
R. v., 2 Str; 519
Russ. & R. C. C; 118
v. State, 2 Carter; 412
21 Geo. 220; 116, 1280
State v., 5 Howard's Miss. R; 481, 489
et al., State v., 2 Rice's S. C. Digest; 113, 998
of the two Sicilies v. Wilcox, 14 Jur; 85

SECTIONS.

King, U. S. *v.*, 5 McLean, C. C. R; 631
Kinlock's Case, Foster, 337; 588
Kingsbury, Com. *v.*, 5 Mass; 564, 566
Kingsley, People *v.*, 3 Cowen; 311, 608
Kingston, R. *v.*, 8 East; 414, 430
Kinlock *v.* Palmer, 1 Rep. Con. Ct; 216
Kinne *v.* Kinne, 9 Conn; 48
Kinnersley & Moore, R. *v.*, 1 Str; 8
R. *v.*, 1 Stra; 431
Kinney, Com. *v.*, 2 Va. Cases; 565
Kirby, Com. *v.*, 2 Cush; 297, 617, 683, 1294
State *v.*, 7 Miss; 414
1 Strobhart; 687
1 Strobh. (S. C.), 155; 686
People *v.*, 2 Parker, C. R. 28; 944
v. State, 1 Ohio St. R; 390
7 Yerger; 703, 704
Kirk *v.* Com., 9 Leigh; 421
Kirkwood, R. *v.*, 1 Mood. C. C; 1123
Lewin's C. C; 632, 633
Kit *v.* State, 11 Humph; 285
Kite *v.* Com. 11 Metc; 417
Kitson, R. *v.*, 20 Eng. Law & Eq; 657
Kittering, State *v.*, 5 Green; 90
Kittle, State *v.*, 2 Tyler; 550 554
Klock *v.* People, 2 Parker, C. R. (N. Y.), 6; 588
Knapp, Com. *v.*, 9 Pick; 94, 124, 419, 685, 691, 695
10 Pick; 135, 136, 141, 149, 709
Kneeland, Com. *v.*, 20 Pick; 6, 253, 351, 618
Knight, State *v.*, 43 Maine 11; 47, 709, 710
Knowles *v.* State, 3 Day; 413
Kosloff, Com. *v.*, 5 S. & R; 209
Kreps, State *v.*, 8 Alab; 513

L.

La Costa, U. S. *v.*, 2 Mason; 266, 411, 887
Lad's Case, Leach; 399
Lad, State *v.*, 2 Swan; 364
Lafuente, People *v.*, 6 Cal. 202; 277
Lake *v.* King, 1 Saund; 131
People, 1 Harris C. C; 46, 47, 57, 711
Lakeman, Com. *v.*, 4 Cush; 1258

SECTIONS.

Lambe's Case, 2 Leach. Crim. Cas; 625, 683
Lambert *v.* People, 7 Cowen; 519, 520
Lambeth *v.* State, 22 Missis. 322; 681
Lamon, State *v.*, 3 Hawks; 472, 1053
Lanauze *v.* Palmer, 1 M. & M; 660
Lancaster, U. S. *v.*, 2 McLean; 172, 317, 364, 784
5 Wheat; 202
Lane, State *v.*, 4 Iredell; 223, 265, 949, 953, 971, 986
Langcake & Hook, Com. *v.*, 1 Yeates; 1165
Langley, State *v.*, 34 N. H. 529; 629
Lanigan, Com. *v.*, 2 Boston L. Rep; 413
La Preux, State *v.*, 1 McMull; 364
Larned *v.* Com., 12 Metc; 616, 617
Larrimore, People *v.*, 3 Selden; 650, 725, 856
Lash, State *v.*, Harring; 280, 292
Lassetty, State *v.*, 1 Rich; 396
Lasube, R. *v.*, 2 Leach; 667
Latham, State *v.*, 13 Ired; 755
Lathrop, U. S. *v.*, 17 John; 185, 189
Laughlin *v.* State, 18 Ohio; 1132, 1150
Laura *v.* State, 26 Miss; 564
Lawrence *v.* State, 10 Ind. 453; 433
Sweeny, 8 Jurist; 717
U. S. *v.*, 4 Cranch C. C; 490, 711
Lawson *v.* State, 20 Ala; 649, 696
Layer's Case, 6 St. Tr; 809
Layer, R. *v.*, 8 Mod; 352
Layton, R. *v.*, 4 Cox C. C; 15, 16, 711
Cro. Car; 519
Lazarus, State *v.*, 1 Con. S. C. R; 1256
Lazier *v.* Com., 10 Grattan; 265, 405, 408, 416, 525, 793, 1069
Leach, Com. *v.*, 1 Mass; 5
Leafe, R. *v.*, Andr; 518
Leanord, State *v.*, 22 Miss. (1 Jones); 449; 423
Lease, R. *v.*, Andr; 285
Le Blanc, State *v.*, 3 Brevard; 755, 1139
Leddington, R. *v.*, 9 C. & P; 122, 964
Lee *v.* Clark, 2 East; 369
Grandsell, Cowp; 763
Lee, McCord; 711
People *v.*, 1 Wheeler's C. C; 1247
R. *v.*, Archb. C. P; 804
U. S. *v.*, 4 McLean; 783, 792
Lehman, People *v.*, 2 Barbour, S. C; 297

SECTIONS.
Lester v. Pittsford, 7 Vt; 48
Levet's Case, Cro. Car; 18
Levett, R. v., Cro. Car; 83
Levin, Penn. v., Addison; 932
Levy, R. v., 4 C. & P; 414
Lewis v. Baird, 3 McLean; 56
Lewis's Case, 4 Esp; 809
4 Greenleaf; 506
Lewis, Com. v., 1 Metc; 67, 78, 243, 247
Penn. v., Addison; 944, 1084
R. v., 1 Car. & Kir; 1251
6 C. & P; 690
4 Esp; 805
State v., 1 Bay; 560, 565
2 Hawks, 98; 563
v. State, 9 S. & M; 671
30 Ala., 54; 1144
Ley, R. v., 1 Lewin; 53
Libbey, U. S. v., 1 W. & M; 92
Liddle, U. S. v., 2 Wash, C. C; 83
Lindsay, Com. v., 10 Mass; 513, 544
Lines, R. v., 1 C. & K; 1138
Lingate, R. v., 6 Petersd. Abr; 686
Linton, Com. v., 2 Va. Cases; 3, 1051
Lippard, Com. v., 6 S. & R; 469
Lipsey, State v., 3 Dev; 591, 948
Lisle, State v., 5 Halstead; 223
Lister v. Boker, 6 Black; 805
Little, State v., 1 N. Hamp; 546
1 Per; 364
Littlefield, People v., 5 Cal. 355; 261, 354, 599
Livingston's Case, 14 Pratt, 592; 47, 550, 1115
Livingston v. Kierstadt, 10 Johns; 752
Van Ingen, 9 Johns; 184
Lloyd, People v., 9 Cal. 54; 1114, 1115
R. v., 4 C. & P; 675
6 C. & P., 39; 692
U. S. v., 4 Cranch, C. C. R; 457
Lockett, R. v., 7 C. & P; 118
Lockhurst, R. v., 1 Dearsly, C. C., 245; 6 Cox, C. C., 243; 22 Eng. Law & Eq. 604; 692
Lockingston's Case, 4 Hall's L. J; 197
Locklear, State v., 1 Busbee; 390, 620
Lockwood, People v., 6 Cal., 205; 238
Lodano v. State, 25 Ala; 364
Lodge v. Phipher, 11 S. & R; 47
Loftin, State v., 2 Dev. & Bat; 371, 379
Logan, State v., 1 Missouri R; 355
U. S. v., 2 Cranch, C. C. R; 5

SECTIONS.
Lohman, People v., 2 Barbour, S. C; 228, 622, 778
v. People, 1 Comstock; 10, 286, 400, 561, 628, 813, 906, 1216, 1228
Long, Com. v., 2 Va. Cases; 537
v. Rogers, 17 Alab; 1245
R. v., 4 C. & P; 1015
5 Co., b; 285
v. State, 12 Georgia; 381
State v., 1 Hayw; 683
Longbottom, R. v., 3 Cox, C. C; 1008, 1016
Longden, R. v., R. R; 1039
Longley, State v., 10 Ind., 482; 427
Lonsdale v. Brown, 4 Wash. C. C; 31
Loom, R. v., 1 Moody; 377
M. C. C; 611
Loomis v. Edgerton, 19 Wendell; 3, 5, 200
Loper, State v., 16 Maine; 776
4 Shep; 702
Lopez, State v., 19 Mo; 410, 514
Lorbon v. State, 7 Mis; 391, 565
Lord Audley's Case, Hutl; 1149
12 Mod; 1136
Lorey, State v., 2 Brev; 536
Lot, State v., Howe, 1 Richard; 381
Loud, Com. v., 3 Met; 541, 551, 587
Love v., Murphy, 6 Shepl; 1152
State v., 1 Bay; 1239
4 Humph; 458
Low's Case, 4 Greenl. Rep; 509
Low v. Mitchell, 18 Maine; 805, 808, 814
Lowe v. Bofeler, 4 Har. & McHen; 703
R. v., 4 Cox, C. C; 1011
Lowery, U. S. v., 2 Wash. C. C. R; 1288
Lowney v. Perham, 2 App. (21 Maine); 809
Lowry, State v., 1 Swan (Tenn.); 546
Lucas v. State, 23 Conn; 767
Lucy v. State, 8 Mo; 482
Ludbury, R. v., 12 Mod; 431
Lukens, R. v., 1 Dallas; 480
U. S. v., 3 Wash. C. C. R; 1288
Lung's Case, 1 Conn; 494, 496
Luning v. State, 1 Chandler; 50
Lutz v. Com., 29 Penn. State R. 441; 1073
Lyford v. Farrar, 11 Foster (N. H.) 314; 760
Lymburn, State v., 1 Brevard; 1251
Lyme Regis v. Henley, 3 B. & Adol; 86
Lynch, People v., 11 Johns; 209
R. v., 5 C. & P; 995

SECTIONS.

Lynes *v.* State, 5 Port; 245
Lynn Regis *v.* Henley, 1 New Cases (House of Lords); 87
R. *v.* 7 T. R; 6
Lyon *v.* Loman, 9 Conn; 47
State, 22 Geo., 399; 986
Lyttleton *v.* Cross, 3 B. & C; 713

M.

Mabbett, R. *v.*, 5 Cox; 1011
Macbride *v.* Macbride, 4 Esp; 805
Macconnehey *v.* State, 5 Ohio (N. S.), 77; 35
Mackally's Case, 9 Co; 129, 598, 626, 1059
Mackey *v.* State, 3 Ohio St. Rep; 390
Macomb, U. S. *v.*, 5 McL. C. C. R; 667
Macomber, Com. *v.*, 3 Mass; 131
Maddocks, R. *v.*, 1 Sid; 766
Maeder *v.* State, 11 Mo; 528
Magill, U. S. *v.*, 1 Wash. C. C. R; 884, 930, 1052
Magrath, State *v.*, 16 Mo; 261
Mahala *v.* State, 10 Yerger; 578, 588, 589
Mahan, State *v.*, 12 Texas, 283; 472
Maher, State *v.*, 35 Maine; 565
Mainor, State *v.*, 6 Iredell; 429, 431
Mair, State *v.*, Coxe; 129, 598, 1074
Major, Com. *v.*, 6 Dana; 131, 153
R. *v.*, 2 East, P. C; 347
Makartney, R. *v.*, Salk; 778
Malone *v.* State, 8 Geo; 702
Malony *v.* Bartley, 3 Campb; 805
Malton *v.* Nesbit, 1 C. & P; 47
Manard *v.* Mammouthshire Canal Co., 4 M. & G. 87
Manley *v.* People, 3 Seld; 278
Mann, R. *v.*, 4 M. & S; 554
State *v.*, 1 Haywood's N. C. R; 134
Manners, R. *v.*, 7 C. & P; 126
Manning State *v.*, 4 Texas, 402; 238
Mansfield, R. *v.*, 1 C. & M; 728
Manson, Com. *v.*, 2 Ashm; 79, 414, 423, 431, 433, 468
Marbury *v.* Madison, 1 Cranch; 200, 207, 209, 776, 806
March *v.* Ludlam, 3 Sandf. Ch. R; 773
People *v.*, 6 Cal., 543; 57, 710, 1121
R. *v.*, 6 Ad. & El; 509
Marchant, U. S. *v.*, 12 Wheat; 794
Marcus, R. *v.*, 2 C. & K; 712
Marriott, R. *v.*, 8 C. & P; 3

SECTIONS.

Marsh, Com. *v.*, 1 Pick; 790
10 Pick; 777
People *v.*, 6 Cal., 543; 587
R. *v.*, 6 Ad. & Ell; 228, 465
1 Den. C. C; 292, 372
Marshal *v.* Adams, 11 Illinois; 667
R. *v.*, 1 Mood. C. C; 294
v. State, 8 Ind., 498; 790
Marston *v.* Jenness, 11 N. Hamp; 541
Marten, State *v.*, 2 Ired; 971
Marter, State *v.*, 2 Ala; 817
Martha *v.* State, 26 Ala., 72; 556, 570
Martin Com. *v.*, 2 Barr; 403
v. Com., 11 Leigh; 631, 702, 703
1 Mass; 71
Hunter, 1 Wheat; 204, 205, 206
Hunter, 3 Wheat; 162
R. *v.*, 3 C. & P; 710, 814, 1012
1 Moody C. C; 343
State *v.*, 2 Ired; 472, 473, 950
1 Williams (Vt.), 310; 635
v. State, 6 Humph; 260
Marvin, State *v.*, 35 N. H. 22; 791
Mason *v.* Bushel, 8 Mod; 244
R. *v.*, 2 East; 306
Master, R. *v.*, 6 C. & P; 1151
Mastin, R. *v.*, 6 C. & P; 1010
Mather *v.* Clark, 2 Aiken (Vermont, 1827); 65
Goddard, 7 Conn; 660
People *v.*, 4 Wend; 274, 437, 554, 564, 566, 805, 806, 808, 809, 812, 815
State *v.*, 1 Hill. S. C; 153
Mathews, R. *v.*, 1 Eng. R; 69
Mathias, State *v.*, 3 Pike; 519, 522
1 Hill. S. C; 594
Mattesin *v.* State, 3 Misso. Rep; 190
Matteson, People *v.*, 2 Cowen; 795
Matthew, R. *v.*, 1 Den. C. C; 73
Matthews, R. *v.*, 1 Eng. R; 75
v. State, 2 Yerg; 378, 379
Zane, 4 Cranch; 204
Mauran *v.* Lamb, 7 Cowen; 809
Maurice, U. S. *v.*, 2 Brock; 172
Mawgridge, R. *v.*, Kelw; 932, 965, 988
Maxwell Com. *v.*, 2 Pick; 379
May, State *v.*, 4 Devereux; 266
Mayhew, R. *v.*, 6 C. & P; 803
Mayo, U. S. *v.*, 1 Curtis C. C; 530
Mayor, R. *v.*, 1 Wills; 772
of Lynn *v.* Turner, Cowp; 87
&c., R. *v.*, 3 East; 90
Mazagora, R. *v.*, R. & R; 712
Mazean, R. *v.*, 9 C. & P; 112
McAleer *v.* McMullin, 2 Barr; 819

SECTIONS.

McAllester, State *v.*, 26 Maine (13 Shep.); 323
24 Maine (11 Shep.); 31, 637, 709
v. State, 17 Ala; 45, 46, 57, 434
McAtee, Com. *v.*, 8 Dana's Ky. R; 131, 303
McBirnie, State *v.*, Add; 1280
McBride *v.* McBride, 4 Esp. N. P; 809
State *v.*, Rice; 193
McBride *v.* State, 2 Eng. (Ark.); 385, 617
McCallester *v.* State, 17 Ala; 941
McCann, People *v.*, 3 Parker C. R. (N. Y.), 272; 46, 47, 635
16 N. Y. (2 Smith), 58; 55, 711
State *v.*, 1 Meigs; 482
v. State, 13 Sm. & Marsh; 738
McCann's Case, 14 Gratt, 570; 541
McCants, State *v.*, 1 Spear; 44, 990, 994
McCartney *v.* State, 3 Ind. 353; 631
McCarty, R. *v.*, 2 Dallas; 697
McChord, Com. *v.*, 2 Dana, 244; 562
McClarey, U. S. *v.*, 7 Bost. Law Rep. (N. S.); 707
McClellan, U. S. *v.*, 1 Gal; 209
McClung *v.* Silliman, 6 Wheat; 209
McClure *v.* State, 1 Yerg. Tenn. R; 219, 230
McClure *v.* State, 1 Yerger, 219; 588
McCluse, State *v.*, 25 Mo. (4 Jones), 29; 1280
McCombs *v.* State, 8 Ohio State R. (U. S.), 643; 1150, 1152
McCook, Com. *v.*, Whart. Prec;
McCormick, U. S. *v.*, 4 Cranch, C. C. R; 548, 599
McCourtney, State *v.*, 6 Mo; 482
McCoy *v.* State, 3 Eng; 977, 1025
State *v.*, 2 Aiken; 400
McCracken, State *v.*, 20 Mo. (5 Bennett), 411; 282
McCreary *v.* Com., 29 Penn. St. R. 323; 575
McCulloch *v.* State of Maryland, 4 Wheat; 611
M'Cully's Case, 2 Lewin, C. C; 162
McDade *v.* State, 20 Ala; 261
McDaniel, R. *v.*, Foster; 121
v. State, 8 S. & M; 674, 681, 944, 975
McDonald, Com. *v.*, 5 Cush; 292, 1281
v. State, 8 Mo; 338, 497

SECTIONS.

McDonald, State *v.*, 4 Jones Law (N. C.), 353; 1025
McDowell, Com. *v.*, 1 Browne; 330
State *v.*, 6 Blackf; 243
McElroy *v.* State, 8 Eng. (13 Ark.); 283
McEntire, State *v.*, Car. L. R; 489
McFadden, Com. *v.*, 11 Harris; 544, 575, 590
McFall, Penns. *v.*, Addison; 41, 44, 918, 944
McGahey *v.* Alston, 2 M. & W; 653
McGarren, People *v.*, 17 Wend; 795
McGavaren, R. *v.*, 6 Cox, C. C; 1249, 1262
McGee, People *v.*, 1 Denio; 665, 755, 1150
v. State, 8 Mo; 1115, 1121
U. S. *v.*, 1 Curtis, 1; 46
McGlue, U. S. *v.*, 1 Curtis C. C. R; 36, 40, 46, 711, 944, 947, 950
McGlynn, State *v.*, 34 N.H. 422; 614
McGorrigal, Com. *v.*, 1 Bennet & Herd Lead. Cases; 297
McGowan, People *v.*, 17 Wend; 560
McGrath, State *v.*, 19 Mis. (4 Bennett), 678; 275
McGraw, State *v.*, 1 Walk; 551, 557.
McGregg *v.* State, 4 Blackf; 474
McGuffie *v.* State, 17 Geo. 497; 498, 979
17 Geo. 194; 1123
McHugh *v.* State, 31 Ala. 317; 677
McIntosh, R. *v.*, 2 East, P. C; 350
McIntyre, People *v.*, 1 Harris, C. C; 433, 790
v. Wood, 7 Cranch; 165, 209
Young, 6 Blackf; 817, 849
McJunkins *v.* State, 10 Ind. 140; 433
McKee, Penn. *v.*, Addison; 274, 1234
State *v.*, 1 Bailey; 274, 503, 544, 589, 1234
McKie, Com. *v.*, 1 Gray R; 63, 64, 707
McKinney *v.* Neil, 1 McLean; 819
McLain, State *v.*, 2 Brev; 337, 611
McLane *v.* State, 4 Georg; 445
McLaughlin, Com. *v.*, 4 R; 328, 330, 345, 346, 407
McLean *v.* State, 16 Ala; 657
McLellan *v.* Richardson, 1 Shep; 495
McLemour, State *v.*, 2 Hill, S. C; 577, 588, 589, 680
McLeod, People *v.*, 1 Hill; 18, 710, 944, 947, 1020, 1026
State *v.*, 1 Hawks; 509
McMahan, People *v.*, 2 Parker C. R. 663; 690

SECTIONS.

McMahon, People v., 15 N. Y. (1 Smith), 384; 690
McMakin, R. v., Russ. & R. C. C; 118
McMebin, People v., 8 Cal. 547; 1244
McMillan v. State, 5 Ohio; 340
McNair, People v., 21 Wend; 755
McNaughton, R. v., 8 C. & P; 492
McNeal, U. S. v., 1 Gallison; 271, 599, 609
McNeill, State v., 3 Hawks; 544
McO'Blenis, State v., 24 Miss. (3 Jones), 402; 667
21 Mis. (6 Benn), 272; 435
McPherson v. State, 9 Yerger; 682
22 Geo. 478; 678, 1020, 1024
McPike, Com. v., 3 Cush; 35, 651, 680, 932, 941
McQuillan v. State, 8 S. & M; 472, 473, 530
McQuoid v. People, 3 Gilmore; 285, 569, 1293
McRue, R. v., 8 C. & P; 1138
McWaters v. State, 10 Mo; 482
Mead, R. v., 2 B. & C; 675
4 C. & P; 348
v. Robinson, Willes; 783
Meakin, R. v., 7 C. & P; 35, 39, 43
Mears, R. v., 1 Bos. Law Rep; 112
Medans v. State, 10 Yerger; 482
Mee v. Reid, Peake, C. N. P; 799
Megnier v. Cabot, 2 Gilman; 19
Megson, R. v., 9 C. & P; 672
Mehan v. State, 7 Wisc. 670; 708
Melen v. Andrews, 1 M. & W; 696, 703
Melville, State v., 10 La. R; 424
Melvin v. Easley, 1 Jones; 50
Mercer v. State, 17 Geo. 146; 41
Merceron, R. v., 2 Stark; 690
Mercy, Com. v., 1 Gray; 692
Meredith v. Com., 18 B. Mon. (Ky.), 49; 641, 1026
R. v., 8 C. & P; 8
Meriam, Com. v., 7 Mass; 54
Merrick, State v., 19 Maine; 728
Merrill, Com. v., Thacher's C. C; 768
People v., 2 Parker C. R. (N. Y.), 590; 1187
State v., 2 Dev; 710, 944, 970
Merritt's Case, Hall's L. J; 195
Mertens, State v., 14 Mo; 497
Mesca, R. v., 1 Dall; 473
Messenger, Com. v., 1 Binney; 326, 608, 657
4 Mass; 214
R. v., Kel; 70
Messingham, R. v., R. & M; 432

SECTIONS.

Metcalf, People v., 1 Wheel. C. C; 1144
Metzger v. People, 14 Ill; 378, 379
Meyer, U. S. v., Whar. Prec; 172
Michael, R. v., 9 C. & P; 112
Mickle v. State, 27 Ala; 732, 734
Middlehurst, R. v., 1 Burr; 296, 620
Middleship, R. v., 5 Cox, C. C; 1011
Middleton, State v., 5 Porter; 472
Mifflin, Com. v., 5 Watts & Serg; 298
Mildrone, R. v., Leach; 799
Milgate, People v., 5 Cal. 127; 710
Millard, Com. v., 1 Mass; 728
R. v., Russ. & Ry; 633, 635
Miller, Com. v., 2 Ash; 513, 544, 1115
5 Dana; 541
3 Cush; 647
2 Par; 372, 427, 430
v. People, 5 Barbour; 712
State v., 1 Dev. & Bat; 1256
24 Conn. 522; 378, 395
v. State, 5 How; 381
8 Ind. 325; 579
Mills, R. v., 6 C. & P. 146; 692
v. Com., 1 Harris; 397, 414
Oddy, 6 C. & P; 773
State v., 17 Maine; 618
U. S. v., 7 Peters; 131
Milnor v. Tillotson, 7 Peters; 652, 653
Mingo, U. S. v., 2 Curtis C. C. 1; 944, 1019
Minton, R. v., 1 McNalby; 671
Mitchell, Com. v., 2 Par; 1257
1 Va. Cases; 932
R. v., 12 Eng. Law & Eq; 385, 617, 1280
3 Cox, C. C; 544
v. State, 5 Yerger; 710, 944, 1084, 1114, 1115
22 Geo. 211; 1020
State v., 6 Mis; 364
5 Ired; 712
1 Bay; 213
Mitchum v. State, 11 Georg; 407, 737, 745, 944, 950
Mix, State v., 15 Mis; 712
Mobbs, R. v., 6 Cox, C. C; 647
Moffett, State v., 1 Greene (Iowa); 373
Moffitt v. State, 2 Humph; 790
Moles, State v., 9 Mo; 482
Molier, State v., 1 Devereux; 307, 406
Molliere, State v., 1 Dev; 803, 804
Monke v. Butler, 1 Roll. R; 713
Monkhouse, R. v., 4 Cox, C. C; 41
Monkton v. Attorney Gen., 2 Russ. & My; 666
Monroe v. State, 5 Geo; 18, 1025
Twistleton, Peake's Evid. Ap; 771

SECTIONS.
Montague, State v., 2 M'Cord; 418, 1153
Montgomery, Com. v., 11 Metc; 728
v. Hernandez, 12 Wheat; 205
v. State, 11 Ohio; 671, 682, 926
Moody v. People, 20 Ill. 315; 1209
Rowell, 10 Pick; 47
R. v., 2 Crawford & Dix, C. C. 347; 692
State v., 2 Haywood; 674, 790
v. State, 7 Blackf; 602
Moor, State v., 1 Walker (Miss.), 134; 588
Moore, Com. v., 9 Mass. R; 532
v. Com., 2 Leigh; 685, 694
Huston, 3 S. & R; 184, 191
People v., 8 Cal. 90; 948
R. v., Law Rep. (N. S;) 42, 657, 692
State v., 12 N. H; 10, 608, 635
v. State, 12 Ala; 583, 671, 676, 682, 727, 734, 859
U. S. v., 3 Cranch; 201, 203, 204, 208
Moran, State v., 7 Clarke (Iowa) 236; 1121
Morea, State v., 2 Ala; 755, 944
Morey, Com. v., 1 Gray R; 688, 692
State v., 2 Wis. 494; 357
Morgan v. Cor. of Carmarthan, 3 Keble; 89
R. v., 29 Eng. Law & Eq; 799
v. State, 13 S. & M; 1279
State v., 3 Iredell; 975, 1020, 1025, 1244, 1284
Morley, R. v., 1 Y. & J; 297
Morman v. State, 24 Miss; 565, 1279
Morrill, Com. v., 8 Cush; 613
Morris' Case, 2 Leach; 74
Morris, R. v., 1 Leach, C. C; 348, 622, 625
State v., 1 Blackf; 550, 563
3 Zab; 87
v. State, 8 Smede & Mar; 421, 550
U. S. v., 1 Curtis, C. C; 544, 588
Morrison v. Leonard, 3 C. & P; 754
Penns. v., Addison's Pa. R; 4
State v., 3 Dev; 614, 624, 708
v. State, 5 Ohio Rep; 703
Morrow, U. S. v., 4 Wash. C. C; 131
Mors v. Palmer, 3 Harris; 816
Morse v. Crawford, 17 Vt; 48
R. v., Str; 778
Mortimer, Com. v., 2 Virg. C; 556
v. Mortimer, 2 Hagg, Conn. R; 683

SECTIONS.
Morton v. Shopple, 3 Car. & Payne; 1242
State v., 1 Williams (Vt;) 381, 390
Moses, State v., 2 Dev; 407, 1069
U. States v., 4 Wash. C. C. R; 776
Mosler, Com. v., 4 Barr; 15, 16, 689, 971
MSS. Phil; 46
Mosley, R. v., R. & M; 671, 673, 674, 1069
Moss v. State, 17 Ark. 327; 790
Mossam v. Joy, 10 St. Tr; 868
Mott, Com. v., 21 Pick; 567
R. v., 2 East, P. C. R. & R; 377, 782
Moulton, Com. v., 9 Mass; 778
U. S. v., 5 Mason; 316
Mount v. State, 14 Ohio; 513, 544, 545
Moyer v. Com., 7 Barr; 294, 405
Leicester, 9 Mass; 90
Moyle, R. v., 2 East. P. C; 377
Moyre, R. v., 1 Leach; 118
Mulatto Bob, Com. v., 4 Dallas; 727, 1099, 1113, 1114
Muldoon, People v., 2 Parker, C. R. (N. Y.) 13; 1289
Muller's Case, Pamp. 1 Orleans; 863
Mundell, U. S. v., 6 Gall; 483
Munger, State v., 15 Vt; 274, 379, 403, 599
Murdock, State v., 9 Mis; 399
Murphy, Com. v., 2 Gray (Mass) 510; 78
11 Cush. (Mass.) 472; 547, 1055
R. v., 8 C. & P; 705
Com. v., 2 Gray; 69, 76, 814
R. v., 6 C. & P; 121, 414, 958
v. State, 28 Miss; 616, 780
U. S. v., 16 Peters; 778
Murray, Com. v., 2 Ashm; 591, 669, 681, 1084, 1106, 1113
People v., 10 Cal. 309; 641, 1114
R. v., 5 Cox; 1002, 1006
State v., 15 Maine; 564, 566
Muscot, R. v., 10 Mod; 778, 803
1 Modern; 778
Myddleton, R. v., 6 Term R; 297
Myers, Com. v., Gen. Court of Virg., Nov. T; 541, 568
v. State, 1 Com; 83

N.

Nash v. State, 2 Greene (Iowa); 1052
State v., 7 Iowa, 347; 669, 702

SECTIONS.
Nass *v.* Van Swearinger, 7 S. & R; 809
Nat, State *v.*, 6 Jones' Law (N. C.) 114; 714
Nathan, State *v.*, 5 Richards; 563
Neal, Com. *v.*, 10 Mass; 1177
v. Farmer, 9 Georgia; 1050
State *v.*, 7 Foster; 594
37 Maine; 1279, 1280
Neale, R. *v.*, 1 Denison, C. C; 564
Neales *v.* State, 10 Mis; 380
Ned *v.* State, 7 Porter; 573–4–8, 588, 589
Needham *v.* State, 1 Texas; 631
Negro Bill, State *v.*, 3 Harrington; 1279, 1283
Negro Jerry *v.* Townshend, 9 Md. 145; 46
Neil, State *v.*, 6 Ala; 770
Nelmo *v.* State, 11 Sm. & M. 500; 682
Nelson *v.* State, 7 Humph; 670–1
11 Humph; 1043
10 Humph; 1258
State *v.*, 29 Maine (16 Shep;) 68, 245, 391, 416, 423, 424, 565
7 Ala; 528
8 N. Hamp; 381
Neville, State *v.*, 6 Jones' Law (N. C.) 424; 983
Nevins, State *v.*, 23 Vt; 349
New Bedford Bridge, U. S. *v.*, 1 Woodb. & Minot; 172
Newall, Com. *v.*, 7 Mass; 10, 388, 400, 1175, 1269
Resp. *v.*, 2 Yeates; 413
Newer, State *v.*, 7 Blackf; 473
Newhall *v.* Jenkins, 2 Gray (Mass.) 562; 758
Newland, R. *v.*, 1 Leach; 781
Newman, People *v.*, 5 Hill; 667
State *v.*, 7 Ala; 744
2 Car. Law Rep; 536
Newson, State *v.*, 2 Jones' Law (N. C.) 173; 599
Newton *v.* Maxwell, 2 Crompt. & Jer; 241
R. *v.*, 2 Moody; 349
13 A. B; 716
3 Cox, C. C. 489; 588
Nichol, R. *v.*, R. & R; 1249, 1262
Nichols, Com. *v.*, 10 Metc; 153, 594
v. Dowling, 1 Stark; 703
State, 8 Ohio State R. (N. S.) 435; 41, 43, 46, 1280
Nicholas, R. *v.*, 2 Car. & K; 755, 1150
Nickerson, U. S. *v.*, 17 Howard, U. S; 565
Nixon *v.* People, 2 Scammon; 1011

SECTIONS.
Nixon, State *v.*, 18 Vt. (3 Washb;) 227, 631
N. J. Turnpike Co., State *v.*, 1 Harr; 86
Noble *v.* People, Breese; 781
State *v.*, 15 Maine (3 Shep;) 622, 630
Nolan, R. *v.*, 1 Crawford & Dix, C. C. 37; 692
Noland *v* State, 19 Ohio; 111
Noles *v.* State, 26 Alab; 1025–6
Noll, State *v.*, 5 Black; 364
Norcross, Com. *v.*, 9 Mass; 659
Norkot's Case, 14 Howell's St. Tr; 834
Normague *v.* People, Breese; 497
Norman, State *v.*, 2 Dev; 379
v. State, 1 Sm. & Marsh; 696
24 Mis; 297
Norris, State *v.*, 1 Hay; 930
v. State, 16 Alab; 48
3 Iowa 513; 465
Northampton, Com. *v.*, 2 Mass; 411
Northus *v.* Jackson, 13 Wend; 660
Norton, Com. *v.*, 3 Bost. Law Rep; 955
People *v.*, 8 Cowen; 134
R. *v.*, R. & R; 251
Russ. & Ry; 250, 285
v. State, 4 Texas 260; 541
State *v.*, 3 Zabr; 228, 232
Norvell, State *v.*, 2 Yerger; 540, 554, 587
Nott *v.* U. S., M'Lean; 685, 687
Nugant *v.* State, 4 Stew. & Port; 72, 589
Nugent, People *v.*, 3 Califor; 378
Territory *v.*, 1 Martin; 806
Nunez, R. *v.*, 2 Stra; 780
Nuthill *v.* State, 11 Humph; 140

O.

Oakley *v.* Schumaker, 15 Wendell; 685
O'Bannon, State *v.*, 1 Bail; 364, 1212
O'Brian, R. *v.*, 2 Car. & Kir; 1062
O'Callahan, U. S. *v.*, 6 McLean, C. C. R; 429, 641
O'Coigley, R. *v.*, 26 How. St. Tr; 809
O'Connell *v.* Com., 7 Met; 613
R., 11 C. C. & Fin; 616, 620
Oddy, R. *v.*, 5 Cox, C. C; 640
Odell, State *v.*, 4 Blackf; 541
Odgers, R. *v.*, 2 M. & Rob; 527
Offord, R. *v.*, 5 C. & P; 15, 45, 46
Offut, State *v.*, 4 Blackf; 508

SECTIONS.

Ogilvie, R. *v.*, 2 C. & P; 250
Ogle *v.* Lee, 2 Cranch; 201
O'Hara, Com. *v.*, 7 Smith's Laws, 1113
Ohnmacht, State *v.*, 10 La. R; 497
Oichman, R. *v.*, 2 East. P. C; 728
Olcott, People *v.*, 2 John; 582
Olds, Com. *v.*, 5 Little; 586
Oliver *v.* State, 17 Ala; 976, 1025
5 How. Miss. R; 599
Omichuned *v.* Barker, Willes; 795
O'Neil, State *v.*, Iredell; 657, 638, 814
Orbell, R. *v.*, 6 Mod; 519
Orr *v.* State, 18 Ark. 540; 414
Orrell, State *v.*, 1 Dev; 1052, 1073
Ortega, U. S. *v.*, 4 Wash. C. C; 83, 209
Osborne *v.* Bank U. S., 9 Wheat; 189
People, 2 Parker, C. R. (N. Y.) 583; 648
Osmer, R. *v.*, 5 East; 285
Osulston, Lord, R. *v.*, 2 Stra; 542
Oulagan, R. *v.*, Jebb. C. C. 270; 588
Overdeer *v.* Lewis, 1 W. & S; 1255
Overshiner *v.* Com., 2 B. Monroe; 498
Overstreet *v.* State, 3 How. Miss; 668
Owen, R. *v.*, 4 Carrington & Payne; 58, 65
9 C. & P; 690
1 Ry. & M. C. C; 124
Owens, State *v.*, 1 Murphey; 1067, 1069, 1072
10 Rich. Law, S. C., 16; 595
Oxford, R. *v.*, 9 C. & P; 15, 57

P.

Packard, R. *v.*, 1 C. & M; 1012
Paed, R. *v.*, 4 Bur; 554
Page *v.* Com., 9 Leigh; 591
Palmer *v.* Haight, 2 Barb. Sup. Ct; 819
R. *v.*, 3 St. Tr; 112, 802
State *v.*, 35 Maine (5 Red.); 622
18 Ver; 379
U. S. *v.*, 2 Cranch, C. C. R; 119, 490
Palse *v.* State, 5 Humph; 9
Pargeter, R. *v.*, 3 Cox; 1011
Paris, R. *v.*, 1 Sid; 778
Parish, State *v.*, 1 Busbee; 690
Park, Com. *v.*, 1 Gray; 153, 594
Parker, Com. *v.*, 2 Pick; 472, 1221
9 Metc; 1221
State *v.*, 1 Chapman's Ver. R; 311, 608
Parkerson, State *v.*, 1 Strobh; 69, 73

SECTIONS.

Parks *v.* State, 3 Ohio St. Rep; 1115
Parmenter, Com. *v.*, 5 Pick; 309, 606
Parnther, Att'y Gen. *v.*, 3 Brown C. C; 711
Parr, Com. *v.*, 5 W. & S; 529, 564, 566, 1137
Parratt, R. *v.*, 4 C. & P., 570; 692
Parry, R. *v.*, 7 C. & P; 562, 568, 570
Parsons *v.* State, 21 Alab; 941
Patridge, R. *v.*, 7 C. & P; 680, 728
Passey, R. *v.*, 7 C. & P; 118
Pate *v.* People, 3 Gilman; 707
Patrick, *v.* State, 3 Jones Law (N. C.), 443; 701
State *v.*, 3 Wis., 812; 1283
Patterson, State *v.*, 2 Iredell; 597, 813, 817
7 Iredell; 289
U. S. *v.*, 3 McLean; 778
Patton, State *v.*, 10 La. R; 51
4 Ired. N. C; 86
Paul, R. *v.*, 1 Leach; 306
Paxton *v.* Douglas, 19 Ver; 805
Payne *v.* Com., 1 Metc. (Ky.), 370; 641, 1026
Payne *v.* People, 6 Johnson; 362
State *v.*, 4 Mis; 541
Peace's Case, 3 Barn. & Ald; 249
Peace R. *v.*, 3 Barn. & Ald; 249, 251
Pearce, R. *v.*, 9 Car. & P; 52, 769
U. S. *v.*, 2 McLean; 83
Peck, Com. *v.*, 1 Metcalf; 781
Pegler, R. *v.*, 5 C. & P; 805
Peiffer *v.* Com., 3 Harris; 575
Pell *v.* Provost, 2 Caines; 249
Pendergrass, State *v.*, 2 D. & B; 1259
Pendleton *v.* Com., 4 Leigh; 311, 608
Pendock *v.* Mackinder, Willes; 760
Percival, Com. *v.*, Thach. C. C; 631
Perdue *v.* State, 2 Humph; 631
Peres, U. S. *v.* 9 Wheaton; 580, 591
Perkins, Com. *v.*, 7 Gratt; 312
1 Pick; 238, 249
Reg. *v.*, 2 Mood. C. C; 755
R. *v.*, 9 C. & P; 672
2 M. C. C; 677
4 C. & P; 121
State *v.*, 3 Hawks; 696
v. Stevens, 24 Pick; 765
Perry, R. *v.*, 4 T. R; 351
1 Den. C. C; 362
Peter, *v.* State, 4 Sme. & Marsh; 694, 701
3 How. Mis; 481
Peters, Com. *v.*, 12 Metc; 177, 541
State *v.*, 2 Rice's Digest; 701, 944
v. State, 3 How. Mis; 502

SECTIONS.

Peterson, U. S. *v.*, 1 W. & M; 414, 419, 513
Petrie *v.* Woodward, 3 Caines; 258
Pettaway, State *v.*, 3 Hawks; 768
Petty, State *v.*, Harp; 365
Pew, R. *v.*, Cro. Car; 1041
Phelps, People *v.*, 5 Wend; 218
R. *v.*, 1 C. & M; 527, 981, 1033
State *v.*, 11 Vermont R; 413, 630, 685, 781
2 Tyler; 771
Phil, State *v.*, 1 Stewart; 551
Philbrick, State *v.*, 1 Red; 285
Philips, R. *v.*, 6 East; 631
Phillips, Com. *v.*, 16 Mass; 135
v. Evans, 1 Cr. & M; 713
Kingfield, 1 App; 814, 815
R. *v.*, C. & P; 61, 1134
1 Lewin, C. C; 633
6 East; 8
2 Str; 430
State *v.*, 24 Mis. (3 Jones), 476; 697, 714
24 Mis. (3 Jones), 475; 1117
v. State, 9 Humph; 1150
Philpott, R. *v.*, 20 Eng. Law & Eq; 1011, 1249
Phinney, State *v.*, 42 Maine, 384; 421, 1283
Phipps, State *v.*, 10 Iredell; 5
Pierson *v.* State, 12 Ala; 944, 1020
Steortz, 1 Morris; 773
Pike, R. *v.*, 3 C. & P; 671, 677, 755
State *v.*, 15 N. H; 185
Pigman *v.* State, 14 Ohio; 42
Pine, People *v.*, 2 Barbour; 16, 18, 22, 40
Pintard, Com. *v.*, 1 Browne; 287
Pirtle *v.* State, 9 Humph; 40, 41, 44, 1109
Pitman *v.* Com., 2 Robinson; 373
Pitts, R. *v.*, C. & M; 710, 961, 1016
Plant, R. *v.*, 7 Car. & P; 552
Planter's Bank *v.* Georgia, 6 Martin; 809
Pleasant *v.* State, 8 Eng. (3 Ark.); 1142, 1145, 1148
15 Arkansas; 772, 782, 814, 1150
Pleasanton *v.* State, 15 Ark; 814
Pleasants *v.* State, 15 Ark; 1152
Plestow, R. *v.*, 1 Camp; 626
Plumbley *v.* Com., 2 Met; 567
Plummer R. *v.*, 1 C. & K; 1011
Plunkett, State *v.* 2 Stewart; 365
Poage *v.* State, 3 Ohio St. Rep. N. S; 588, 759

SECTIONS.

Poll, State *v.*, 1 Hawks; 671, 674, 681, 702, 703, 704
Pollard, Com. *v.*, 12 Metc; 804
R. *v.*, 8 C. & P; 75
Pomeroy *v.* Com., 2 Va. Cases; 346
Pond, U. S. *v.*, 2 Curtis C. C., 265; 364, 520
Pool, State *v.*, 2 Dev; 412
Poole *v.* Perritt, 1 Spears; 805
Richardson, 3 Mass; 48
Pope *v.* Foster, 4 T. R; 271, 599, 609, 613
Popplewell, R. *v.*, 1 Str; 351
Populus, State *v.*, 12 Ga., Ann., 710; 591
Porter, State *v.*, 10 Rich. Law (S. C.), 145; 599
U. S. *v.*, 2 Cranch, C. C. R; 414, 761, 778
Posey, State *v.*, 7 Richardson; 419
Postmaster Gen. *v.* Stockton, 12 Peters; 524
Potter, People *v.*, 1 Parker C. C; 766
5 Mich., 1; 1084
U. S. *v.*, 6 McLean, C. C. R; 294
Potts *v.* House, 6 Georgia; 46, 48
State *v.*, 4 Halstead; 311, 608
Poulton, R. *v.*, 5 Car. & Paine; 748, 941, 942
Powell, Com. *v.*, 8 Leigh; 5
R. *v.*, 14 Eng. L. & Eq; 348
1 Leach; 755
v. State 19 Alab; 577, 589
Power Com. *v.*, 7 Metcalf, 596; 1255
Powers, State *v.*, 25 Com., 48; 378
Pratt, State *v.*, 10 La; 364
Pray, Com. *v.*, 13 Pick; 289
Preslar, State *v.*, 3 Jones' Law, N. C., 421; 1014
Pressly's Case, 6 C. & P., 183; 697
Preston *v.* State *v.*, 25 Mis; 540, 970, 979
Preswell, State *v.*, 12 Ired; 631
Price, Com. *v.*, 8 Leigh; 596
R. *v.*, 3 Per. & D; 631, 682
8 C. & P; 73, 74, 1037
v. State, 19 Ohio; 238, 565
State *v.*, 12 Gill & J; 379
6 Halstead; 228, 295, 368
Priddle, R. *v.*, 2 Leach C. C; 759
Prigg *v.* Com., 16 Peters; 184, 205, 1094
Prior, U. S. *v.*, 5 Cranch, C. C. R; 419
Pritchard, R. *v.*, 7 C. & P; 53, 531
Pritchett *v.* State, 22 Alab; 641
2 Sneed (Tenn.); 285; 587

SECTIONS.

Proprietors, Com. v., 2 Gray; 87, 88
Puckering, R. v., 1 Mood. C. C; 359
Puddifoot, R. v., 1 Mood; 377
Pulham, R. v., 9 C. & P; 422, 432
Pullbrook, R., 9 C. & P; 350
Pulten v. People, 1 Dougl; 768
Purchase, Com. v., 2 Pick; 581, 587
R. v., 1 C. & M; 527
Putnam, State v., 38 Maine; 519
Pybos v. State, 3 Humph; 465
Pye's Case, East's P. C; 623
Pyland v. State, 4 Sneed (Tenn.) 357; 362

Q.

Queen's Case, 2 B. & B; 661, 677, 797, 819
Quesenberry v. State, 3 Stew. & Port; 641
Quin, Com. v. Gray, Mass. 478; 278
Quinn, State v., 3 Brev; 1258

R.

Rabon, State v., 4 Rich; 1072
Radley, Com. v., 3 Cox C. C; 48
R. v., 2 Car. & K; 625
Ragan, State v., 22 Mis. (1 Jones), 459; 364
Raifort, State v., 7 Port; 265, 396, 408
Rainey v. People, 3 Gilman, 501
Rambler v. Tyrone, 7 S. & R; 648
Ramsey, State v., 5 Jones, N. C. 195; 979
Rand v. Com., 9 Gratt. (Va); 427
State v., 33 N. H. 216; 473, 706
Randall, R. v. R. & R; 344
Com. v., 4 Gray (Mass) 36; 622, 1259
State v., 2 Aikens; 192
Randolph v. Com. 6 Serg. & R; 292
People v., 2 Parker C. R. 213; 61, 1134
State v., 24 Conn. 363; 761, 814
Rands, People v., 3 Parker C. R. (N. Y.), 335; 634
Rank v. Shewey, 4 Watts; 660
Rankin, People v., 2 Wheeler's C. C; 685
R. v., 1 R. & R; 988
Rapp v. Com. 14 B. Monroe, 614; 641, 970
Rash, State v., 12 Ired; 635, 639, 649
Rasnick v. Com., 2 Virg. C; 368, 381, 390
Rasnick's Case, 2 Virg. Ca; 129

SECTIONS.

Rathburn, People v., 21 Wend; 605, 714
Rather v. State, Porter, 67, 77
Ravara, U. S. v., Wharton's St. Tr; 167
2 Dallas; 209
Rawden, R. v., 8 B. & C; 660
Rawle v. State, 8 S. & M; 472, 528
Ray, Com. v., 3 Gray, 441; 607
State v., 1 Rice; 551, 565, 587
v. State, 15 Georgia; 970
Read, R. v., Fost. Rep; 98
Reading, R. v., 1 Leech C. C; 342
R. T. Hard; 770
Reany, R. v., 40 Eng. Law & Eq. 552; 673, 680
Reason, R. v., 1 Str; 679
Rector, People v., 19 Wend; 805, 815, 898
Redley, R. v., Russ. & R; 281
Reed, Com. v., 3 Am. L. Journ; 400, 781, 1174, 1175
v. Jackson, 1 East; 713
R. v., 2 Den. C. C; 540
v. State, 15 Ohio; 633
16 Ark. 499; 251, 252, 597
State v., 35 Maine (5 Redf.); 265, 408
12 Md. 263; 560, 565
Reed's Case, 2 Rodgers' Rec; 355
Reese v. State, 8 Ind. 416; 579
Reeves v. State, 20 Ala; 219, 220, 224
Reid, R. v., 1 Eng. Law & Eq; 389
Rennie's Case, 1 Lew. C. C; 35
Renshaw, R. v., 20 Eng. Law & Eq; 1249
Rensick v. Delafield, 2 Cox; 1011
Restall v. Stratton, 1 H. Bl; 271, 599
Revels, State v., 1 Busbee; 565
Reyburn, U. S. v., 6 Peters; 652, 653
Reynolds v. State, 2 N. & McCord; 379
3 Kelly; 513, 544
11 Texas, 120; 385, 474
Rhea v. State, 10 Yerger; 662
Rhine, v. Robinson, 27 Pa. St. R. 30; 667
Rhodes, R. v., 2 Stra; 549
Rhodes' Case, Serg. Cons. L; 95
2 Stra; 781
Rice v. State, 8 Mis; 1015
Richards, Com. v., 1 Mass. R; 319, 345
18 Pick; 667
People v., 1 Mich; 564
R. v., 5 C. & P; 680

SECTIONS.
Richardson, U. S. v., 5 Cranch, C. C. R; 1244
Richels v. State, 1 Sneedy; 1241, 1245, 1250
Richey, State v., 5 Halst; 469, 472, 519
Ridgly, State v., 2 Har. & M'Hen; 762
Ridgway's Case, 2 Ashmead; 455
Riggs v. State, 26 Mississippi; 1053
30 Miss. (1 George) 635; 710
Rigmardon, R. v., 1 Lewin; 1005
Rigsby, U. S. v., 2 Cranch, C. C. R; 363
Riley, Com. v., Thach. C. C; 597, 606, 1019
v. State, 9 Humph; 603, 1052, 1084
Ripley, State v., 2 Brevard; 411
Risher, State v., 1 Rich; 556, 565
Risler, State v., 1 Richardson; 565
Rivereau v. St. Ament, 3 Iowa, 118; 667
Roach, State v., 2 Haywood; 269, 518
Roan, State v., 2 Dev; 1039
Robb v. Hackley, 23 Wend; 820
Robbins v. State, 20 Ala; 1260
8 Ohio State R. (N. S.), 131; 669, 671, 925, 927, 1219
State v., 1 Strobb; 412
Roben, State v., 4 Rich; 399
Roberts v. Allett, M. & M; 808, 809
Com. v., 1 Yeates; 383
v. Doxon, Peake's C; 655
People v., 6 Cal. 214; 499
v. State, 14 Missouri; 766, 949, 1035
19 Ala; 261
3 Georg; 18, 22, 26
14 Geo; 563, 565
State v., 1 Deveraux, 259; 694
26 Maine (13 Shep.); 277
2 Dever. & Bat; 489
Klev; 694
R. v., 33 Eng. Law & Eq. 583
C. & M; 350
2 C. & K; 802
1 Camp; 649, 704
Robins, R. v., 2 Moody & R; 1151
Robinson v. Calf, 1 Const. R; 549
Com. v., Thach. Cr. Cas; 637, 1178
1 Gray R; 650, 700, 767, 790, 794

SECTIONS.
Robinson v. Dane, 16 Ver; 752
Neal, 5 Monroe; 805
People v., 2 Parker (N. Y), 235; 40, 41, 44, 673
1 Harris, C. C; 40
1 Parker, C. C; 711
State v., 9 Foster; 445, 578
R. v. 2 Burr; 10
2 Leach; 635
1 Holt; 251
Roby, Com. v., 12 Pick; 388, 563, 621
Roche, R. v., 1 Leach; 541
Rockafellow, State v., 1 Halst; 469
Roderick, R. v., 7 C. & P; 8
Roe, State v., 12 Verm; 513
Roebuck, R. v., 36 Eng. Law & Eq. 631; 631, 649
Rogers, Com. v., 7 Metc; 15, 16, 22, 45, 46, 47, 55, 83, 709, 711, 761, 1281
5 Serg. & R; 292, 480
7 Metc. 500; 55
v. People, 3 Parker. C. R. (N. Y.), 632; 41
People v., 4 E. D. Smith (N. Y.) 9; 689
R. v., 8 C. & P; 344
9 C. & P; 343, 350
Rogier, R. v., 1 B. & C; 668
Rohfrisch, State v., 12 La. An. 382; 499
Rollins, State v., 8 New Hampshire; 4, 1208, 1209
Romp v. State, 3 Iowa, 276; 364, 378
Rookwood, R. v., Holt; 524
Roozevelt v. Gardiner, 2 Cowen; 238
Roper, R. v., 1 Crawf. & Dix, C. C; 544
Rosinski, R. v., 1 Mood. C. C; 1247
Ross, Resp. v., 2 Dallas; 781
State v., 25 Mo. (4 Jones), 426; 1160
v. State, 9 Mo; 528
1 Blackf; 369, 616
Triplett, 3 Wheat; 203
U. S. v., 1 Garrison; 127, 959, 998
Roudenbush, U. S. v., 1 Bald; 42, 44
Roulstone, State v., 3 Sneed. (Tenn.), 107; 430
Rout, State v., 3 Hawks; 333, 345
Row, R. v., Russell & Ryan, C. C. 153; 686
Rowlands, R. v., 2 Den. C. C; 513
Royall, U. S. v., 3 Cranch, C. C. R; 288, 289

SECTIONS.
Rudd, R. *v.*, 1 Leach; 769
Ruddifoot, R. *v.*, R. & M; 611
Ruffney, Com. *v.*, 28 Pa. St. Rep. 259; 445
Ruggles *v.* Borter & Johnston; 6
Rulloff, People *v.*, 3 Parker, C. R. (N. Y.), 401; 683, 745
Rump *v.* Com., 30 Penn. S. R. 475; 190
Rush *v.* Cavenaugh, 2 Barr; 474
Russell *v.* Com., 7 Serg. & R; 411
R. *v.*, 1 Leach; 781
M. C. C; 122, 137, 964
1 C. & M; 489
State *v.*, 2 Yeates; 809
Russen, R. *v.*, 1 East, P. C; 1138
Russhing, State *v.*, 2 N. & M'Cord; 596
Rust, People *v.*, 1 Caines' R; 285
State *v.*, 35 N. H., 438; 364, 426
Rutherford, State *v.*, 1 Hawks; 987, 1039
13 Texas, 24; 522
Rutherwood, State *v.*, 1 Hawks; 998
Rutledge, State *v.*, 8 Humph; 373, 528
Ryan, People *v.*, 2 Wheel. C. C; 983
Rynders, People *v.*, 12 Wend; 414

S.

Sackett, Com. *v.*, 22 Pick; 637, 638
State *v.*, 1 Hawks; 641
Sainsbury, R. *v.*, 4 T. R; 10
Salisbury *v.* State, 6 Conn; 320, 778
Sallagher, Conn. *v.*, 4 Pa. L. J; 1150
Sallis, R. *v.*, 7 C. & P; 42
Salter, R. *v.*, 5 Esp; 704
Sam *v.* State, 33 Miss. 347; 701
Sampson *v.* Com., 5 Watts & Serg; 104, 426
Samuel, Com. *v.*, 2 Pick; 103, 614, 709
v. Payne, Doug; 1034
State *v.*, 2 Dev. & Bat; 771
State *v.*, 3 Jones' Law (N. C.), 74; 983
Sanders *v.* State, 18 Ark. 198; 131
Sandys, R. *v.*, 1 Car. & Mars; 1073
Sansom, State *v.*, 3 Brev; 611
Santelle, Com. *v.*, 11 Cush. (Mass.), 147; 363
Sarah *v.* State, 28 Miss; 399, 416, 422, 1071
Sargent, Com. *v.*, Thach. Crim. Cases; 324, 498
Satterthwhite *v.* State, 28 Ala. 65; 709
Saunders, R. *v.*, Plowd; 134
8 C. & P; 1144, 1156
2 Burr; 414
Sawyer's Case, 2 Hale & D; 759
Sayer *v.* Finck, 2 Caines; 9

SECTIONS.
Sayres, Com. *v.*, 8 Leigh; 497, 536
Scaggs *v.* State, 8 S. & M; 699
Scaife, R. *v.*, 1 M. & Rob; 669, 682
Scalbert, R. *v.*, Leach; 589
Schaller *v.* State, 14 Mo; 40
Scannel, Com. *v.*, 11 Cush. (Mass.), 547; 400, 403, 1154
Scates, State *v.*, 5 Jones, N. C., 420; 694, 941
Scheffer *v.* State, 3 Wis. 823; 690
Schmidt *v.* State, 14 Missouri; 614
Schofield, R. *v.*, Cald; 8
Schuler, U. S. *v.*, 6 McLean; 297
Scott *v.* Com., 6 S. & R; 622
Hooper, 14 Verm; 795, 798
People *v.*, 6 Mich. (2 Cooley), 287; 1280
v. State, 31 Mis. (2 Geor.), 473; 421
State *v.*, 24 Ver. (1 Deane); 400, 1287
La. Ann. 274; 669, 941
1 Hawks; 699, 1050
4 Iredell, L. R; 946, 954, 974, 1026
2 Dev. & Bat; 5
v. U. S., 1 Morris; 563, 565
Scribner, State *v.*, 2 Gill. & J; 358
Scroggins, U. S. *v.*, 1 Hempstead; 1162
Scurry, State *v.*, 3 Rich; 258, 597
Seaborn *v.* State, 20 Ala; 701, 944
State *v.*, 4 Dev; 472
Sealy *v.* State, 1 Kell; 819
Seamons, State *v.*, 1 Iowa R; 265, 364, 408
Searcy *v.* State, 4 Texas, 450; 277, 284
Searle, Com. *v.*, 2 Binney; 306, 411
R. *v.*, 1 Mood. & Rob; 45, 46
Sevree *v.* Door, 9 Wheaton; 660
Sedgwick *v.* Watkins, 1st Ves. Sen; 769
Seed, Com. *v.*, 3 Amer. Law Jour; 1259
Seeft *v.* Com., 8 Leigh; 223
Segar, State *v.*, 7 Parker; 472
Seibert, Com. *v.*, Wharton on Homicide; 641
Sellers, R. *v.*, C. B. 1796, Car. C. L; 678
Senior, R. *v.*, 6 Mood. C. C; 942, 1015, 1220
Sergeant ex parte, 8 Hall's L. J; 195
R. *v.*, 1 R. & M; 67, 767, 770
Sermon, R. *v.*, 1 Burr; 518
Serpentine *v.* State, 1 How. Miss. R; 273, 396, 685, 698
Sertorius *v.* Smith, 24 Miss; 728
Severn, R. R. Co., R. *v.*, 2 B. & Ad; 86

SECTIONS.
Sewell, State v., 3 Jones' Law (N. C.), 245; 36, 56
Sexton, R. v., 1 Deacon, Crim. Law, 424, 427; 692
State v., 3 Hawks; 518
Shakespear, R. v., 2 East; 258, 597
Shannon v. Com., 2 Harris; 565
Sharman, R. v., 24 Eng. Law & Eq; 553
Sharp v. Emmet, 5 Whar; 819
State, 19 Ohio; 1276
U. S. v., 1 Peters' C. C. R; 57, 381
Sharpe, R. v., 40 Eng. L. & Eq. 581; 6
State v., 17 Geo. 290; 364
Sharpless, Com. v., 2 Serg. & R; 6, 311
Shaver, Com. v., 3 Watts Serg; 760
Shaw, People v., 1 Harris, C. C; 1270
R. v., 6 C. & P; 692, 710, 773
v. Wrigley, 2 East; 602
Sheafe v. Rowe, 2 Lees R; 48
Shean, R. v., 2 C. & P; 572
Shearer v. State, 7 Blackf; 614
Sheen, R. v., 2 C. & P; 251, 551
Shelderton, R. v., 2 Keb; 90
Sheldon v. Clark, 1 Johnson; 708
Shell v. State, 6 Humph; 5
Shellard, R. v., 9 C. & P; 819
Shelley, R. v., 2 Leach, Cr. C; 653
Shelmire, U. S. v., Bald; 712
Shelse, People v., 3 Hill's N. Y. R; 1149
Shelton, State v., 2 Jones' Law (N.C.), 360; 675
v. State, 1 Stew. & Por; 261
Shephard, State v., 7 Com; 563, 564, 565, 566, 1144
Shepherd, Com. v., 6 Binney; 768
R. v., 7 C. & P; 685, 692
Sheppard, R. v., R. & R; 712
Sheridan's Case, 31 Howell's St. Tr; 657
Sheriff, People v., 1 Harris C. C; 894
Com. v., 16 Serg. & R; 450
Sherry, Com. v., Whart. on Hom; 1084, 1108
Sherman v. Sherman, 1 Root, 486; 774
Shiflet, State v., 20 Mis. (5 Bennett), 415; 364, 378
Shoemaker, State v., 1 Miss; 190, 616
v. State, 12 Ohio; 924
U. S. v., 2 McLean; 513, 544, 580, 588
Short v. Lee, 1 Jac. & W; 653
Mercer, 1 Eng. R., L. & E; 807
Shorter v. People, 2 Comstock, S. C., 4 Barb; 18, 641

SECTIONS.
Shoultz, State v., 25 Mo. (4 Jones), 128; 18, 1027, 1084
Shott, R. v., 3 C. & K. 206; 564
Shouse v. Com., 5 Barr; 383, 434
Shover v. State, 5 Eng; 631
Showley, State v., 5 Hayw; 607
Shults, U. S. v., 6 McLean C. C. R; 15, 16
Shultz v. State, 13 Texas, 401; 707
Shyber, Resp. v., 1 Dallas; 782
Silsbee, Com. v., 9 Mass; 6
Simmons, Com. v., 6 J. J. Marshall; 1250, 1263
v. Com., 1 Rawle; 269, 287, 406
Simmons, 11 Jur; 803
State, 4 Geo; 150
7 Hammond (Ohio); 312
State v., 6 Jones' Law (N. C.), 21; 998
Simon v. Grantz, 2 Pa. R; 775
v. State, 5 Florida, 285; 698
Sims, Com. v., 2 Virg. Cases; 243, 244
State v., 2 Bail. S. C. Rep; 141, 149, 591
Simpson, Com. v., 9 Metc; 627
R. v., Lewin, C. C; 673
1 Mood. C. C. 410; 692
3 C. & K. 207; 564
State v., 2 Hawks; 5
5 Yerger; 64
v. State, 10 Yerg; 86, 373
Skinner v. Perot, 1 Ash; 763, 764
Slane Peerage Case, 5 Clark & Fin; 666
Slater, People v., 5 Hill, N. Y. R; 281, 602
Slaughter v. Com., 11 Leigh; 953, 1084, 1112
State, 5 Humph; 550, 554
Sleeman, R. v., 1 Dearsley, C. C. 269; 692
Slicker v. State, 8 Eng. (13 Ark.); 390, 1293
Sloman v. Kelley, 4 Younge & Collyer; 809
Small, U. S. v., 2 Curtis, C. C. 241; 1264
Smallwood, U. S. v., 5 Cranch, C. C. R; 769
Smart, State v., 4 Rich; 362
Smith's Case, East's P. C; 402
Smith, ex parte, 6 Law Rep; 196
v. Blandy, R. & M., N. P; 697
Bowker, 1 Mass; 245
Coffin, 6 Shepl; 795, 797
Com. v., Whar. on Hom. App. (7 Smith's Laws); 727, 797, 1101, 1113

SECTIONS.
Smith, Com. v., 9 Mass; 472
2 Grey; 797
6 Bost. Law R., N. S; 497
v. Com., 7 Grat; 565, 567
10 Gratton; 685, 686, 693
Jackson, 1 Paine; 209
Jeffries, 9 Price; 603
Kiramer, 1 Am. Law Reg; 57
Mall, 2 R. Rep; 294
Mason, 2 Str; 244
Ohio, 22 Ohio R; 1276
People v. 5 Cowen; 516
4 E. D. Smith, 18; 41
R. v., 3 Burr; 614
2 C. & P; 632
4 C. & P; 632, 633
8 C. & P; 3
2 Starkie R; 667
1 Mood. C. C; 251, 252, 767
2 Moody; 344
1 Cox C. C; 59, 65
4 Cox C. C; 527
33 Eng. Law & Eq; 965, 1280
v. Sparrow, 4 Bing; 6
State, 8 Ham; 255
2 Ohio St. R., N. S; 1276
State v., 3 Hawks; 6
2 Iredell; 435, 530, 766, 790, 850, 855
1 Bailey; 766
1 Cheves; 5
2 Strobh; 710, 944, 965
16 Miss (1 Bennett); 560
Peck; 265
32 Maine (2 Red.); 369, 935, 1059
5 Day; 633
2 Harring; 220
10 Rich. Law (S. C.), 34; 932
v. State, 9 Ala; 662, 771
28 Mississippi; 473, 497
1 Hum. Tenn. R; 6
1 Yerger; 958
33 Maine (3 Red.); 1222
3 Redding; 965
U. S. v., 2 Mason; 376, 411
1 Southard; 191

SECTIONS.
Smithie, R. v., 5 C. & P; 683, 696
Smyth, Com. v., 11 Cush. (Mass.), 473; 497
Sneed v. Com., 6 Dana; 370
Snell, Com. v., 3 Mass; 781
Snelling, Com. v., 15 Pick; 712
Snyder v. Nations, 5 Blackf; 754
Snyder, 6 Binney; 767
Soars, R. v., Atk. & Brigh., 2 East P. C; 126
R. & R; 126
Solliday v. Com., 28 Pa. St. R., 13; 571
Somerset's Case, 2 St. Trials; 67, 134
Somerville's Case, 1 Anderson R; 69
Somerville, Com. v., 1 Va. Cases, 164; 551
Sommers, State v., 3 Vermont; 378
Soper, State v., 13 Maine; 702
Sorn, State v., 9 Humph; 60
Souder v. State, 12 Texas, 462; 1020
Soule, State v., 20 Maine; 411
Southard v. Rexford, 1 Cowen; 806
Souther v. Com., 7 Grat; 1050, 1114
Southworth v. State, 9 Conn; 413
Spangler v. Com., 3 Binn; 327, 345
Sparks v. Com., 9 Barr; 497
Sparling, R. v., 1 Str; 351
Spear, State v., 6 Mis; 587
Spears v. State, 2 Ohio St. Rep. (N. J.); 692
Forrest, 15 Verm; 814
Spellard, R. v., 9 C. & P; 705
Spence v. State, 17 Ala; 701
R. v., 1 Cox, C. C; 1008, 1011
Spencer v. Com., 11 Leigh; 631
State v., 1 Zabriskie; 15, 70, 196, 711, 1084, 1103
Sperry v. Com., 9 Leigh, 623; 588
Spicer, R. v., 1 Car. & K; 377, 611
1 Dennis, C. C; 611
Spier's Case, 1 Dev; 544, 574, 577, 589
Spiller, R. v., 5 Car. & P; 1015
Spilsbury, R. v., 7 C. & P; 671, 692, 695
Sponsonby, R. v., 1 Leach; 781
Sprague, People v., 2 Parker C. R., 43; 16
6 Parker C. C., 43; 15
State v., 4 R. I., 257; 1239
Spratt v. State, 8 Mo; 497
Springfield, Com. v., 7 Mass; 277, 411
Squire, R. v., 1 Russ; 80
Stafford Lent. Assizes; 77
State v., 10 N. Hamp; 506
Squires, Com. v., 1 Metc; 10, 400, 565, 1269

SECTIONS.

Squires, State *v.*, 1 Tyler's Ver. R; 311
Stage's Case, 5 City Hall Recorder; 65
Staker, State *v.*, 3 Ind., 570; 522
Standley, R. *v.*, R. & R; 118, 124
Stanley, R. *v.*, 5 C. & P; 805
Stanly, State *v.*, 4 Jones' Law (N. C.), 290; 565
Stannard, R. *v.*, 7 C. & P; 636
Stanton R. *v.*, 1 Car. & Kir; 1143, 1145, 1156
State *v.*, 1 Iredell; 364, 781, 782
Stapleton, R. *v.*, 1 Crawf. & Dix. C. C; 73
Star *v.* Tracy, 2 Root; 809
Stark, State *v.*, 1 Strobh; 40, 711
Starke, State *v.*, 1 Strobh, 479; 56
Starkie *v.* People, 17 Ill., 17; 671, 682
Starks *v.* People, 5 Denio; 814
Starling, State *v.*, 6 Jones, N. C., 471; 711
St. Clair, Com. *v.*, 1 Grat; 472
Stearns, Com. *v.*, 10 Metc; 631, 633
Stedman, R. *v.*, Foster; 971
State *v.*, 7 Porter; 372, 385, 495, 498, 617
Stein *v.* Bowman, 13 Peters; 771
Steinham *v.* U. S., 2 Paine, C. C. R; 783
Stephen *v.* State, 11 Georg; 419, 683, 685, 689, 1143, 1150, 1153, 1154
Stephens *v.* Myers, 4 Car. & Payne; 1242
State, 14 Ohio; 435
State *v.*, Wright's Ohio R; 306
Stetson, U. S. *v.*, 3 W. & M; 419
Stetter, U. S. *v.*, U. S. C. C., Phila., Feb. 1852; 766
Stevens, Attorney-General *v.*, 3 Price; 323
v. Com., Leigh; 624
Stevens *v.* Fassett, 27 Maine (14 Shep.); 541
Stevenson, R. *v.*, 2 Leach, C. C; 588
Steventon, People *v.*, 9 Cal., 273; 1114
Stewart, Com. *v.*, 1 S. & R; 668
v. Com., 4 S. & R; 328, 345
R. *v.*, Russ. & R. R. C; 112, 126
v. State, 26 Ala; 702
1 Ohio St. R; 924, 953, 972, 1020, 1021, 1113

SECTIONS.

Stewart *v.* State, 5 Ohio R; 385, 400, 517, 1276, 1280
19 Ohio; 924
Stimson, State *v.*, 4 Zabr. (N. J.), 9; 297, 362, 363
Stocker, R. *v.*, 1 Salk; 294
Stockbridge, Com. *v.*, 11 Mass; 411
Stockham, People *v.*, 1 Harris; 433, 1216, 1228
Stocking *v.* State, 7 Ind., 326; 747, 783
Stoddart *v.* Manning, 2 H. & S; 809
Stokes, R. *v.*, 3 C. & K; 15, 56, 711
6 C. & P; 591
v. State, 18 Geo., 17; 814, 932
Stone *v.* People, 2 Scammon, 326; 588
R. *v.*, 6 T. R; 706
1 East; 614
v. State, 2 Scam; 584, 590, 1069
4 Humph; 948, 952, 956, 1104
1 Spencer; 415
State *v.*, Rice; 696
Stonecifer, People *v.*, 6 Cal., 405; 708
Stoops, Penn. *v.*, Addison; 676, 769
Storrs *v.* State, 3 Missouri R; 272
Wetmore, Kirby; 809
Stoughton, R. *v.*, 2 Str; 294
v. State, 2 Ohio St. R; 390, 598
13 Sm. & M; 1052, 1053
Stout *v.* Com., 11 Serg. & R; 400, 1287
Com. *v.*, 7 B. Monr; 297, 372
People *v.*, 3 Parker, C. R. (N. S.), 670; 774
Stow, Com. *v.*, 1 Mass; 306
Stowell, U. S. *v.*, 2 Curtis, C. C., 153; 513, 519
Strahan, R. *v.*, 7 Cox, C. C; 530, 538
Strandifer, State *v.*, 5 Porter; 560, 565
Straughan *v.* State, 16 Ark., 37; 435
Streek, R. *v.*, 2 C. & P., 413; 588
Street, State *v.*, Tay; 306
Stringfellow *v.* State, 26 Mississippi; 683
Strington, R. *v.*, 2 Wms. Saunders; 90
Stripp, R. *v.*, 36 Eng. Law & Eq., 587; 690
Stroner, R. *v.*, 1 Car. & Kir; 1150
Stroud *v.* Com., 11 S. & R; 1139
R. *v.*, C. & K; 251

SECTIONS.

Stubbs, R. *v.*, 33 Eng. Law & Eq; 789
Studstill *v.* State, 7 Geo; 133, 933, 950
Stultz *v.* People, 4 Scam; 421
Sturges *v.* Crowninshield, 4 Wheat; 184
Sugland, Com. *v.*, 4 Gray (Mass.), 7; 1126
Sullivan, Penns. *v.*, Add; 1139
People *v.*, 3 Selden; 950, 990, 1020
v. People, 1 Harris, C. C; 898
Com. *v.*, 6 Gray, 477; 1126
R. *v.*, 8 Ad. & El. 831; 588
Summons *v.* State, 5 Ohio (N. S.), 325; 667
Sumner *v.* State, 5 Black; 707
Susquehanna Road *v.* People, 15 Wend; 86
Sussex Peerage Case, 11 Cl. & F; 666
Sutcliffe *v.* State, 18 Ohio; 926
Sutton *v.* Johnstone, 1 T. R; 713
R. *v.*, 4 Nev. & Mann; 65
5 B. & Ad; 554
8 B. & C; 588
State *v.*, 4 Gill; 400, 419
Swails State, *v.*, 7 Blackf; 597
State *v.*, 8 Ind. 524; 1280
Swan *v.* State, 4 Humph; 41, 44, 1084, 1113
Sweetman, People *v.*, 3 Parker, C. R. (N. Y.), 358; 185
Sweney, Com. *v.*, 10 Serg. & R; 306, 307
Swift Run Gap Turnpike Co., Com. *v.*, 2 Virg. C; 233
v. Duffield, 6 Serg. & Rawle; 1220
Swindall, R. *v.*, 2 Car. & Kir; 1007, 1016
Swink, State *v.*, 2 Dev. & Bat; 696
Swinney, Com. *v.*, 1 Va. Cases; 347, 348, 384
Sykes *v.* Dunbar, 2 Selw. N. P; 508
Sylvester, Com. *v.*, 6 P. L. J; 415, 418
Symes *v.* State, 5 Porter; 536
Symonds, State *v.*, 36 Maine; 465, 472, 506

T.

Tackett, State *v.*, 1 Hawks; 641, 970
Taggart, State *v.*, 38 Maine (3 Heath), 298; 498
Tam *v.* State, 3 Miss; 264
Taney *v.* Kemp, 4 Har. & Johns; 809
Tannett, R. *v.*, R. & R; 258, 597
Tarbart *v.* Tipper, 1 Camp; 312

SECTIONS.

Tarbox, Com. *v.*, 1 Cushing; 306, 308, 311
Tatem's Exec. *v.* Loflan, Cooke; 809
Taunton *v.* Costar, 7 T. R; 2038, 2044
Taverner, R. *v.*, Carr. L; 633
Taylor, Com. *v.*, 5 Binney; 45
5 Cush; 306, 686, 692
People *v.*, 3 Denio; 285, 290, 303, 528, 572
R. *v.*, 4 Cox, C. C; 56, 711
5 Burr; 989
1 C. & P; 680
3 B. & C; 559, 572
8 C. & P; 112, 686
9 C. & P; 661
1 Leach; 130
v. Riggs, 1 Peters; 652
State *v.*, 3 Brevard; 702
1 Hawks; 554
1 Const. R; 605
2 Barley; 564
v. State, 6 Humph; 50, 377, 403
U. S. *v.*, 4 Cranch, C. C. R; 669
5 McL; 888
Teal, R. *v.*, 11 East; 759
v. State, 22 Mis. (1 Geor.), 619; 18
22 Geo. 75; 1027
Teas *v.* State, 7 Humph; 474
Teasdale, R. *v.*, 3 Esp; 778
Teisher, Resp. *v.*, 1 Dallas; 5
Telicote's Case, 2 Starkie, N. P. C., 483; 697
Territory *v.* McFarlane, 1 Martin; 403
Testick, R. *v.*, 1 East; 312
Testick's Case, 2 East, P. C; 343
Thackman, State *v.*, 1 Bay; 249
Tharp *v.* State, 15 Ala; 647
Thayer, Com. *v.*, 5 Metc; 294
v. People, 1 Harris's C. C; 690
2 Doug; 470
U. S. *v.*, Cir. Court, 2 Wheel. C. C; 987
Thelluson *v.* Woodford, 4 Vesey; 1220
Thibeau, State *v.*, 30 Vt. 100; 221
Thomas, Com. *v.*, 1 Virg. Cases; 1139
v. Com., 2 Robinson's Adm. R; 401, 508
Newton, M. & M; 806
People *v.*, 3 Parker, C. R. (N. Y.), 256; 631, 692
R. *v.*, 2 Moody; 349
3 D. & C; 519
Reported Wills' Cir. Ev; 723
8 C. & P; 35, 39, 43, 686, 687, 997
2 East, P. C; 781

SECTIONS.

Thomas, R. *v.*, 2 Leach, C. C. 637; 697
6 C. & P. 353; 692
State *v.*, 2 McCord; 362
v. State, 6 Miss; 474
5 How. Mis. R; 538
Thomasson, State *v.*, 22 Geo. 499; 524
Thompson, Com. *v.*, 4 Leigh; 472
6 Mass; 933, 1015
2 Cush; 598
5 Mass; 930
Thach. Cr. C; 652
v. Com., 1 Metc. (Ky), 13; 116, 768
R. *v.*, 1 Mood. C. C; 1035, 1059
1 Leach, C. C. (4th Ed.), 291; 692
State *v.*, 10 La. R; 772
Wright's R; 707
2 Strobh; 373, 415, 418
v. State, 25 Ala; 989
3 Ala. 28; 608, 657
U. S. *v.*, 6 McLean, 56; 219, 232
Thomson, State *v.*, 13 Iredell; 544
Thorne, People *v.*, 6 Law Rep; 735
Thornton, R. *v.*, 1 Mood. C. C; 690, 692
v. Royal Exch. Co., Peak; 47
State *v.*, 2 Rice's Dig; 403
Thorp, U. S. *v.*, 5 Cranch, C. C. R; 1279
Thorpe, R. *v.*, 1 Leach; 766
Thurlow, Com. *v.*, 24 Pick; 379, 614
Thurston, Com. *v.*, 7 J. J. Marshall; 809
People *v.*, 2 Parker, C. R. 49; 46
5 Cal. 69; 465
State *v.*, 2 McMullen; 565
Tilden, Com. *v.*, 1 Boston Law R; 777
Tilley, State *v.*, 3 Iredell; 641, 951, 953, 971, 986
1 Nott & McCord; 362
Timmins, R. *v.*, 7 C. & P; 1005
Tindall, R. *v.*, 6 Ad. & E; 4, 236
Tipper *v.* Com., 1 Metc. (Ky.), 6; 699
Tipton *v.* State, Peck's R; 226, 403, 697
Tisdale, Com. *v.*, 2 Dev. & Bat; 544
State *v.*, 2 Dev. & Bat; 521, 538, 546, 547
Tompkins, U. S. *v.*, 2 Cranch, C. C. R; 457
v. State, 32 Ala. 573; 743
17 Geo. 356; 422

SECTIONS.

Toney, State *v.*, 13 Texas, 74; 234
Tookey, State *v.*, 2 Rice's S. C. Dig; 932, 948, 1113
Toole, R. *v.*, 40 Eng. Law & Eq. 583; 597
Toomer, State *v.*, 1 Chevas; 1052
Tootle, State *v.*, 2 Harring; 377, 611
Touchett, R. *v.*, Ben. & Head's Lead. Cases; 22
Towle, R. *v.*, R. & R; 130
Town of Fletcher, State *v.*, 13 Ver; 90
Town, State *v.*, Wright's Ohio R; 124, 710, 924, 926, 944, 1115, 1121
Townley *v.* State, 13 Harrison; 412
Townsend, People *v.*, 3 Hill, N. Y; 58, 65, 77, 548, 626
State *v.*, 2 Harrison; 565, 798
Trafford, R. *v.*, 1 B. & Ad; 429
Travers, R. *v.*, 2 Str; 755
State *v.* 2 Wheeler's C. C; 932, 966, 970, 981, 998, 1001, 1033, 1020, 1040
Treadway, People *v.*, 3 Barb. Sup. C. R; 218
Trexler, State *v.*, 19 Ala; 292, 1281
Trilloe, R. *v.*, 1 Car. & Marsh; 942
2 Moody, C. C; 1220
Trimmer, Com. *v.*, 1 Mass; 71, 73
Troax, U. S. *v.*, 3 M'Lean; 783
Trueman, R. *v.*, 8 C. & P; 416, 423, 424
Tryer, Resp. *v.*, 3 Yeates; 364, 373
Tuberville *v.* Savage, 1 Mod; 1241
Tuck, Com. *v.*, 20 Pick; 383, 395, 513, 544, 630
Tucker, Com. *v.*, 8 Mass; 469
Tucket, R. *v.*, 1 Cox. C. C; 57
Tukey, State *v.*, 2 Rice's Digest; 972
Tully *v.* People, 6 Mich. (2 Cooley), 273; 1121
State *v.*, 4 Iredell; 949
Turk *v.* State, 2 Hammond, part 2; 489, 509
U. S. *v.*, 12 Peters; 201
Turley *v.* State, 3 Humph; 611
Turner's Case, 5 Ohio; 532
Turner, Com. *v.*, 1 Mass: 69
R. *v.*, 1 Mood. Cr. Cas; 696, 703
5 M. & Selw; 614, 708
1 Mood. C. C; 376
1 Sid; 432
State *v.*, 1 Wright; 40, 710, 924, 926, 932, 944, 1111
v. State, 28 Miss; 1053
Turnpike Co., Com. *v.*, 2 Virg. Cas; 86
Road *v.* People, 15 Wen; 1011
Turns *v.* Com., 6 Metc; 536, 1054

SECTIONS.

Turpin *v.* State, 4 Blackf; 431
Turtly, State *v.*, 2 Hawks; 631
Twitchell, Com. *v.*, 4 Cush; 390
Twitty, State *v.*, 2 Hawks; 306, 791, 783
Twyning, R. *v.*, 2 R. & Al; 615
Tye, R. *v.*, R. & R; 1060
Tyler's Case, R. & R; 619
Tyler, Reg. *v.*, 8 C. & P; 732
R. *v.*, 1 C. & P. 129; 686
Tyner *v.* State, 5 Humphrey; 714, 745

U.

Uhl *v.* Com., 6 Gratt; 760, 762
Ullday, R. *v.*, 8 C. & P; 83
Underwood, State *v.*, 6 Iredell; 753
Unknown, Com., *v.*, 6 Gray, Mass. 489; 373
Upchurch, R. *v.*, 1 Mood. C. C. (1835;) 65, 690, 692
State *v.*, 9 Iredell 455; 400
Updegraff *v.* Com., 11 S. & R; 6, 351, 373, 418
Upham, State *v.*, 36 Maine; 637
38 Maine; 709
Upton, State *v.*, 1 Devereux; 258
v. State, 5 Iowa 466; 783
20 Mo; 1115, 1121
Urias, People *v.*, 12 Cal. 325; 1114

V.

Vaiden *v.* Com., 12 Gratt. 717; 1022
Vaignew, State *v.*, 5 Rich; 686, 688, 690, 695
Vaillant *v.* Dodemead, 2 Atk; 773
Valentine, State *v.*, 6 Yerg; 400
7 Ired; 763
Van Buren *v.* State, 24 Miss; 694
Van Butchell, R. *v.*, 3 C. & P; 671, 673, 681
Vance *v.* Com., 2 Virg. Cases; 10, 16, 57
Vandercomb, R. *v.*, 2 Leach; 551, 572
Vanderworker *v.* State, 8 Eng. (13 Ark); 413
Vandyke *v.* Dare, 1 Bailey; 232
Vanhook *v.* State, 12 Texas 252; 468, 472
Vanhorn, People *v.*, 8 Barbour; 513, 544, 547
Vann R. *v.*, 8 Eng. Law. & Eq; 1011
2 Denison, C. C; 6
Van Omeron *v.*, Dowick, 2 Camp; 713
Van Santvoord, People *v.*, 9 Cowen; 261, 599
Vansickle, Com. *v.*, 1 Brightley; 11, 373, 594
U. S. *v.*, 2 M'Lean; 814, 815
Vantandrill, R. *v.*, 4 M. & Sel; 3
Varney, Com. *v.*, 10 Cush. (Mass.) 402; 250
State *v.*, 8 Boston Law Rep; 682, 1116
Vass *v.* Com., 8 Leigh; 674, 682
Vattier *v.* State, 4 Blackf; 472
Vaugh *v.* Perrine, 2 Penn; 806
Vaughan, Com. *v.*, 9 Cush. (Mass.) 594; 635
v. Com., 2 Va. Cases; 565
R. *v.*, 1 Cox, C. C; 15
5 St. Tr; 802
4 Barr; 8
v. Perrine, 2 Pa. R; 809
Vaux's Case, 4 Co; 112, 551, 555
Vawter, State *v.*, 7 Blackf; 1229
Verelst R. *v.*, 3 Camp; 653, 713
Vermilyea, People *v.*, 7 Cowen; 783
Vermont Cent. R. R., State *v.*, 1 Williams (Vt.) 103; 402
Vigol, U. S. *v.*, C. C., 2 Dallas; 1020
Vill of Hornsey, R. *v.*, 1 Roll. R; 90
Vinal *v.* Burrill, 16 Pick; 660
Vincent *v.* Cole, 1 M. & M; 661
R. *v.*, 9 C. & P; 665
State *v.*, 1 Car. Law R; 474
Vittum, State *v.*, 9 New Hamp; 249
Vivian, R. *v.*, 1 C. & K; 349
Voke, R. *v.*, R. & R; 635, 649
Voshall, State *v.*, 4 Indiana; 265, 408
Vowles *v.* Young, 13 Ves; 666

W.

Waddington, R. *v.*, 2 East, P. C; 270
Wade, Com. *v.*, 17 Pick; 557, 565, 588
R. *v.*, 1 Mood. C. C; 588, 754
State *v.*, 34 N. H. 495; 378
Wadsworth, R. *v.*, 5 Mod; 519
Wagers *v.* Dickey, 17 Ohio; 667
Waite, Com. *v.*, 5 Mass; 781
Wakefield *v.* Mackey, 1 Phill. R; 251
Ross, 5 Mason; 795, 797
Waldron *v.* Tuttle, 4 N. Hamp; 666
Walker's Case, 5 City Hall Recorder; 65
Walker *v.* Com., 1 Leigh; 648
Kearney, 2 Stra; 764
R. *v.*, 6 C. & P; 10, 400
2 Sid; 799
1 Car. & P; 1008, 1010, 1016
2 M. & R; 1150
State *v.*, 2 Murphy; 266

SECTIONS.

Walker *v.* State, 6 Blackf; 814
State *v.*, 14 Miss; 261
v. Wildman, 6 Madd. R; 773
Walkley, R. *v.*, 6 C. & P; 686
Wallace, People *v.*, 9 Cal. 30; 1114
State *v.*, 9 N. Hamp; 649
Wallis, R. *v.*, Salk; 130
Walls *v.* State, 7 Blackf; 631
Walston *v.* Com., 16 B. Monroe 15; 669
Walters, Com. *v.*, 6 Dana; 366, 497, 498, 499
R. *v.*, 1 Car. & M; 349, 350, 962
Walton *v.* State, 3 Sneed (Tenn.) 687; 544
Waltzer *v.* State, 3 Wis. 785; 435
Ward, Com. *v.*, 2 Mass; 312
People *v.*, 15 Wendell; 685
v. People, 3 Hill; 92
State, 6 Hill, N. Y. R; 131, 806
2 Missouri; 456, 807
22 Alab; 474
28 Ala. 53; 597
8 Blackford, 101; 682
Warickshall's Case, 1 Leach, Cr. Cas; 683, 695
Warman, R. *v.*, 2 Car. & K; 594, 832
Warner *v.* Com., 1 Barr; 411
Lucas, 10 Ohio; 805
People *v.*, 5 Wend; 218, 351, 407, 606
U. S. *v.*, 4 McL; 888, 941
Warre, R. *v.*, 1 Str; 221
Warren *v.* Nichols, 6 Metc; 667
People *v.*, 1 Parker, C. C; 565
v. State, 1 Greene (Iowa); 728
Warshoner, R. *v.*, 1 Mood. C. C; 363, 369, 466
Wasden, State *v.*, N. C. Term R; 220
v. State, 18 Geo. 264; 710
Washington, State *v.*, 1 Bay; 410
Waterborough, Com. *v.*, 5 Mass; 213
Waterbury *v.* Sturdevant, 18 Wendell; 702
Waterhouse, State *v.*, M. 8 Yerger; 587
Waters, R. *v.*, 2 Car. & Kir; 1062
6 C. & P; 1017
7 C. & P; 1061
1 Mood. C. C; 251
State *v.* (4 Heath.) 54; 383
Const. Ct. R; 309
Watkins, State *v.*, 9 Conn; 639
R. *v.*, 4 C. & P. 550; 697
U. S. *v.*, 3 Cranch, C. C. R; 445, 529
Watson *v.* Brewster, 1 Barr; 666

SECTIONS.

Watson, R. *v.*, 32 Howell's State Tr; 703
2 Stark; 776
Watt's Case, Hard; 781
Wau-kon-chau-neck-kaw *v.* U. S., 1 Morris; 497
Wave *v.* Wave, 8 Greenl; 819
Wayne, County of, *v.* Com. 26 Penn. State R. (2 Casey), 171; 421
Weaver *v.* Bush, 8 T. R; 1256
State *v.*, 2 H; 930
13 Iredell; 309, 588
v. Taylor, 5 Ala; 819
Webb, Com. *v.*, 6 Randolph; 1113
R. *v.*, 3 Bur; 523, 524
Webster, Com. *v.*, 5 Cush. 324; 637
v. Com., 424, 636, 638, 645, 707, 709, 710, 743, 863, 944, 1064
State *v.*, 5 Halsted; 379
5 Greene; 497
Weeks *v.* Hall, 19 Conn; 816
Weighurst *v.* State, 7 Md; 1119, 1121
Weingorpflinn *v.* State, 7 Black; 414, 416, 421, 518, 524, 544, 579, 819, 1154
Welbourn, R. *v.*, 1 East's P. C; 671
Weld, Com. *v.*, Thacher's C. C; 83
Welde *v.* Com., 2 Metc; 214
Welland, R. *v.*, R. & R; 376, 611
Wells, State *v.*, Coxe R; 636, 1020
v. Tucker, 3 Binney; 771
Wemberly, State *v.*, 3 M'Cord; 406
Wentworth, State *v.*, 37 N. H. 196; 635, 686
Wentz, Com. *v.*, 1 Ashmead; 355, 610, 778
Wescombe, R. *v.*, Annnal Register for 1829; 720
Wesley *v.* State, 11 Humph. 502; 591
West, R. *v.*, 2 C. & K; 343, 942
40 Eng. Law & Eq. 564; 347
State *v.*, 6 Jones' Law N. C. 505; 944
v. State, 1 Wisc. 209; 707
2 Zab. (New J.); 540
Westbeer, R. *v.*, 1 Leach; 616
Westfield, State *v.*, 1 Bailey; 131
Weston, State *v.*, 9 Conn; 855
Whaley *v.* State, 11 Geo; 662, 698, 714, 731
Wheat *v.* State, 6 Miss; 614, 708
Wheater, R. *v.*, 2 Mood. C. C. 45; 690
Wheaton, R. *v.*, 3 Moody, C. C; 690
Wheeler *v.* Anderson, 3 Hagg. Eccl. R; 664
Com. *v.*, 2 Mass; 513, 544

SECTIONS.
Wheeler, State v., 3 Vermont; 5, 400
v. Wheeler, 3 Hagg; 48
Whipple, People v., 9 Cow; 763, 783
Whitaker v. English, 1 Bay; 131
White, Com. v., 6 Binney; 411, 1067, 1115
People v., 22 Wend; 10, 400
24 Wend; 898
14 Wend; 637, 638
R. v., 1 Leach; 594, 755
U. S. v., 5 Cranch C. C. R; 445, 446, 448, 449, 667, 703, 798, 812, 814, 815, 817
Russ. & R. C. C; 118
9 C. & P; 349
2 Wash. C. C; 490
Whiteford v. Com., 6 Randolph; 1084, 1107, 1114
Whitehead, R. v., 3 C. & K; 1010
Whitelock v. Baker, 13 Ves; 666
Whitesides v. People, 1 Breese R; 265, 408
Whiting v. State, 14 Conn; 364
Whitney, R. v., 1 Moody; 377
State v., 15 Ver. R; 405
v. Turner, 1 Scam; 131
Whittier, State v., 21 Maine; 614, 647, 755
Wicks, Com. v., 2 Va. Cases; 1115
R. v., R. & R; 344
Wickwire v. State, 19 Conn; 528
Wier, R. v., 1 B. & C; 1037
Wigg, R. v., 2 Salk; 519
1 Ld. Raym, 2 Salk; 10, 11, 373
Wightman, State v., 26 Miss. (5 Jones), 515; 561
Wike v. Lightner, 11 S. & R; 815
Wilbur v. Selden, 6 Cowen; 667
Wilburne, State v., 2 Brevard; 504
Wilcox, R. v., R. & R. C. C; 313
v. Smith, 5 Wend; 653
Wild, R. v., 1 Mood. C. C; 58, 65, 685, 690
Wilday, R. v., 1 Maule & Sel; 551
Wilder, State v., 7 Blackf; 622
Wiley v. Merrick, 11 Metc; 761
People v., 3 Hill; 321, 611, 619
Wilkes, R. v., 7 C. & P; 785
Wilkins, State v., 7 Verm; 528
Willard, Com. v., 22 Pick; 9, 808
Wilcox, R. v., 1 Simons, N. S; 88
Willey, People v., 2 Parker C. R. (N. Y.), 19; 41
William v. East India Com., 3 East; 615
Williams v. Baldwin, 7 Ver; 771
Bryant, 5 M. & W; 251

SECTIONS.
William's Case, 2 Grat; 574
Com. v., 2 Cush; 361, 391, 613, 619, 856
Thacher, C. C; 319
2 Ashm; 669, 671, 1087
v. Com., 29 Pa. St. R. 102; 728
2 Grattan; 576, 591
E. I. Co., 3 East; 615
Morris, 12 Wheat; 205
Ogle, 2 Str; 258, 597
People v., 19 Wend. R; 790
2 Parker, C. R. (N. Y.), 84; 635
R. v., 9 B. & C; 778, 780, 782
8 C. & P; 769, 1144, 1156
2 C. & K; 349, 350
7 Car. & Payne; 250, 755
1 Mood. C. C; 359
10 Mod; 69
2 Den. C. C; 350
R. & M; 617
2 Camp; 620
State v., 2 Jones' Law (N. C.), 194; 728
19 Geo. 142; 667
4 Indiana; 272
12 Ired; 8
3 Foster (N. H.); 402, 1285
2 Tenn; 6
5 Gill; 518
10 Humph; 391, 565
2 McCord; 219, 232, 415
2 Strobh; 364
2 Harrington; 780
1 Williams (Vt.); 716, 1259
v. State, 12 S. & M; 131, 347
9 Mo; 482, 486
14 Ohio; 1132, 1134
8 Humph; 649
Williamson, Com. v., 2 Virg. C; 136
R. v., 3 C. & P; 1015
1 Cox; 1008, 1018
State v., 3 Murphey; 334
Willice, R. v., 1 East, P. C; 450
Willis v. People, 1 Scam; 251
R. v., 1 Car. & Kir; 251, 257

SECTIONS.
Willoughby, R. v., 2 East P. C; 349
Wills, State v., 2 Hill S. C; 193
Wilson v. Boerem, 15 Johns; 675
Com. v., 2 Cushing; 648, 650, 725
2 Gray; 306
1 Gray R; 19, 49, 50, 641
v. Com., 10 S. & R; 10, 602
Gilbert, 2 B. & P; 602
Mason, 1 Cranch; 201
Ohio, 18 Ohio R; 1276
People v., 3 Parker C. R. (N. Y.), 199; 747
R. v., 37 Eng. Law & Eq. 605; 1230
2 Car. & K; 597
8 T. R; 402
v. Rastall, 4 T. R; 773, 774, 775
State v., 8 Porter; 639
1 Porter; 362
7 Ind. 516; 1285
v. State, 16 Ark. 1; 591
24 Conn. 57; 563, 565
18 Ohio; 1276
20 Ohio; 417
1 Por; 336
22 O. R; 1218, 1219
Troup, 7 Johnson, 773
U. S. v., 1 Bald; 778
7 Peters; 765
Wiltberger, U. S. v., 2 Wash. C. C. R; 970
Wimberley, State v., 3 M'Cord; 285, 307
Winehart v. State, 6 Indiana; 82
Winfield v. State, 3 Iowa, 339; 408
Wingard v. State, 13 Georg; 261
Winson, U. S. v., 1 Gal; 209
Winter v. State, 20 Alab; 707
Winters, People v., 2 Parker C. R. (N. Y.), 10; 1260
Wiscart v. Dauchy, 3 Dall; 201, 209
Wisdom, State v., 8 Porter; 647, 699
Wise, State v., 7 Richards; 433
Wishon, State v., 15 Mis; 522
Withers, R. v., 2 Campb; 773
Wittingham, State v., 7 Verm; 90
Wogan v. Small, 11 S. & R; 48
Wolcott, State v., 21 Conn; 455
Wolff, State v., 15 Mis; 728
Wood, Com. v., 2 Cushing; 465
People v., 3 Parker C. R. (N. Y.), 681; 649
State v., 1 Day; 1253
U. S. v. Serg. Const. L; 209
v., 2 Wheeler's C. C; 223

SECTIONS.
Wood, v., 3 Wash. C. C; 667
14 Peters; 802
Woodbury v. Goodyear, 7 Gray, 467; 46, 47
Woodcock, R. v., 1 Leach; 671
2 Leach; 679
Woodcock's Case, 2 Leach, C. C; 769
Woodfall, R. v., 5 Burr; 589
Woodford v. Ashley, 2 Camp; 609
11 East; 271, 599, 609
State, 1 Ohio State R; 409
Woodman, State v., 3 Hawks; 262, 599
Woodrow, R. v., 15 M. & W; 8
Woodruff, State v., 2 Day; 587
Woodsides v. State, 2 How. Miss. R; 226, 231, 499, 669, 710, 944, 948, 1113
Woodson, State v., 5 Humph. R; 55
Woodward, Com. v., Thacher's C. C; 135
R. v., 8 C. & P; 70
State v., 34 Maine; 614
21 Miss. (5 Bennett), 265; 522
Wooley v. State, 11 Humph; 378
Woolmer, R. v., 1 Mood. C. C; 1037
Worcester v. State of Georgia, 6 Peters; 204, 205
Worcester Turnp. Co., Com. v., 3 Pick; 86
Word v. Com. 3 Leigh; 63
Worley v. State, 11 Humph; 1050
Worrall, U. S. v., 2 Dall; 603
Wortham v. Com., 5 Rand; 513, 541, 544
Worthington v. Com., 5 Rand; 484
Wray, *ex parte*, 30 Miss. (1 George), 673; 985
Wright, Com. v., 1 Cusch; 306-7-10
v. People, 1 Breese; 1441
People v., 9 Wend; 381
R. v., 1 Burr; 10
1 Went; 928
R. & R; 46
9 Car. & Payne; 942
1 Lewin C. C. 48; 692
v. State, 5 Indiana; 400, 513, 544, 577, 579, 588, 589
4 Humph; 416
6 Yerger; 631
9 Yerger; 641, 1280
Tatham, Ad. & El; 664

SECTIONS.

Writhpole's Case, Cro. Car; 551
Wyatt *v.* Gore, Holt; 776
State, 25 Ala; 701
2 Swan; 1142, 1145
State *v.*, 2 Haywood; 778
Wycherly, R. *v.*, 8 C. & P; 1225, 1227
Wyil's Case, 5 Co; 766
Wylie, R. *v.*, 1 N. R; 635
Wyman, Com. *v.*, Thach. Crim. C; 798
Wynn, R. *v.*, 2 East; 523

Y.

Yancey, State *v.*, 1 Tr. Com. R; 410
1 Car. L. R; 542
Yarborough, State *v.*, 1 Hawks; 938, 996
Yates' Case, 1 Car. & Marsh; 803
Yates, Reg. *v.*, 5 Jar; 780
York, Com. *v.*, 7 Law R; 641
9 Metc; 641, 707, 709, 910, 944, 949, 970, 1013

SECTIONS.

York, State *v.*, 37 N. H. 175; 686
Young, Com. *v.*, 7 B. Mon; 410
v. the King, 3 T. R; 418, 429, 432
R. *v.*, 8 C. & P; 121
7 Peake's Add. Cas; 422
v. Rex, 3 T. R; 414, 430
State 11 Humph; 1026
2 Yerger; 697

Z.

Zard, Com. *v.*, Ros. Cr. Ev; 65
Zarrasseller *v.* People, 17 Ill. 101; 410
Zell, Penna. *v.*, Addison; 1073
Zellers, State *v.*, 2 Hals; 710, 930, 944
v. State, 7 Ind. 659; 597, 598
Zephon, Com. *v.*, Oyer & Term. Phila., July, 1844; 1113
Zepp, Com. *v.*, 5 P. L. J; 551
Zollicoffer *v.* Turney, 6 Yerger; 809

A TREATISE

ON

CRIMINAL LAW.

BOOK I.

OF INDICTMENTS GENERALLY.

CHAPTER I.

WHAT OFFENCES ARE INDICTABLE.

I. HOW OFFENCES ARE CLASSIFIED, § 1.
- 1st. FELONIES, § 2.
- 2d. MISDEMEANORS, § 3.
  - (a) *Mala in se*, § 3.
    - (1.) Disturbance of public peace, § 4.
    - (2.) Malicious injury to others, § 5.
    - (3.) Nuisance or scandal to the community, § 6.
    - (4.) Personal lewdness, § 7.
    - (5.) Attempts, § 8.
  - (b) *Mala prohibita*, § 10.
    - (1.) Acts enjoined or forbidden by statute, though no statutory remedy by indictment is prescribed, § 10.
    - (2.) Where the statute prescribes the punishment, § 10.
    - (3.) Where a new punishment is given to a common law offence, § 10.
    - (4.) Where a common law misdemeanor is made a statutory felony, § 10.
    - (5.) When common law is absorbed in statute generally, and herein of the Pennsylvania Act of March 21, 1806, § 11.

I. HOW OFFENCES ARE CLASSIFIED.

§ 1. AN offence which may be the subject of criminal procedure, is an act committed or omitted in violation of public law, either forbidding or commanding it. Offences at common law were divided into three classes, treasons, felonies, and misdemeanors. In England, under the head of treason were collected, first, with the name of high treason, the compassing of the king's death, the comforting of the king's enemies, the counterfeiting of the privy seal, the forging of the king's coin, and the slaying of the chancellor, or either of the king's justices; and secondly, with the name of petit treason, such offences as were looked upon as arising, in private life, from the same principle of treachery and disloyalty as urged, in the affairs of state, the compassing the sovereign's death; comprising the slaying, by a wife, of her lord and husband, and by an ecclesiastic of his ordinary. In this country, however, petit treason, as a distinct class of offences, is no longer recognized, the

crimes composing it having sunk into a place among the more flagrant homicides; and high treason, under the constitutions both of the federal union and of the several states, is limited to the levying war against the supreme authority, or adhering to its enemies, giving them aid and comfort.

1st. Felonies.

§ 2. Felonies, in England, comprised originally every species of crime, which occasioned the forfeiture of lands and goods.(*a*) At common law, in addition to the crimes more strictly coming under the head of treason, the chief, if not the only felonies, were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. By statutes, however, running from the earliest period, new felonies were, from time to time, created; till finally, not only almost every heinous offence against person or property was included within the class, but it was held, that whenever judgment of life or member was affixed by statute, the offence to which it was attached became felonious by implication, though the word felony was not used in the statute.(*b*) In this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted.(*bb*) In New York, however, felony, by the revised statutes, is construed to mean an offence for which the offender, upon conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison.(*c*) And in Virginia it comprehends all offences, below treason, which occasioned a forfeiture of property at common law, all so denominated by statutes, and all to which statutes have annexed capital punishment or confinement in the penitentiary, excepting those which, though subjected to the latter punishment, are or may be declared misdemeanors by the statutes creating them.(*d*)

2d. Misdemeanors.

§ 3. Misdemeanors comprise all offences lower than felonies, which may be the subject of indictment. They are divided into two classes, first, such as are *mala in se*, or penal at common law, and secondly, such as are *mala prohibita*, or penal by statute.

(*a*) *Mala in se.*—Whatever, under the first class, mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official duty when done corruptly, is the subject of indictment.(*e*) There is a distinction, how-

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(*a*) Adams *v.* Barret, 5 Geo. 404. (*b*) 1 Hale, 703; 1 Hawk. c. 40, s. 2.

(*bb*) In Louisiana it was lately held by a prior ruling of the late Court of Errors and Appeals, that the term felony was not known to the laws of Louisiana, was an unadvised *dictum*, and not law. State *v.* Rohfrischt, 12 La. An. 382.

(*c*) Rev. Stat. N. Y. Part IV. Chap. II. Title 7, s. 30.

(*d*) 2 Virginia cases, 122. Davis's Criminal Law.

(*e*) Black. Com. 65 w; 1 Hawk. P. C. c. 5, s. 1; 1 East, P. C. c. 1, s. 1; 1 Russell on Crimes, 46.

ever, between the penal code of England and that of this country in regard to misdemeanors *mala in se*, which must be kept in mind in determining how far the want of common law authority in one country, in respect to such offences, is to weigh upon the courts of the other.(*f*) There is a grade of offences, in the first place, comprehending adultery, fornication, and lewdness in general, together with those misdemeanors connected more or particularly with the conduct of the rites and observances of religion, which in England are cognizable chiefly in the ecclesiastical courts, but which here, in many of the states, have been punished by indictment as offences at common law. In England, in the second place, from the earliest period of judicial history, statutes were from time to time passed which defined the limits and determined the punishment of almost every offence, as it in its turn attracted legislative action. Thus, in the English books, few cases are found of malicious mischief at common law; penalties more summary than the common law afforded being provided for the protection of each species of property as it became the object of investment. No case, for instance, is to be found of an indictment at common law for malicious injury done to locks or other improvements on navigable rivers; because, as soon as locks were introduced into England, and canals built, by the statute 1 Geo. 2, st. 2, c. 19, such offences were made felonious, and were subject to transportation.(*g*) Every species of malicious mischief, in fact, which came before the legislature, was made felonious; and, as when a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor,(*h*) the common law remedy was absorbed. So, though elementary writers agree that the destruction of an infant *en ventre sa mere* is indictable at common law,(*i*) no case is to be found in England where such is adjudged by the courts, the statute 43 Geo. 3, c. 58, making it a felony, being enacted at the time when the offence first required the action of the public authorities. The want of English precedents, in such cases, does not show that the offences of such character were not cognizable at common law; it shows only that at an early period common law remedies gave way to statutes which rendered their provisions more specific, and their penalties more severe. Many offences, accordingly, which have been punished exclusively by statute in England, have been brought, in this country, within common law sanction, and have been considered misdemeanors. The colonies, leaving behind them the penal code of the country whose common law they adopted, found themselves obliged, as the passage of statutes under the colonial economy was no easy matter, to establish, each by itself, a system of criminal jurisprudence, which depended much more on the adjudication of the courts than the enactments of the legislature. The consequence was, that whenever a wrong was committed, which, if statutory remedies alone were pursued, would have been unpunished, the analogies of the common law were extended to it, and it was adjudged,

(*f*) Grisham *v.* State, 2 Yerger, 589. (*g*) See post, § 2002–3.
(*h*) R. *v.* Cross, Ld. Raymond, 711; 3 Salk. 193.
(*i*) Bracton, l. 3, c. 21; 3 Coke's Inst. 50; 1 Hawkins, 94; 1 Vesey, 98; 1 Russell on Crimes, 671. Post, § 1220.

if the reason of the case required it, an offence to which the common law penalties reached.(*j*) A judicial criminal code has been thus created, which, though in many cases modified by the several legislatures, constitutes, in part, the law of the land. The English books, in such cases, cease to be a guide, because, as was said by the Supreme Court of Vermont, in a case adopted in a recent case in New York, "the English statutes were so ancient, and the punishment so severe, that they were of course resorted to, and the common law thus lost sight of, though the statutes were intended as a mere increase of its penalties.(*k*)

§ 4. It has been laid down, in accordance with such principles, that whatever, in the first place, is productive of a disturbance of the public peace;(*l*) or, secondly, of malicious injury;(*m*) or, thirdly, of nuisance or scandal of the community;(*n*) or, fourthly, partakes of the character of personal lewdness;(*o*) or, fifthly, tends or incites to the commission of any specific crimes;(*p*) is indictable as a misdemeanor in this country, although in England the offence is either indictable only by statute, or is exclusively cognizable in the ecclesiastical courts.

(1.) *Disturbances of the Public Peace.*(*q*)—It has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers-by;(*r*) to disturb a congregation when at religious worship;(*s*) to go about armed with dangerous and unusual weapons, to the terror of citizens;(*t*) to raise a liberty pole in the year 1794, as a notorious and riotous expression of ill-will to the government;(*u*) to tear down, forcibly and contemptuously, an advertisement set up by the commissioners, of a sale of land for county taxes;(*v*) to agree to fight, though no fight takes place;(*w*) to break into a house in the day or night-time, and dis-

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(*j*) The comprehensiveness of the common law is illustrated, in England, by a series of cases, which, though much less numerous than those in this country, from the fact that the common law remedy has been there so much more nearly absorbed by statute, nevertheless show that there is no public wrong which is not the subject of criminal action. Thus it has been held indictable unlawfully and injuriously to carry a child infected with the smallpox along the public streets; R. *v.* Vantandril, 4 M. and Selw. 73; R. *v.* Burnett, 4 M. and Sel. 272; to refuse to provide necessities for an infant of tender years, whether child, apprentice, or servant; R. *v.* Marriott, 8 C. and P. 425; R. *v.* Smith, 8 C. and P. 153; to show a monster for money; Harring *v.* Walrond, 2 Cha. Ca. 110; to put combustible materials on board a ship without giving notice of the contents; 1 Russell on Cr. 298; William *v.* East India Com. 3 East. 192, 211; and to overwork children in a factory; 2 Twiss's Life of Eldon, 36.

(*k*) State *v.* Briggs, 1 Aiken, 226; Loomis *v.* Edgerton, 19 Wendell, 420; State *v.* Cawood, 2 Stewart, 360. On this point see a very able and comprehensive opinion of Shaw, C. J., in Com. *v.* Chapman, 23 Metc. 68—Post, § 2525, *note.*

(*l*) Post, § 2497.

(*m*) See on this point, 7 Law Rep. N. S. 88, 89, and post, § 2002–3.

(*n*) See post, § 2370–1–2–3, &c.

(*o*) See post, § 2396–7–8.

(*p*) See post, § 2696–7–8.

(*q*) See post generally, § 2456–2501.

(*r*) United States *v.* Hart, 1 Peters' C. C. R. 390. See post generally, § 2456–2501.

(*s*) State *v.* Jasper, 4 Dev. N. C. R. 323.

(*t*) State *v.* Huntley, 3 Iredell, N. C. R. 418; though see, *per contra*, State *v.* Simpson, 5 Yerger's Tenn. R. 356, Peck, J., dissenting.

(*u*) Penns. *v.* Morrisson, Addison's Pa. R. 274.

(*v*) Penns. *v.* Gillespie, Addison's Pa. R. 267.

(*w*) State *v.* Hitchins, 2 Harrington's Del. R. 257.

turb its inhabitants;(*x*) to violently disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot;(*y*) to publicly kidnap another;(*z*) and, in short, to do any act which may create a public disturbance, provided that such be the natural consequence of the act.

§ 5. (2.) *Malicious Injury to Others.*(*a*)—It has been held indictable to destroy a horse,(*b*) a cow,(*c*) a steer,(*d*) or any beast whatever, which may be the property of another;(*e*) to be guilty of wanton cruelty to animals in general, when the essential ingredient of malice towards the owner is present,(*f*) or the offence is a public scandal;(*g*) to cast the carcass of an animal in a well in daily use;(*h*) to poison chickens, to tear up fraudulently a promissory note, or maliciously break windows;(*i*) to mischievously set fire to a number of barrels of tar, belonging to another;(*k*) to girdle or otherwise maliciously injure trees kept either for use or ornament;(*l*) to put cow-itch on a towel;(*m*) though it seems not to be so, to put cantharides in rum;(*n*) to discharge a gun, with the intention of annoying and injuring a sick person in the immediate vicinity;(*o*) and to break into a room with violence for the same purpose;(*p*) to go armed upon the porch of another man's house and from thence shoot and kill a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house;(*q*) though it is not an indictable offence to remove a stone from the boundary line between the premises of A. and B., with the intent to injure B.;(*r*) nor to shave and crop the hair from a mare's tail in a stable;(*s*) nor to frequent a neighbor's house, grossly abuse his family, and make their lives uncomfortable.(*t*)

(*x*) Com. *v.* Taylor, 5 Binney, 281; Hackett *v.* Com. 3 Harris, 95.

(*y*) Com. *v.* Hoxey, 16 Mass. 385.

(*z*) State *v.* Rollins, 8 New Hampshire, R. 550.

(*a*) See post fully as to malicious mischief, § 1943–2012.

(*b*) Resp. *v.* Teischer, 1 Dallas, 335; Stats *v.* Council, 1 Tennessee, 305; though this case has since been denied; Shell *v.* State, 6 Humph. 283; Taylor *v.* State, 6 Humph. 285.

(*c*) Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cowen, 218.

(*d*) State *v.* Scott, 2 Dev. and Bat. 35; Wh. Prec. 213.

(*e*) Loomis *v.* Edgerton, 19 Wendell, 420. See particularly Kilpatrick *v.* People, 5 Denio, 277; Henderson's case, 8 Gratt. 709; though see State *v.* Wheeler, 3 Vermont, 344; Illies *v.* Knight, 3 Texas, 316.

(*f*) State *v.* Briggs, 1 Aiken, 226. See for a general discussion of this question, 7 Law Rep. N. S. 89, 90.

(*g*) U. S. *v.* Logan, 2 Cranch, C. C. R. 259; U. S. *v.* Jackson, 4 Cranch, C. C. R. 750.

(*h*) State *v.* Buckman, 8 New Hamp. 203.

(*i*) Resp. *v.* Teischer, 1 Dallas, 335. The better opinion now is, that to make such an offence indictable, it must be done either secretly and in the night time (Kilpatrick *v.* People, 5 Denio, 277), or in such a way as to produce a breach of peace. State *v.* Phipps, 10 Iredell, 225.

(*k*) State *v.* Simpson, 2 Hawkes, 460.

(*l*) Com. *v.* Eckert, 2 Browne, 251; Loomis *v.* Edgerton, 19 Wendell, 420; *per contra*, Brown's case, 3 Greenleaf, 177.

(*m*) People *v.* Blake, 1 Wheeler's C. C. 490.

(*n*) R. *v.* Hanson, 2 C. & R. 912.

(*o*) Com. *v.* Wing, 9 Pick. 1.

(*p*) Com. *v.* Taylor, 5 Binney, 277.

(*q*) Henderson's case, 8 Gratton, 709.

(*r*) State *v.* Burroughs, 2 Halstead's R. 220. See Com. *v.* Powell, 8 Leigh, 729.

(*s*) State *v.* Smith, 1 Cheves, 157; *contra*, Boyd *v.* State, 2 Humph. 39.

(*t*) Com. *v.* Edwards, 1 Ashmead, 146. According to a newspaper report of a late English case, it is a misdemeanor to keep an animal whose noise is a cause of disturb-

§ 6. (3.) *Nuisance or Scandal to the Community.*(u)—Under this head it has been held indictable to cast a dead body into a river without the rites of Christian sepulture;(v) to be guilty of eaves-dropping;(w) to knowingly sell unwholesome provisions;(x) to sell a wife;(y) to disinter a dead body without proper authority;(z) to give more than a single vote at an elec-

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ance to neighbors. In the particular issue, the evidence was, that the defendant, whose name was Minty, kept a cock which crowed 150 times in 25 minutes. The judges held that this was *per se* a nuisance in a populous town, and the defendant was convicted and fined.

(u) See post generally, § 2362–2446.

(v) Kanavan's case, 1 Greenleaf, 226.

(w) State *v.* Williams, 2 Tenn. 108; Com. *v.* Lovett, 6 P. L. J. 226. Post, § 2377.

(x) State *v.* Smith, 4 Hawkes, 378; 2 Iredell, 40.

(y) R. *v.* Delaval, 3 Burroughs, 1434.

(z) Com. *v.* Cooley, 10 Pick. 37; R. *v.* Lynn, 7 T. R. 733; 1 Leach, 477. In harmony with this is a late English case, R. *v.* Vann, 2 Denison C. C. 325, 8 Eng. Law & Eq. 569. This was an indictment for a nuisance in not having buried the body of a dead child, but leaving it in a yard, the stench from which was a public nuisance. It appeared that the child of the prisoner died; that he applied to the parish to bury it, but the guardians said that, under the power of the Poor Law Commissioners, they would lend him 7*s.* 6*d.* to bury the child, provided he would sign a document undertaking to repay the amount on demand. The prisoner refused to sign this document, and the relieving officer refused to advance him the money. The prisoner then removed the body to a yard, and the stench from it amounted to a nuisance. The chairman of the Leicestershire sessions told the jury that as the prisoner had been offered relief he was bound to receive it, and he was not excused from his liability. Upon this the prisoner was found guilty. A case was reserved, whether the prisoner, by refusing to render himself under an obligation for a debt, had not rendered himself liable to this indictment?

Baron Platt.—What public duty has a man to incur a debt?

Lord Campbell.—Is it an indictable misdemeanor not to incur a debt?

Mr. O'Brien said, the question was, whether he was liable to be punished for a nuisance.

Lord Campbell.—If he had the means of giving his child Christian burial, and refused to do so, he was liable to be indicted; but not if he had not any means.

Mr. O'Brien.—He had the means offered, if he incurred the debt.

Lord Campbell.—Unless he had the means he is not indictable. He could not chop up the body for meat: he could not throw it into the river. He had not the means of giving it Christian burial.

Mr. O'Brien said he was bound to incur the debt.

Lord Campbell.—If a Jew said, "I will give you the money at 50*l.* per cent.?"

Mr. O'Brien said, a man was as much bound to provide burial for his child as sustenance. It would be no answer to say he had not the means, if a baker said he would give him credit for bread.

Lord Campbell.—Has he committed a crime because he had no means? Was he bound to steal or beg?

Mr. O'Brien said, the means were put before him by the relieving officer.

Lord Campbell said: We are clearly of opinion that this conviction is unlawful, and that the direction of the chairman to the jury cannot be supported, because he told them, which is true enough, that the defendant was bound to provide burial for his child if he could: but he goes on to say, that as the guardians were entitled, under the order of the Poor Law Commissioners, to give relief for the purposes of burial, by way of loan, and as the defendant had been offered such relief, he was bound to receive it, and was not excused from his liability for the interment of his deceased child, and therefore the jury were bound to convict. There is no doubt, if the man has the means of burying his child, he is bound to do so, but he is not liable to be indicted for a nuisance if he has not the means of burying it. He cannot sell the body, or throw it into a river. Unless he had the means of giving the child Christian burial, he does not commit a nuisance by the child remaining unburied, although it might be a nuisance to the neighborhood, for which the parish officer would probably be liable. The defendant was not bound to accept a loan, and render himself liable to be proceeded against, and lose his liberty, and lose the means of maintaining his family, by incurring a debt.—*Evening Mail*, 21 Nov. 1851. See 1 Russ. on Crimes, 465.

tion ;(*a*) to be guilty of individual offensive drunkenness ;(*b*) or notorious lewdness,(*c*) or open and public cruelty to a slave or servant;(*d*) though on this point the better rule is that, to make the offence indictable, it must be such as to shock and insult, not an individual, but the community ;(*e*) to indulge publicly in profane swearing ;(*f*) or in loud and obscene language, so as to draw together a crowd in a thoroughfare,(*ff*) though the offence be not laid as a nuisance;(*g*) to publicly and blasphemously revile the Christian religion, which is part of the common law of the land;(*h*) to unnecessarily perform secular labors on Sunday, in such a way as to disturb the worship of others ;(*i*) and in fine to commit any act which from its nature must prejudicially affect the morals and health of the community.(*j*)

§ 7. (4.) *Personal Lewdness.*(*k*)—Under this head fornication has been held indictable ;(*l*) and adultery ;(*m*) and it has been held a misdeameanor to solicit another to commit adultery;(*n*) and to notoriously haunt houses of ill-fame.(*o*)

§ 8. (5.) *Attempts.*—It has been held indictable to lie in wait near a jail, by agreement with a prisoner, and to carry him away ;(*p*) to send threatening letters;(*q*) to challenge another to fight with fists ;(*r*) to challenge another to fight under any circumstances, though not in such a way as to constitute the statutory offence ;(*s*) to even intimate to another a desire to fight with deadly weapons :(*t*) and, in conclusion, to attempt to commit any offence, or to solicit its commission,(*u*) though it has been said that to make such at-

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It is even a misdemeanor at common law to enter an unconsecrated burial ground, and without the knowledge or consent of the owners of the ground or authority of any kind, to dig up and carry away a corpse buried therein; although the person committing the act may have been actuated by motives of affection and respect to the deceased, and of religious duty, and have conducted the removal decently. R. *v.* Sharpe, 40; Eng. Law. and Eq. 581.

(*a*) Com. *v.* Silsbee, 9 Mass. 417.

(*b*) Smith *v.* State, 1 Hum. Tenn. R. 396.

(*c*) State *v.* Moore, 1 Swan, Tenn. 136. (*d*) U. S. *v.* Cross, 4 Cranch, C. C. 603.

(*e*) State *v.* Waller, 3 Murphy, 229 ; R. *v.* Webb, 2 Carr, & K. 933.

(*f*) State *v.* Kirby, 1 Murphy, 254 ; State *v.* Ellow, 1 Devereux, 267 ; State *v.* Graham, 3 Sneed. (Tenn.) 134.

(*ff*) State *v.* Appling, 25 Mis. (4 Jones) 315.

(*g*) Barker *v.* Com. 7 Harris, 412; Bell *v.* State, 1 Swan, Tenn. 42. Post, § 2401–2410.

(*h*) People *v.* Ruggles, 8 Johnston, 290; Com. *v.* Kneeland, 20 Pick. 206 ; Thatcher's C. C. 346; Com. *v.* Updegraph, 11 Serg. & Raw. 394; State *v.* Chandler, 2 Harrington, 553; Smith *v.* Sparrow, 4 Bing. 84–8; Story's Miscellaneous Writings, 451. Post, § 2536–45.

(*i*) Com. *v.* Dupuy, 6 P. L. J. 223 ; Brightly R. 44.

(*j*) Com. *v.* Sharpless, 2 Serg. & R. 91 ; Resp. *v.* Teischer, 1 Dallas, 335 ; People *v.* Smith, 7 Cowen, 258.

(*k*) See post, § 2396.

(*l*) State *v.* Cox, N. C. Term R. 165. Post, § 2667.

(*m*) Com. *v.* Call, 21 Pick. 509; State *v.* Wallace, 9 New Hampshire, 518 ; though see *contra*, Anderson *v.* Com., 6 Rand. 627 ; Com. *v.* Jones, 2 Grat. 555 ; and State *v.* Brownson, 2 Bailey, 149. Post, § 2648.

(*n*) State *v.* Avery, 7 Connect. 267. (*o*) Brooks *v.* State, 2 Yerger, 482.

(*p*) People *v.* Washburn, 10 Johnson's R. 160.

(*q*) U. S. *v.* Ravara, 2 Dallas, 299. (*r*) Com. *v.* Whitehead, 2 Bost. Law Rep. 148.

(*s*) State *v.* Farrier, 1 Hawkes, 487 ; State *v.* Taylor, 3 Brevard, 243. Post, § 2674.

(*t*) Com. *v.* Tibbs, 1 Dana, 524.

(*u*) Com. *v.* Hackett, 3 Harris, 95 ; State *v.* Keyes, 8 Vermont, 57 ; Demarest *v.* Haring, 6 Cowen 76 ; State *v.* Taylor, 3 Brevard, 243. See post, § 2696.

tempt or solicitation indictable, it must have a direct, if not an immediate tendency to the commission of the offence,(v) and it is plain that there must be some act done to consummate the intent.(w) It is not necessary, however, that such attempt should be successful.(x)

§ 9. As a general rule, the tests laid down by a late learned writer, may be taken as satisfactory, that to constitute a misdemeanor of the character falling under this head, there must be some act done, a criminal intent, and an injury to the public.(y)

And to this it may be added, that a misdemeanor, in order to make an attempt to commit it indictable, must be something higher than the infraction of a police regulation.(a) Thus it has been held not to be indictable to persuade another to drink liquor without a license.(b)

(v) People v. Brockway, 2 Hill N. Y. 558. In Pennsylvania it has been held that an indictment charging the defendant, "with force and arms, &c., unlawfully and wickedly, did attempt to pick the pocket of one John S., with intent then and there feloniously to steal, take and carry away the goods and chattels, &c., of the said J. S.," &c., without laying an assault, is too vague and uncertain to be supported; as, unless some *act* is done, the offence is not indictable. Randolph v. Com., 6 Serg. & Rawle R. 398; S. P. Clarke's case, 6 Grat. 675. The English law on the subject of attempts to commit crime, is very distinct. Thus it is said that, when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. Per Lord Mansfield, C. J., in Schofield's case, Cald. 397. Thus an attempt to commit a felony is, in many cases, a misdemeanor. Higgin's case, 2 East R. 21; Rex v. Kinnersley and Moore, 1 Str. 196; and an attempt to commit even a misdemeanor has been sometimes decided to be itself a misdemeanor. Per Grose, J., in Higgins' case, 2 East R. 8; and see Rex v. Phillips, 6 East, 464. And the mere soliciting another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. Thus to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. Higgins' case, 2 East R. 5. It was held not to be necessary, in order to show that this was only a misdemeanor, to negative the commission of a felony, as none of the precedents of indictments for attempts to commit a rape or robbery contain any such negative averment; but it is left to the defendant to show it, if he pleads that the misdemeanor was merged in the greater offence. And it has been held that the completion of an act, criminal in itself, is not necessary to constitute criminality. By Lord Mansfield, in R. v. Schofield, Cald. 400. An attempt to commit a statutable misdemeanor is as much indictable as an attempt to commit a common law misdemeanor (R. v. Butler, 6 C. & P. 368, Patterson, J.), for when an offence is made a misdemeanor by statute, it is made so for all purposes. Parke, B., R. v. Roderick, 7 C. & P. 795. And the general rule is, that "an attempt to commit a misdemeanor, is a misdemeanor, whether the offence is created by statute, or was an offence at common law." Parke, B., R. v. Roderick, 7 C. & P. 795; 1 Russel on Cr. 46. Hawkins even carries the law farther; "the bare intention to commit a felony is so very criminal that, at the common law, it was punishable as felony, where it missed its effect through some accident, no way lessening the guilt of the offender. But it seems agreed, at this day, that felony shall not be imputed to a bare intention to commit it; yet it is certain that the party may be severly fined for such intention." 1 Hawk. c. 25, s. 3; Ibid. c. 55; State v. Williams, 12 Ired. 172. Post, § 372.

(w) R. v. Heath, R. & R. 184; Com. v. Morse, 2 Mass. 138; R. v. Meredith, 8 C. & P. 589; R. v. Woodrow, 15 M. & W. 404.

(x) R. v. Schofield, Cald. 397; R. v. Vaughn, 4 Barr. 249 c.; see 7 Law Rep. n. s. 34.

(y) 7 Law Rep. n. s. 36.

(a) Com. v. Willard, 22 Pick. 476; R. v. Bryan, 2 Stra. 866; Palse v. State, 5 Humph. 108.

(b) Com. v. Willard, 22 Pick. 476.

§ 10. (*b*) *Mala prohibita.* (1.) *Acts enjoined or forbidden by Statute, though no statutory Remedy by Indictment is prescribed.*—Misdemeanors which are *mala prohibita,* and which become penal by statute, are of two sorts; first, those which consist in the commission or omission of any act enjoined or forbidden by statute, though by such statute such omission or commission is not made the subject of indictment; and secondly, those which consist of the omission or commission of any act which by itself is made specifically indictable. If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.(*c*) Thus, wherever a duty is imposed on a public officer, the neglect to perform it is a public offence, and as such is indictable.(*d*) So an indictment lies against a quasi corporation, for neglecting to do what the common good requires; as, when the corporation of a city have power to direct the excavating, deepening, or cleansing of a basin connected with a river, and neglect to take the necessary means for that purpose, so that the basin becomes foul and stagnant, and a nuisance is created.(*e*)

(2.) *Where the Statute prescribes the Punishment.*—Wherever a statute creates an offence, and expressly provides a punishment, the statutory provisions, as will be seen more fully hereafter, must be followed strictly and expressly.

(3.) *Where a new Punishment is given to a Common Law Offence.*—Where a statute attaches a new penalty to that which was an offence at common law, either the remedy by statute or that at common law can be pursued. And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute.(*f*) Thus, even when the charter of a turnpike road provided a particular penalty on keeping the road out of repair, the negligence was held accountable at common law.(*g*) Where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statnte,(*h*) or the same statute in a subsequent substantive clause, describes a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by

(*c*) 2 Hawk. c. 25, s. 4; R. *v.* Davis, Say. 133; and see R. *v.* Sainsbury, 4 T. R. 457; State *v.* Fletcher, 5 N. Hamp. 257; R. *v.* Harris, 4 T. R. 202; Keller *v.* State, 11 Md. 525; People *v.* Bogart, 3 Parker, C. R. (N. Y.) 143.

(*d*) Wilson *v.* Com. 10 Serg. & R. 375; Gearhart *v.* Dixon, 1 Barr, 224.

(*e*) People *v.* Corporation of Albany, 11 Wen. 539; see R. *v.* Great N. and E. Railway Co. 9 Ad. and El. 315.

(*f*) R. *v.* Robinson, 1 Burr, 799; R. *v.* Wigg, 1 Ld. Raym. 1165, 2 Salk. 460; R. *v.* Balme, 1 Cowp. 648; R. *v.* Carlisle, 3 B. & A. 161; and see 2 Hale, 191; 1 Saund. 195, n. (4); State *v.* Moore, 9 Yerger, 353. Post, § 411.

(*g*) Turnpike Road *v.* People, 15 Wen. 267.

(*h*) R. *v.* Boyall, 2 Burr, 832.

indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute, at his option;(*i*) but, if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other; for, the express mention of any other mode of proceeding impliedly excludes that of indictment.(*j*)

(4.) *Where a Common Law Misdemeanor is made a Statutory Felony.*—In England, when a misdemeanor at common law is created a felony by statute, the misdemeanor is merged, and cannot be prosecuted as such;(*k*) and the reason is, that if such were not the case, the defendant would lose his right to a special jury, and to a copy of the bill of indictment.(*l*) The same doctrine is held at common law in Pennsylvania,(*m*) Massachusetts,(*n*) and in Maryland.(*o*) In New York, Vermont, and Ohio, however, it is said, that as the reason for the English rule does not there apply, the rule itself does not hold, and it is accordingly held that if the evidence, in an indictment in such case, does not make good the felony, the word feloniously may be rejected, and judgment had for the constituent misdemeanor.(*p*) In Massachusetts the latter principle is now established by statute.(*q*)

§ 11. (5.) *When Common Law is absorbed in Statute generally, and herein of the Pennsylvania Act of March* 21, 1806.—Where a new mode of punishment, or new method of procedure, is directed, the class of the offence not being altered, the remedies, in general, are considered cumulative, and the defendant may still be indicted at common law.(*r*) But in Pennsylvania the law is different. It is there provided, that "in all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of Assembly of this commonwealth, the directions of the said acts shall be strictly 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."(*s*) It has been held by the courts, in conformity with this act, that wherever a mode of procedure is attached to a specific offence by any act of Assembly, the common law remedy is abrogated, and the indictment and sentence must pursue the act.(*t*)

(*i*) 2 Hale, 171, R. *v.* Wright, 1 Burr. 543; and see R. *v.* Jones, 2 Str. 1146; R. *v.* Harris, 4 T. R. 205.

(*j*) R. *v.* Robinson, 2 Burr. 805; R. *v.* Buck. 1 Str. 679.

(*k*) R. *v.* Cross, 1 Ld. Raymond, 711, 3 Salk. 193. See post, § 400.

(*l*) Hawk. b. 2, c. 47, s. 6; 1 Ch. C. L. 251, 639; R. *v.* Walker, 6. C. & P. 657; though see R. *v.* Carradice, Rus. & R. 205.

(*m*) Com. *v.* Gable, 7 Serg. & Rawle, 423, per Tilghman, C. J.; Hackett *v.* Com. 3 Harris, 95, is seemingly contra, but here the term "feloniously" was a mere matter of impertinence in the bill, and there was no attempt to prosecute the case as a felony.

(*n*) Com. *v.* Newell, 7 Mass. 245.

(*o*) Black *v.* State, 2 Maryl. 376.

(*p*) People *v.* Jackson, 3 Hill, 92; People *v.* White, 22 Wend. 175; Lohman *v.* People, 1 Comstock, 379; Hess *v.* State, 5 Ohio, 1.

(*q*) Com. *v.* Squires, 1 Metc. 258.

(*r*) R. *v.* Dickinson, 1 Saund. 135, note (4); 2 Hawk. P. C. c. 25, s. 4; R. *v.* Wigg, Lord Raymond, 1163; 2 Salk. 460; 1 Russell on Crimes, 49; State *v.* Jesse, 7 Gill and Johnson, 290; Turnpike Road *v.* People, 15 Wen. 267.

(*s*) Act of 21st March, 1806, sect. xiii.; 4 Smith's Laws, p. 332. Post, § 373.

(*t*) 3 Serg. & Rawle, 273; 1 Rawle, 290; 3 Penn. R. 180; 3 Watts, 330; 5 Rawle, 64; 5 Wharton, 357. Post, § 373.

It was even held, that where an act of Assembly gave a penalty to the party injured by the extorsive and corrupt conduct of a magistrate, which penalty was to be recovered in a civil suit, the offence ceased to be indictable at common law. But it seems that the act in question only applies when a specific method of procedure is directed by act of Assembly; for when a new penalty is attached to a common law offence, then the indictment may still be at common law, though in case of conviction, no other than the statutory punishment can be inflicted. Thus, when an act of Assembly provided a new punishment for murder, it was held, that though by so doing, the act of 21st of March, 1806, prevented any other than the statutory punishment from being imposed, yet the indictment would still lie at common law, and that it was not necessary for it to conclude contrary to the act.(*u*) In nuisances, also, either in the obstruction of navigable rivers against which there are peculiar statutory provisions,(*v*) or in the endangering of the health of the city of Philadelphia, to protect which a board of health, armed with plenary powers, is established,(*w*) the remedy of common law is unextinguished.(*x*)

CHAPTER II.

WHAT PERSONS MAY BE INDICTED.

I. PERSONS NON COMPOTES MENTIS, § 13.

1st. WHERE THE DEFENDANT IS INCAPABLE OF DISTINGUISHING RIGHT FROM WRONG IN REFERENCE TO THE PARTICULAR ACT, § 15.

2d. WHERE THE DEFENDANT IS ACTING UNDER AN INSANE DELUSION AS TO CIRCUMSTANCES, WHICH, IF TRUE, WOULD RELIEVE THE ACT FROM RESPONSIBILITY, OR WHERE HIS REASONING POWERS ARE SO DEPRAVED AS TO MAKE THE COMMISSION OF THE PARTICULAR ACT THE NATURAL CONSEQUENCE OF THE DELUSION, § 17.

3d. WHERE THE DEFENDANT IS IMPELLED BY A MORBID AND UNCONTROLLABLE IMPULSE TO COMMIT THE PARTICULAR ACT, § 24.

4th. HOW INTOXICATION AFFECTS RESPONSIBILITY FOR CRIME, § 32.

(*a*) Insanity produced by *delirium tremens* affects the responsibility in the same way as insanity produced by any other cause, § 33.

(*b*) Insanity produced immediately by intoxication does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated, § 37.

(*c*) While intoxication *per se* is no defence to the *fact* of guilt, yet when the question of *intent* or *premeditation* is concerned, evidence of it is material for the purpose of determining the precise degree, § 41.

5th. MEDICAL WITNESSES AS EXPERTS, § 45.

6th. BY WHOM AND HOW THE DEFENCE OF INSANITY MAY BE TAKEN, § 51.

7th. PRESUMPTION OF SANITY, AND WHEN SUCH PRESUMPTION SHIFTS, § 55.

8th. HOW FAR EVIDENCE OF PRIOR INSANITY IS ADMISSIBLE, § 57.

I. PERSONS NON COMPOTES MENTIS.

§ 13. Both the legal and psychological relations of persons of unsound

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(*u*) Com. *v*. Evans, 13 Serg. & Rawle, 326.

(*v*) Com. *v*. White, 6 Binney, 179. Post, § 371. (*w*) Com. *v*. Church, 1 Barr, 105.

(*x*) Com. *v*. Vansyckle, Brightly R. 69. Post, § 373.

mind are discussed at large in another work,(*y*) to which the reader is referred as containing the present learning on these topics. At present it is proposed to do no more than to give a brief synopsis of the practical points which the decisions of the courts, as exhibited at large in the fuller treatise to which reference is made, may be considered as establishing.

§ 14. At the outset, it should be observed that the introduction of compulsory confinement for parties acquitted of the fact of guilt on grounds of insanity, has, to some extent, altered the issue which the older text writers and judges discussed. Under the old practice, if the defendant were convicted, he was punished as if he were a perfect moral agent, and if he were acquitted he was suffered to run at large, though he were acquitted on the ground of a monomania which would impel him to commit the same act the very next day. Under the present practice, both these alternatives may be avoided, and the jury, by acquitting on the specific ground of insanity, may insure the sequestration of the defendant from society until the insanity be cured. This change of policy should always be kept in view when reconciling the older with the later cases.(*a*)

It will not be here attempted to lay down any general definition of insanity generally as constituting a defence in criminal trials. I propose simply to enumerate the several cases in which this defence, in either of its phases, has been sustained by the courts, not, as the present practice is, as conferring irresponsibility for crime, but as constituting such a state of facts as to remove the defendant from the category of the sane to that of the insane transgressors. These cases may be classified as follows:—

1st. Where the defendant is incapable of distinguishing right from wrong in reference to the particular act.

§ 15. Wherever idiocy or amentia, or general mania, is shown to exist, the court will direct an acquittal; or if a jury should convict in the teeth of such instructions, the court will set the verdict aside. While the earlier cases lean to the position that such depravation of understanding must be general, it is now conceded that it is enough if it is shown to have existed in reference to the particular act.(*b*)

(*y*) Wharton & Stillé's Med. Juris. § 44 et seq.

(*a*) The present defect is not so much in the law as in the *working* of the law. Were the provisions for the confinement of insane criminals faithfully carried out, there would be comparatively little cause to complain of the uncertainty with which the law of penal insanity is beset. But this is not the case, for there is hardly a jurisdiction in which a man imprisoned on the ground of insanity one year, may not be seen rollicking about the streets in full liberty the next. Perhaps this difficulty would be most easily obviated by adopting the suggestion made elsewhere, viz., taking verdicts of guilty in all cases where the defence is insanity alone, and having the question of punishment or discipline afterwards determined by a mixed court of medical men and civilians. (W. & S. Med. Jur. § 276.)

(*b*) 1 Inst. 247; Bac. Abr. Idiot, Co. Litt. 247, (*a*); 1 Russ. on Cr. by Greaves, 13; 1 Hawk. cl. s. 3; 4 Bla. Com. 24; Collinson on Lunacy, 573, 673, (*n*); R. *v.* Oxford, 9 C. & P. 533; Burrow's Case, 1 Lewin, 238; R. *v.* Goode, 7 Ad. & El. 536; 67 Hans. Par. Deb. 728; Bowler's Case, Hadfield's Case, Ibid. 480; 27 How. St. Tr. 1316; Com.

§ 16. To this effect is the answer of the fifteen judges of England to the questions propounded to them by the House of Lords in June, 1843. "The jury," they said, "ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."(*c*)

In this conntry, whatever may have been the hesitancy as to the enunciation of the other propositions to be hereafter stated, there has been none as to this. There has scarcely been a case in which the defence of insanity has been taken, in which the jury have not been told that if the defendant was unable "to distinguish right from wrong," or to discern "that he was doing a wrong act," or was "not conscious of the moral turpitude of the act," or was "deprived of his understanding and memory," or was "ignorant that he was committing an offence against the laws of God and nature," he was irresponsible.(*d*)

2d. WHERE THE DEFENDANT IS ACTING UNDER AN INSANE DELUSION AS TO CIRCUMSTANCES, WHICH, IF TRUE, WOULD RELIEVE THE ACT FROM RESPONSIBILITY, OR WHERE HIS REASONING POWERS ARE SO DEPRAVED AS TO MAKE THE COMMISSION OF THE PARTICULAR ACT THE NATURAL CONSEQUENCE OF THE DELUSION.

§ 17. The answer of the English judges on this point is worthy of notice. The question propounded to them in this respect, was, "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" "To which question," they replied, "the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with

v. Rogers, 7 Metc. 500; 7 Bost. Law Rep. 449; Com. *v.* Mosler, 4 Barr, 267; Freeman *v.* People, 4 Denio, 10; State *v.* Spencer, 1 Zabriskie, 196; State *v.* Gardiner, Wright's Ohio R. 392; Com. *v.* Farkin, 3 Penn. L. J. 482; Vance *v.* Com., 2 Virg. C. 132; McAllister *v.* State, 17 Alab. 434; U. S. *v.* Shultz, 6 McLean, 121; People *v.* Sprague, 6 Parker C. C. 43; R. *v.* Barton, 3 Cox C. C. 275; R. *v.* Offord, 5 C. & P. 168; R. *v.* Higginson, 1 C. & K. 129; R. *v.* Stokes, 3 C. & K. 185; R. *v.* Layton, 4 Cox C. C. 149; R. *v.* Vaughan, 1 Cox C. C. 80.

(*c*) 1 Car. & Kir. 134; 8 Scott, N. R. 595. See State *v.* Hulting, 21 Mo. 464; R. *v.* Layton, 4 Cox, C. C. 148; R. *v.* Barton, 3 Cox, C. C. 275; 1 Bennett & Heard Lead. Cases, 942.

(*d*) See more particularly Com. *v.* Rogers, 7 Metc. 500; Com. *v.* Mosler, 4 Barr, 267; Com. *v.* Farkin, 3 Penn. L. J. 482; Freeman *v.* People, 4 Denio, 10; State *v.* Hulting, 21 Mo. 464; U. S. *v.* Clark, 2 Cranch C. C. R. 158; U. S. *v.* Shultz, 6 McLean C. C. R. 121; McAllister *v.* State, 17 Alab. 434; Vance *v.* Com., 2 Virg. C. 132; People *v.* Pine, 2 Barbour, 571; People *v.* Sprague, 2 Parker C. R. 43; State *v.* Huting, 21 Miss. (6 Bennett) 464.

respect to which the delusion exists, were real. For example: if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

§ 18. So far as the law thus stated goes—and it is stated with extreme caution—it has been recognized as authoritative in this country.(*e*) Even where there is no pretence of insanity, it has been held in one State, as will be seen more fully hereafter,(*f*) that if a man, though in no danger of serions bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence;(*g*) and though this proposition is too broadly stated, as is remarked by Bronson, J., when commenting on it in a recent case in New York, and should be qualified so as to make it necessary that there should be facts and circumstances existing which would lead the jury to believe that the defendant had reasonable (in proportion to his own lights) ground for his belief, yet with this qnalification it is now generally received.(*h*) And, indeed, after the general though tardy acquiescence in Selfridge's case, where the same view was taken as early as 1805 by Chief Justice Parker, of Massachusetts, and after the almost literal incorporation of the leading distinctions of the latter case in the revised statutes of New York, as well as into the judicial system of most of the States, the point must be considered as finally at rest. Perhaps the doctrine, as laid down originally in Selfridge's case, would have met with a much earlier acquiescence had not the supposed political bias of the court in that extraordinary trial, and the remarkable laxity shown in the framing of the bill of

(*e*) The supposed contradictions of the authorities on this point have arisen from an attempt to reduce into an inflexible code opinions which, while relatively true in their particular connection, were not meant for general application. Thus, for instance, when a defendant, in whom there is no pretence of mania or homicidal insanity, claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to determine is, whether he labors under such incapacity or not. The error has been to seize such an expression as this as an arbitrary elementary dogma, and to insist on its application to all other cases. Or, take the converse, and suppose the defence is merely homicidal insanity. In such a case it would be very proper to tell the jury that, unless they believe the homicidal impulse to have been uncontrollable, they must convict; and yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases as idiocy. It is by confining the decisions of the courts to the particular state of facts by which they have been elicited, that we can extract from the mass of apparently contradictory *dicta*, the propositions given in the text.

(*f*) Post, § 1024–28.

(*g*) Granger *v.* State, 5 Yerger, 459. Post, § 1024–28.

(*h*) Shorter *v.* People, 2 Comstock, 197–202, S. C. 4 Barb. 460; Monroe *v.* State, 5 Geo. 85; State *v.* Scott, 4 Iredell, 409; People *v.* M'Leod, 1 Hill, 420; People *v.* Pine, 2 Barbour, 168; Roberts *v.* Slate, 3 Georg. 310. See generally Wharton on Homicide, 216–7–8–9, &c., and post, § 1024–28. But see State *v.* Shoultz, 25 Mis. (4 Jones) 128, where evidence of peculiar nervousness on part of defendant was held inadmissible, and see Teal *v.* State, 22 Miss. (1 George) 619, and see other cases, post, § 1027.

indictment, and in the adjustment of bail, led to a deep-seated professional prejudice, which reached even such parts of the charge as were indisputably sound.

With these cases may be classed that of Levet;(*i*) who was in bed and asleep in his house, when his maid-servant, who had hired the deceased to help her to do her work, as she was going to let her out about midnight, thought she heard thieves breaking open the door, upon which she ran up stairs to the defendant, her master, and informed him thereof. Suddenly aroused, he sprang from his bed, and running down stairs with his sword drawn, the deceased hid herself in the butlery, lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving she was a thief, cried out, "Here are they who would undo us;" and the defendant, in the paroxysm of the moment, dashing into the butlery, thrust his sword at the deceased and killed her.(*ii*) The defendant was acquitted under the express instructions of the court, and the case has stood the test of the common law courts for over two hundred years, during which it has never been questioned. In New York and Pennsylvania in particular, this case, after very careful examination, has been solemnly reaffirmed.(*j*)

§ 19. In none of the cases which have just been noticed, is the *actual* existence of danger an essential ingredient, and certainly, as the intentions of an assailant are incapable of positive ascertainment, such a danger can never be absolutely shown to exist. It is true that in cases to be hereafter noticed,(*jj*) *dicta* have been thrown out to the effect that the danger must be such as to alarm a reasonable man, but whenever the requisite state of facts has been presented, courts have not hesitated to say that the danger must be estimated, not by the jury's standard, but by that of the defendant himself. Thus, an enlightened and learned judge in Pennsylvania, one who would be among the last to weaken any of the sanctions of human life, directed the jury to take into consideration "the relative characters, as individuals," of the deceased and the defendant, and, in determining whether the danger really was imminent, or not, to inquire "whether the deceased was bold, strong, and of a violent and vindictive character, and the defendant much weaker, and of a timid disposition."(*k*) And though it is not admissible to prove by way of defence, that the deceased was of a barbarous and vindictive nature and character,(*l*) yet threats uttered by him, and expressions of hostile feeling, as explaining the excited condition of the defendant's mind, may always be received.(*m*)

The principle which may be deduced from the cases is, that if by an insane delusion, or *depravation* of the reasoning faculty, the defendant insanely believes, either that the imagined evil is so intolerable as to make life-taking

(*i*) Levet's case, Cro. Car. 438; 1 Hale, 42, 474.
(*ii*) See post, § 1027, for a fuller discussion of this remarkable case.
(*j*) See cases cited post, § 1027, *note*.
(*jj*) Post, § 1026. (*k*) Post, § 1027. (*l*) Post, § 641.
(*m*) Com. *v*. Wilson, 1 Gray R. 337. See post, § 1024–28.

necessary or justifiable in order to avert it, or that while the evil is of a lesser grade, life-taking is an appropriate and just way of getting rid of it, he is entitled to such a verdict as will transfer him from the category of sane to insane criminals.

§ 20. That an insane delusion, as to the value or meaning of human life, will have this effect, even though the party himself knows when committing the act that he is doing wrong, and is violating the laws of the land, is illustrated by Lord Erskine, in a well-known case: "Let me suppose," he said, "the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that upon the trial of such a lunatic for murder, you, being on your oaths, were convinced, upon the uncontradicted evidence of one hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to other intents and purposes he was sane—answering, reasoning, acting as men, not in any manner tainted with insanity, converse and reason and conduct themselves. Suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all principles of good and evil; yet would it be possible to convict such a person of murder, if, from the influence of the disease, he was ignorant of the relation in which he stood to the man he had destroyed, and was utterly *unconscious* that he had struck at the life of a human being?"(*n*)

§ 21. Again: in a case which has more than once occurred within the walls of a lunatic asylum, a man fancies himself to be the Grand Lama or Alexander the Great, and supposes that his neighbor is brought before him for an invasion of his sovereignty, and he cuts off his head or throttles him. He knows he is doing wrong; perhaps, from a sense of guilt, he conceals the body; he may have a clear perception of the legal consequences of his act. In such a case criminal responsibility, in the full sense of the term, does not exist. It was in conformity with this view, in a case where it was proved that the defendant had taken the life of another under the notion that he was set about with a conspiracy to subject him to imprisonment and death, that Lord Lyndhurst told the jury that they might "acquit the prisoner on the ground of insanity, if he did not know, when he committed the act, what the effect of it was with reference to the crime of murder." What, therefore, he in fact decided, was, that a man who, under an insane delusion, shoots another, is irresponsible when the act is the product of the delusion. Such, indeed, on general reasoning, must be held to be the law in this country, and such will it be held to be when any particular case arises which requires its application.

§ 22. In England this view has been recognized in several cases, notwith-

(*n*) Winslow on Plea of Insanity, 6.

standing the reluctance of the courts in that country to enlarge the boundaries of insane irresponsibility. Thus on the trial of Hadfield, who could distinguish between right and wrong, but who was under a delusion that it was his duty to offer himself as a sacrifice for his fellow men, and that his shortest way of so doing was to kill the king, which he knew to be morally wrong, Lord Kenyon, on these facts being made out, advised a withdrawal of the prosecution. The same course was followed by Chief Justice Tindale in McNaughten's case, when on a trial for shooting at Mr. Drummond, the private secretary of Sir Robert Peel, a singular delusion was proved.(*o*) In the ecclesiastical courts, the existence of delusions or hallucination on material points has frequently been held to so far constitute insanity, as to require a party to be declared incapable of managing his estate.(*p*) In this country, the legitimacy of such a defence in criminal cases has been in several instances specifically recognized.(*q*)

§ 23. Partial insanity, however, is no defence, when the crime was not its immediate product. If the defendant was sane as to the crime, but insane on other topics, the insanity in the latter respect will not save him.(*qq*) The crime must have been the result of the delusion. Dr. Casper(*r*) has given us a pregnant illustration of this: A merchant, named Schraber, was convicted of cheating by false pretences and false information, and was sentenced to imprisonment for six years. On an application to the court to reconsider the sentence, insanity was set up, and it appeared that the prisoner either felt or feigned a belief that he was a legitimate son of the late Duke Charles of Mecklenberg Strelitz; which certainly, if not a mere fiction, was an insane delusion. Much reason existed to believe that the whole thing was simulated; but, independently of this, the court was clear that as the mania, if real, had no connection with his crime, it formed no ground for a revision of the sentence.(*s*)

(*o*) See also R. *v.* Brixey, and R. *v.* Touchett, cited in Bennett & Head's Lead. Cases, 100.

(*p*) Dew *v.* Clark, 3 Adams, 79; Frere *v.* Peacocke, 1 Robertson, 442.

(*q*) Roberts *v.* State, 3 Georgia, 310; People *v.* Pine, 2 Barbour, 571; Com. *v.* Rogers, 7 Metc. 500.

(*qq*) State *v.* Huting, 21 Miss. (6 Bennett) 30; Bovard *v.* State, 30 Miss. (1 George) 600; Com. *v.* Mosler, 4 Barr, 266.

(*r*) Wochenschrift, Nr. 31-32.

(*s*) It is in determining such questions as these that the common law draws in the aid of medical science. The common law may in fact be defined to be the experience of past ages and the wisdom of the present, applied to the particular issue. If a question is to be tried involving the most delicate point of mechanics, the testimony of experts is taken, and what they declare to be the law of philosophy, the judges declare to be the law of the land. If a question of marine rights is to be determined, the mysterious laws of the sea are invoked—the "sweet influences of the Pleiades and the bands of Orion"—and as taught by science, they become part of the common law. And so on a trial where the question at issue was whether a certain species of fish was able to surmount obstructions by which a river in Maine had been dammed up by parties interested in the soil, it was held that the observations of scientific men versed in this particular topic, were part of the common law of the land for the specific case; and that, therefore, naturalists, who had given attention to the habits of this fish under such circumstances, could be called to give their opinion on the merits. (Cottril *v.* Mason, 3 Fairf. 222. See more fully as to cases in which the opinions of experts are evidence, post, § 45, 664.) And the great works of the masters in all professions have

3d. WHERE THE DEFENDANT IS IMPELLED BY A MORBID AND UNCONTROLLABLE IMPULSE TO COMMIT THE PARTICULAR ACT.

§ 24. The questions propounded to the English judges related solely to the doctrine of insane delusions; and the replies, though containing general expressions, can hardly, even in England, be considered as authoritative in a case where the defence is monomaniac impulse. In this country, the effect of such a defence, as distinguished from that of insane delusion, has been the subject of special consideration. The first case in which it was gravely considered is that of Rogers in the Supreme Court of Massachusetts, in the spring of 1844.(*t*) Chief Justice Shaw, who delivered the charge, began by laying down two propositions of great breadth. "In order to constitute a crime," he says, "a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, *or* if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. These extremes," he then proceeds to state, "are easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging; or so perverted by insane delusion, as to act under false impressions and influences." To such cases—to those where the mind is not "incapable of judging," &c., and to those where it acts, "under false impressions and influences,"—and to such alone, he applies the "right and wrong" test; reserving to it a very small sphere of action, since the defence of insanity would scarcely be ventured where there was both a capacity to judge, reason, and remember, and a freedom from false "impressions and influences." Taking up the particular defence of monomania, which was that advanced in the case before him, he proceeds to state the law with a liberality in entire accordance with the weight of medical authority. "This" (monomania) "may operate as an excuse for a criminal act in one of two modes. 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act: as where the belief is that the party killed had

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become, also, part of the common law. Even by a judge of remarkable rigidity as a literal commentator on the old writers, this is freely admitted. "I consider the administrators of criminal law greatly indebted to them (writers on medical jurisprudence, &c.), for the results of their valuable experience, and professional discussion in the subject of insanity; and I believe that those judges who carefully study the medical writers, and pay the most respectful but discriminating attention to their scientific researches on the subject, will seldom, if ever, submit a case to a jury in such a way as to hazard the conviction of a deranged man." (Hornblower, C. J., 1 Zabriskie, 166.) So that when, in any particular instance, ignorance may be exhibited or injustice done, it must be attributed, not to a want of flexibility in the system, but to an imperfect dissemination of truth by those who have assumed its guardianship.

(*t*) This case is reported with great fulness, in pamphlet shape, by Messrs. Bemis & Bigelow, and is incorporated, in a condensed form, in the seventh volume of Mr. Metcalf's Reports, p. 500.

an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates, to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in homicide, or other violent acts toward friend and foe indiscriminately; so that, although there were no previous indications of violence, yet the subsequent act connecting itself with the previous symptoms and indications, will enable an experienced person to say, that the outbreak was of such a character that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted on by motives, and governed by will." * * * * "Are the facts of such a character, taken in connection with the opinion of professional witnesses, as to induce the jury to believe that the accused was laboring for days under monomania, attended with delusion, and did thus indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroyxsm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the diseased was not an accountable agent? If such was the case, the accused is entitled to an acquittal."

§ 25. Chief Justice Gibson, of the Supreme Court of Pennsylvania, sitting in 1846 with two of his associates in a Court of Oyer and Terminer, after repudiating the doctrine that partial insanity excuses anything but its direct results, and sliding, in reference to such cases, into the "right and wrong" test, proceeded to charge the jury as follows: "But there is a *moral or homicidal* insanity, consisting of an irresistible inclination to kill or to commit some other particular offence.(*u*) There may be an unseen ligament pressing on the mind, drawing it to *consequences which it sees but cannot avoid,* and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, *though aware of the heinous* nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety.

(*u*) The charge was oral, having been reported by the present writer, and but hastily revised by the judge himself, which may account for the want of literal exactness in this and other expressions.

To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."(*uu*)

§ 26. In a still earlier case in Pennsylvania, Judge LEWIS, then presiding in Lycoming County, and afterwards Chief Justice of Pennsylvania, a judge by whom the subject of medical jurisprudence has received peculiar and careful attention—recognized the same doctrine. "Moral insanity arises from the existence of some of the natural propensities in such violence, that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is therefore to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never to be admitted as a defence, until it is shown that these propensities exist in such violence, as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. Where its existence is fully established, this species of insanity relieves from accountability to human laws. But this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach."(*v*)

§ 27. In conformity with the results arrived at by the learned judges, whose decisions have been just cited, may be treated a case tried before Mr. Justice STORY, in which that learned and humane judge decided that a young woman, who in a violent impulse in puerperal fever threw her child overboard, though at the time perfectly conscious of the enormity of the act, was entitled to an acquittal.(*w*)

§ 28. In the enunciation of this doctrine there should be the strictest caution, and in the application of it the most jealous scrutiny. And in connection with it, it is always important to keep in mind the impressive language of Lord BROUGHAM, when discussing the question before the House of Lords: "With respect to the point, of a person being an accountable being, that was, an accountable being to the law of the land, a great confusion had pervaded the minds of some persons whom he was indisposed to call reasoners, who considered accountability in its moral sense, as mixing itself up with the only kind of accountableness with which they, as human legislators, had to do, or of which they could take cognizance. He could conceive of the case of a human being of a weakly constituted mind, who might by long brooding over real or fancied wrongs, work up so perverted a feeling of hatred against an individual that danger might occur. He might

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(*uu*) Com. *v.* Mosler, 4 Barr, 266.

(*v*) The same view was, some years after, repeated by the same enlightened and able judge; Lewis Cr. Law, 404; by Judge Edmunds (2 Am. Jour. of Ins.); and Judge Whiting (Freeman's Trial—Pamph.); and by the Supreme Court of Georgia (Roberts *v.* State, 3 Georgia, 310).

(*w*) U. S. *v.* Hewson, 7 Bost. Law Rep. 361.

not be deluded as to the actual existence of injuries he had received, but he might grievously and grossly exaggerate them, and they might so operate upon a weakly framed mind and intellect as to produce crime. He could conceive that the Maker of that man, in his infinite mercy, having regard to the object of his creation, might deem him not an object for punishment. But that man was accountable to human tribunals in a totally different sense. Man punished crime for the purpose of practically deterring others from offending, by committing a repetition of the like act. It was in that sense only that he had anything to do with the doctrine of accountable and not accountable. He could conceive a person whom the Deity might not deem accountable, but who might be perfectly accountable to human laws."(*x*)

It is safest to lay down the test, that unless there be some degree of mental disturbance, proved or presumed, moral insanity will not be a defence to a criminal charge.(*xx*)

§ 29. Chief Justice Hornblower, it is true, in a charge delivered at Nisi Prius, and which bears the impress of his single authority, not having been reviewed by the court in banc, took still more decided ground, involving an emphatic disclaimer of moral insanity *in toto*. At the same time he rejects in a manner quite unexampled for its summariness, all the old tests, and reduces the inquiry to a point which, after all, leaves the widest margin. "In my judgment, the true question to be put to the jury is, whether the prisoner was *insane* at the time of committing the act; and in answer to that question there is little danger of a jury's giving a negative answer, and convicting a prisoner who is proved to be insane on the subject matter relating to or connected with the criminal act, or proved to be *so far* and *so generally* deranged as to render it difficult, or almost impossible, to discriminate between his sane and insane acts."(*y*)

(*x*) Hans Par. Deb. LXVII. 728.

(*xx*) See Wh. and St. Med. Jur., ed. 1860, § 58, where the cases will be found fully noticed.

(*y*) State *v.* Spencer, 1 Zabriskie, 196. In People *v.* Huntingdon, N. Y., Dec. 22, 1856, Judge Capron thus charged the jury:—

"You doubtless need not to be told, gentlemen, that the law holds no person bereft of reason responsible for acts. Deprived of mind, man is but an automatic machine, and human courts, in holding him, when thus afflicted, acquit of guilt, do but humbly and obscurely imitate the perfect justice of Deity. Insanity or mental alienation has from time immemorial received the attention of the civil and criminal tribunals of all enlightened governments; able professors in all the learned professions, and other profound scholars, have studied and examined the structure and functions of the human system, the laws and operations of mind, the relations of each to the other, and their mutual influence as a united organism, and have deduced results and demonstrated their correctness by practical illustrations and logical deductions from established data; these results the courts have never failed to sanction as soon as their learned authors agreed among themselves on the subjects, and practical experience attested their certainty.

"Acting in this spirit, the theories of the schools on the subject of insanity, as approved by the majority of the learned in that department of science, have been from time to time recognized and placed among the rules of evidence and law. By many judicial decisions in England and this State, insanity has been considered under the distinct heads of IDIOCY, ADVENTITIOUS and VOLUNTARY INSANITY. With idiocy and voluntary insanity we have no concern on this trial. Adventitious or accidental insanity has been denominated, in judicial opinions, *monomania*, or insanity on some particular subject or subjects, the party being sane on all others, and *total* or general

§ 30. It is proper to notice that in cases in which the defence is either insane impulse or insane delusion, the "right and wrong" test cannot be pro-

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on all subjects. The courts have also sanctioned the division of insanity into *permanent* and *temporary* insanity, the latter being also called *lunacy*. It is not my purpose on this occasion, nor would it be useful if I had the necessary time at my command, to remark particularly on the characteristics of these distinctions. I have referred to them simply to aid you in understanding more clearly my subsequent remarks on the test of insanity adopted by the courts. Our purpose being practical and not scientific, our search being for legal recognitions and not theories, I feel bound to charge you in conformity with the decisions of the courts which have the authority to declare the law in the particular case. We are in a court of law, not in the school of science; our action, therefore, must be governed by legal adjudications, and not by the theories and speculations of the schools. These scholastic theories and speculations may be sound, and may indicate a better test of truth in cases of insanity than the existing rule affords; but until the proposed substitute shall have been sanctioned and adopted by the only legitimate authority, we must adhere to the old rule of decision.

"Insanity is described by the judicial tribunals as the state of being unsound in mind, deranged, diseased or unnatural *in intellect*. By the same authority, insanity is also distinguished as *general* and *partial*, extending to all subjects or confined to one or a few subjects. You will therefore observe that the law on this subject, as at present administered, regards it, whether general or special, as a derangement of the mind, the intellect, the reasoning and appreciating principle, the spring of motives and passions. To constitute a complete defence, insanity, if partial, as *monomania*, must be such a degree as to wholly deprive the accused of the guide of reason in regard to the act with which he is charged, and of the knowledge that he is doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, in the particular case in which crime is imputed to him, and to know that he is doing wrong, the act is criminal in law, and he is liable to punishment.

"But it is insisted for the prisoner that insanity, either general or special, may exist, and the subject be totally unable to control his actions, while his intellect or knowing and reasoning powers suffer no notable lesion. It is claimed that persons thus afflicted may be capable of reasoning or supporting an argument on any subject within their sphere of knowledge. In a more practical sense, it is claimed that a person may steal your property, burn your dwelling, or murder you, and know that the deed is a criminal offence, and that he will be punished if tried and convicted, and may be able to reason on the subject, and yet be guiltless on the ground of insanity! This affliction has received the name of MORAL INSANITY, because the natural feelings, affections, inclinations, temper or moral dispositions only are perverted, while the mind, the seat of volition and motion, remains unimpaired. I will not positively assert that this theory is not sound. It may be reconcilable with moral responsibility for human conduct, but I am not reluctant to confess *my own mental inability to appreciate* the harmony between the two propositions if it exist. This theory may afford a more just and humane standard by which to test the presence of insanity than the adopted rule, but until the proper authorities sanction the change, the theory proposed cannot be regarded here.

"With these views of the law in your minds, you will consider the evidence of the medical witnesses. They are gentlemen of deservedly high positions and profound learning, and their opinions on a question of insanity are entitled to great respect. The evidence which they have given is competent and pertinent on that question, and you will regard it in connection with the other evidence in the case offered on that point in this trial; but it is proper and perhaps necessary that the court should remind you that the medical witnesses predicate their opinions upon the hypothesis, so frankly and fairly stated by them in your hearing, that a person may be insane to a degree which should exempt him from legal accountability for his criminal acts, and yet that his intellect or mind may remain unimpaired to any considerable extent; that he may know that his act is criminal, but is nevertheless unable to restrain himself from its perpetration. In considering their opinions, therefore, you will regard the principle on which they are formed, and that principle not being recognized in our law, those opinions are not entitled to the same weight in your deliberations that they should have commanded if they had been given with reference to that law."

The student is referred to W. & S. Med. Jur., in which the Psychological relations of insanity are discussed under the following heads:—

I. GENERAL THEORIES OF MENTAL UNSOUNDNESS, § 78.
   1st. PSYCHOLOGICAL THEORY, § 79.
   2d. SOMATIC THEORY, § 80.

perly applied. For in point of fact, cases of insanity are very rare in which no moral sense remains.(*a*)

(*a*) W. & S. Med. Jur. § 60, 260, et seq. See also Bennett & Head's Lead. Cas. 101.

(*Wharton & Stillé's Med. Jur. Analysis—continued.*)

3d. INTERMEDIATE THEORY, § 81.
- Difficulties attending each of the first two, § 82.
- Questions as to moral responsibility of lunatics, § 83.
- Views of President Edwards, § 84.
- Of Dr. Barlow, § 85.

II. HOW MENTAL UNSOUNDNESS IS TO BE DETECTED, § 86.

1st. BY WHOM, § 86.
- Medical expert necessary for this purpose, § 86.
- Great skill and experience needed, § 87.
- Dangers of an inexperienced examiner being baffled, § 88.
- Responsibility in law of medical examiner, § 89.
- Importance of examiner adapting his manner to patient's condition, § 90.
- Important that legal and medical officers should, in such cases, act in common, § 92.
- Manner in which medical witness is to be examined on trial, § 94.

2d. AT WHAT TIME, § 95.
- (1.) Time of the act, § 95.
- (2.) At trial, § 97.
- (3.) On and after sentence, § 98.

3d. BY WHAT TESTS, § 100.
- (1.) Physiognomy, § 100.
  - Relations of the different features, § 101.
- (2.) Bodily health and temperament, § 102.
  - State of bowels, § 102.
  - Physical disorganization, § 103.
  - Insensibility to pain and cold, § 104.
  - Irregularities in action of senses, § 105.
  - Change in disposition, § 106.
- (3.) Hereditary tendency, § 107.
  - Importance of this test, § 108.
  - Admissible in point of law, § 108.
  - Opinion of Gibson, C. J., § 108.
- (4.) Conversation and deportment, § 110.
  - Necessity of great circumspection in this respect, § 110.
  - Cases illustrating this, § 111.
- (5.) Nature of act, § 112.
  - (*a*) Its insensibility, § 112.
  - (*b*) Its incongruity with antecedents, § 113.
  - (*c*) Its motivelessness, § 114.
  - (*d*) Its inconsequentiality, § 115.

III. FROM WHAT MENTAL UNSOUNDNESS IS TO BE DISTINGUISHED.

1st. EMOTIONS, § 116.
- (1.) Remorse, § 116.
- (2.) Anger, § 118.
- (3.) Shame, § 122.
- (4.) Grief, § 124.
- (5.) Homesickness (*Nostalgia*), § 125.

2d. SIMULATED INSANITY, § 127.
- Necessity for close examination, § 127.
- Tests to be applied, § 128.
- Delirium most usually counterfeited, but the most difficult, § 129.
- Physiognomy and health to be examined, § 130.
- Case to be compared with other recorded cases, § 131.
- Simulation not to be inferred from absence of a trace of insanity at the examination, § 132.
- Causes why such signs may be suppressed, § 132.

A man named John Billman, who had been sent to the Eastern Penitentiary of Pennsylvania, for horse stealing, murdered his keeper under circum-

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(*Wharton & Stillé's Med. Jur. Analysis—continued.*)

Pretended insanity frequently turns into real, § 133.
How examination is to be conducted, § 134.
Patient to be brought into a succession of relations, § 135–8.
To be furnished with pen, ink and paper, and other methods of examination, § 135–8.
Insania Occulta, features of, § 139.
Necessity of guarding against, § 139.

IV. MENTAL UNSOUNDNESS, AS CONNECTED WITH DERANGEMENT OF THE SENSES, AND DISEASE, § 140.
1st. Deaf and Dumb, § 140.
2d. Blind, § 141.
3d. Epileptics, § 142.
Peculiar tendency of epilepsy to insanity, § 142.
Nature of epilepsy, § 143.
Distinction between the several classes, § 144.
Different stages of the disease, § 145.
Actions committed during attack, not valid, § 146.
Rule as to intermediate stages, § 147.
Tests laid down by Clarus, § 148.

V. MENTAL UNSOUNDNESS, AS CONNECTED WITH SLEEP, § 149.
General effect of sleep on the senses, § 149.
1st. Somnolentia or sleep-drunkenness, § 151.
2d. Somnambulism, § 159.

VI. MENTAL UNSOUNDNESS AS AFFECTING THE TEMPERAMENT, § 163.
1st. Depression, § 163.
2d. Hypochondria, § 166.
3d. Hysteria, § 169.
4th. Melancholy, § 170.

VII. MENTAL UNSOUNDNESS AS AFFECTING THE MORAL SYSTEM, § 174.
1st. General moral mania, § 174.
Effect of, § 174.
General symptoms, § 175.
Illustrations, § 176.
2d. Monomania, § 177.
Doctrine of *Mania sine Delirio*, § 178.
Difference of opinion as to its existence, § 179.
Tests to be applied to it, § 180.
Tendency in this country to recognize its existence, § 183.
(1.) Homicidal mania, § 186.
Cases where Esquirol supposes it to exist, § 186.
Precautions necessary in its recognition, § 190.
Tests suggested by Dr. Ray, § 190.
" " Dr. Taylor, § 190.
Dr. Mayo's objections to the entire theory, § 191.
(2.) Kleptomania—(morbid propensity to steal), § 192.
(3.) Pyromania—(morbid incendiary propensity), § 195.
How far recognized in England, § 197.
Necessary tests, § 198.
(4.) Aidoiomania—(morbid sexual propensity), § 199.
(5.) Pseudomania—(morbid lying propensity), § 202.
(6.) Oikeiomania—(morbid state of domestic affections), § 204.
(7.) Suicidal mania—(morbid propensity to self-destruction), § 206.
Tendency to this in cases of melancholy, &c., § 207.
Legal consequences in actions against life insurers, § 208.
(8.) Fanatico-mania, § 209.
(*a*) Supernatural or pseudo-supernatural demoniacal possession, § 210.
Testimony of ancient writers to this, § 210.
" of the New Testament, § 211.

stances of great brutality, and yet with so much ingenuity as to elude suspicions of his intentions, and almost conceal his flight. He hung a noose on

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(*Wharton & Stillé's Med. Jur. Analysis—continued.*)

(*b*) Mental alienation on religious subjects, § 214.
Tendency of infidelity to insanity, § 214.
Conservative influence of Christianity, § 215.
Insane delusion the result of a *departure* from Christianity, § 216.
Illustrations of this, § 217.
Legal bearings of religious insanity, § 219.
(9.) Politico-mania, § 220.
How far an epidemic, § 221.
Causes likely to generate it, § 221.

VIII. MENTAL UNSOUNDNESS, AS CONNECTED WITH INTELLECTUAL PROSTRATION, § 222.
1st. IDIOCY, § 222.
Nature of, § 222.
Physical incidents of, § 223–5–6.
Cretinism, § 228.
2d. IMBECILITY, § 229.
With concomitant insanity, § 230.
Original, § 230.
Supervening, § 230.
Specious, § 230.
With confusion of mind, § 230.
Without insanity, § 231.
Distinction between innocent and malignant imbecility, § 232.
3d. DEMENTIA, § 234.

IX. MENTAL UNSOUNDNESS ACCOMPANIED WITH DELIRIUM, § 235.
1st. GENERAL DELIRIUM, § 235.
(*a*) Depressed delirium, § 236.
(*b*) Maniacal delirium, § 237.
(*c*) Delirium tremens, § 238.
(*d*) Puerperal mania, § 239.
2d. PARTIAL DELIRIUM, § 240.

X. MENTAL UNSOUNDNESS, AS CONNECTED WITH DELUSIONS AND HALLUCINATIONS, § 241.
1st. GENERAL, § 241.
Marked by general derangement of the perceptive faculties, § 241.
Various phases it assumes, § 242.
Tests of Ellinger, § 243.
Effect of general delusion, § 244.
2d. PARTIAL, 245.
Delusions and hallucinations, § 245.
When there is no other sign of mental unsoundness, § 246.
When mental unsoundness has made some progress, § 247.
In cases of drunkenness, &c., § 248.
In cases of developed insanity, § 249.
Causes of delusions, § 250.
Abercrombie's classification, 252.
Hallucination in regard to a change into, or a possession by wild animals, § 253.

XI. MENTAL UNSOUNDNESS, AS CONNECTED WITH LUCID INTERVALS, § 254.

XII. TREATMENT OF INSANE CRIMINALS, § 259.
Necessity of separate places of confinement in which insane criminals can be placed, § 259.
(I.) FOR RETRIBUTION, § 260.
In most, if not all cases of crime resulting from insane impulse, there is original responsibility, § 260.
Insanity, in most cases, the result of moral excess, § 261–9.
Qualified responsibility of lunatics, § 261–9.

the outside of a small window which is placed in the door of the cells to enable persons outside to look in. He then induced the keeper, in order to look at something on the floor directly at the foot of the door, to put his head entirely through. The noose was then drawn, and but for an accident, the man would have been suffocated. Notwithstanding this attempt, the same keeper was inveigled into the cell alone, a few days afterwards, on the pretence of Billman being sick, and was there killed by a blow on the head with a piece of washboard. Billman undressed him; changed clothes with him; placed him on a bed in such a position as to induce the general appearance of his being there himself; traversed in his assumed garb, the corridor with an unconcerned air; addressed an apparently careless question to the gate-keeper, and sauntered listlessly down the street on which the gate opened. He was, however, soon caught; but his insanity was so indisputable, that the prosecuting authorities, after having instituted a careful and skilful medical examination, became convinced of his irresponsibility, and united upon the trial in asking a verdict of acquittal on the ground of insanity. He was then remanded to confinement under the Pennsylvania practice; and some time afterwards, when in a communicative mood, he disclosed the fact of his having several years back murdered his father under circumstances which he detailed with great minuteness and zest. Inquiries were instituted, and it was found that he had told the truth. The father had been found strangled in his bed; the son had been arrested for the crime; but so artfully had he contrived the homicide, that he was acquitted by means of an alibi, got up by means of a rapid ride at midnight, and a feigned sleep in a chamber, into which he had clambered by a window. Here, then, was not only a sense of guilt, but a keen appreciation of the consequences of exposure, and an abundance of evidence of long harbored intention and intelligent design.

§ 31. A still more emphatic illustration of the same sense of accountability among lunatics, as a class, is to be found in an anecdote related by Dr. Winslow.(*b*) When Martin set York Minster on fire, a conversation took place among the inmates of a neighboring lunatic asylum, having reference to this general topic. The question was, whether Martin would be hanged, when, in the course of the discourse, one madman announced to the others

(*b*) Lectures, &c., 108.

(*Wharton & Stillé's Med. Jur. Analysis—continued.*)

(2.) For Prevention, § 270.
  Mischief to society if monomaniacs are suffered to go at large, § 270.
  Necessity of restraint, § 271.
(3.) For Example, § 272.
  Contagiousness of unchecked crime, § 272.
(4.) For Reform, § 273.
  Impossibility of patient recovering when permitted to run at large, § 273.
  Injury to the community from the want of secondary punishments, the result being acquittals of dangerous parties, from an unwillingness to see the severer penalties inflicted, 274.
  Ordinary penitentiaries inadequate, § 275.
  And so of ordinary lunatic asylums, § 276.

a position, in which they all acquiesced, that Martin would not be hanged, because he was "one of themselves." It certainly will not be maintained that a consciousness of the legal relations of crime, such as this remark exhibited, confers responsibility where it does not otherwise exist.

4th. How intoxication affects responsibility for crime.

§ 32. The law in this connection may be summed up as follows:—

(*a*) Insanity, produced immediately by *delirium tremens*, affects the responsibility in the same way, as insanity produced by any other cause.

(*b*) Insanity immediately produced by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated.

(*c*) While intoxication *per se* is no defence to the *fact* of guilt, yet when the question of *intent* or *premeditation* is concerned, evidence of it is material for the purpose of determining the precise degree.

§ 33. (*a*) *Insanity produced by delirium tremens affects the responsibility in the same way as insanity produced by any other cause.*—If a man who, laboring under *delirium tremens*, kill another, is made responsible, there is scarcely any species of insanity which on like principles would not be subjected to the severest penalties of criminal law. "It may be the immediate effect," says Dr. Ray,(*c*) "of an excess or series of excesses, in those who are not habitually intemperate, as well as in those who are; but it most commonly occurs in habitual drinkers, after a few days' total abstinence from spirituous liquors. It is also very liable to occur in this latter class when laboring under other diseases, or severe external injuries, that give rise to any degree of constitutional disturbance. The approach of the disease is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have obviously increased in severity, the patient ceases to sleep altogether, and soon becomes delirious. At first the delirium is not constant, the mind wandering during the night, but, during the day, when its attention is fixed, capable of rational discourse. It is not long, however, before it becomes constant, and constitutes the most prominent feature of the disease. Occasionally the delirium occurs at an earlier period of the disease, and may even be the first symptom of any disorder. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this period, the disease is fatal; and whether subjected to medical treatment or left to itself, neither its symptoms nor its duration are materially modified. The character of the delirium in this

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(*c*) Med. Jur. 438.

disease is peculiar, bearing a stronger resemblance than any other form of mental derangement, to dreaming. It would seem as if the dreams which disturb and harass the mind during the imperfect sleep that precedes the explosion of the disease, continue to occupy it when awake, being then viewed as realities, instead of dreams. The patient imagines himself, for instance, to be in some peculiar situation, or engaged in certain occupations, according to each individual's habits and profession; and his discourse and conduct are conformed to this delusion, with this striking peculiarity, however, that he is thwarted at every step, and is constantly meeting with obstacles that defy his utmost efforts to remove. Almost invariably, the patient manifests, more or less, feelings of suspicion or fear, laboring under continual apprehension of being made the victim of sinister designs and practices. He imagines that certain people have conspired to rob or murder him, and insists that he can hear them in an adjoining apartment, arranging their plans and preparing to rush into his room; or that he is in a strange place, where he is forcibly detained and prevented from going to his own home. One of the most common hallucinations is, to be constantly seeing devils, snakes, vermin, and all manner of unclean things around him and about him, and filling every nook and corner of his apartment. The extreme terror which these delusions often inspire, produces in the countenance an unutterable expression of anguish, and, in the hope of escaping from his fancied tormentors, the wretched patient endeavors to cut his throat or jump from the window. Under the influence of these terrible apprehensions he sometimes murders his wife or attendant, whom his disordered imagination identifies with his enemies, though he is generally tractable, and not inclined to be mischievous. After perpetrating an act of this kind, he generally gives some illusive reason for his conduct, rejoices in his success, and expresses his regret in not having done it before.

§ 34. As far as concerns temporary incapacity, therefore, *delirium tremens* acts in the same way as any other *delirium*, and when complete, destroys the moral as well as the intellectual responsibility. The only question, therefore, is whether there is anything in the *source* from which it is derived which requires that it should be exempted from the general rule by which delirium forms a good defence to an indictment for a criminal offence. In the *dicta* of one or two of the older law writers, this exception is sought to be sustained on the ground that a drunkard, in every stage, is a voluntary demon, and that he can no more use his consequent mania as a defence, than can the man who kills another by a sword allege that it was the sword, and not himself, that was the guilty agent. But to this the answer is threefold: (1) that *delirium tremens* is not the *intended* result of drink in the same way that drunkenness is; (2) that there is no possibility that *delirium tremens* will be voluntarily generated in order to afford a cloak for a particular crime; (3) that so far as original cause is concerned, it is not peculiar in being the offspring of indiscretion or guilt, for such is the case with almost every other species of insanity. These points scarcely need to be expanded. The fact is, *delirium tremens* runs the same course with almost every other species of insanity known in the criminal courts. It is the result, like most other manias, of

prior vicious indulgence; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt.

§ 35. The law is well settled that a person who is incapacitated from moral and intellectual agency by reason of *delirium tremens*, is irresponsible.(*d*) Thus, in the leading American case, Story, J., declared criminal responsibility not to attach where the delirium is the "remote consequence" of voluntary intoxication, "superinduced by the antecedent exhaustion of the party, arising from gross and habitual, drunkenness. However criminal," he proceeded to say, "in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it, to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed when Drew (the defendant) was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise, remotely, from what, in a moral view, is a criminal neglect or fault of the party; as from religious melancholy, undue exposure, extravagant pride, ambition &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."(*dd*)

§ 36. In a still earlier case of at least equal authority, the court told the jury that if they "should be satisfied by the evidence, that the prisoner, at the time of committing the act charged in the indictment, was in such a state of mental insanity not produced by the immediate effects of intoxicating drinks, as not to have been conscious of the moral turpitude of the act, they should find him not guilty."(*e*) And expressly to this very point is a very recent case, where a federal judge of high authority told the jury "that if the defendant was so far insane as not to know the nature of the act, nor whether it was wrong or not, he is not punishable, although such *delirium tremens* is produced by the voluntary use of intoxicating liquors."(*f*)

When delirium tremens is set up as a defence, the prisoner must show that he was under a delirium at the time the act was perpetrated, there being ~~no~~ no presumption of its existence from antecedent fits from which he has recovered.(*ff*)

(*d*) U. S. *v*. Drew, 5 Mason, U. S. Rep. 28; U. S. *v*. Forbes, Crabbe R. 558; Bennett *v*. State, Mart. & Yerg. 133; U. S. *v*. Clarke, 2 Cranch C. C. R. 158; Cornwell *v*. State, ibid. 14; Carter *v*. State, 12 Texas, 500; Maconnehey *v*. State, 5 Ohio (N. S.) 77; R. *v*. Thomas, 8 C. & P. 820; R. *v*. Meakin, 7 C. & P. 299; Rennie's case, 1 Lew. C. C. 76; 1 Hale, 32; 1 Rus. on Cr. 7; 4 Black. Com. 26.

(*dd*) U. S. *v*. Drew, supra.

(*e*) U. S. *v*. Clarke, 2 Cranch, C. C. R. 158.

(*f*) U. S. *v*. McGlue, 1 Curtis, C. C. R. 1.

(*ff*) State *v*. Sewell, 3 Jones, Law (N. C.) 245. See post, § 55-6.

§ 37. (*b*) *Insanity produced immediately by intoxication does not destroy responsibility, where the patient when sane and responsible, made himself voluntarily intoxicated.*

§ 38. There can be no doubt on this point, either on principle, policy, or authority. Drunkenness, so long as it does not prostrate the faculties, cannot be distinguished from any other kind of passion. If the man who is maddened by an unprovoked attack upon his person, his reputation or his honor, be nevertheless criminally responsible—if hot blood form no defence to the fact of guilt—it would be a most extraordinary anomaly if drunkenness voluntarily assumed should have that effect, independently of all extraneous provocation whatever. If, as is claimed—or else there is no ground for the exception—drunkenness so incapacitates the reason as to make it at least partially incapable of distinguishing between right and wrong, or else so inflames the passions as to make restraint unsupportable, then comes in the familiar principle that the man who voluntarily assumes an attitude or does an act which is likely to produce death in others, is responsible for the consequences, even though he had at the time no specific intentions to take the life of any one. Thus, if a man breaking an unruly horse wilfully ride him among a crowd of persons, the probable danger being great and apparent, or if a workman out of sport or mischief, slide a plank from the top of a roof into a crowded street, or if a manufacturer deliberately and knowingly leave in the cellar of an uninhabited house a keg of powder, and death ensue, it is murder at common law.(*g*) And so it must also be held that the steamboat captain who deliberately dashes his boat into a crowd of smaller craft, so that life is taken, is in like manner responsible. There can be no question as to this. The man who voluntarily arms himself with weapons of destruction, and then throws them hap-hazard among the innocent and unoffending, without even the excuse of specific malice or provocation, is at least as dangerous as the assassin who picks out his victim in advance. Against the last there may be some checks,—against the first none. Caution may ward off the one, or innocence escape it, but to the other the most innocent and benevolent would be as likely to fall victim as the most depraved. The mind in the one case may be inflamed with revenge—that "Wild Justice," as Bacon calls it—which, though no defence, is yet capable of being reached by reason and averted by care. But in the other, the motive is mere gross sensual indulgence, and the blow cannot be restrained by strength, or avoided by inoffensiveness.

§ 39. And as a mere matter of legal *policy*, the same position holds good. There rarely could be a conviction for homicide if drunkenness avoided responsibility.(*h*) Sir E. Coke scarcely goes beyond the tenor of civil as well as of common law writers, when he says, "As for a drunkard who is *voluntarius dæmon*, he hath, as has been said, no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it. *Omne crimen*

(*g*) See Wharton on Homicide, 45.

(*h*) See W. & S. Med. Jour. § 67.

ebrietas et incendit et detegit."(*i*) And although now drunkenness cannot be said to aggravate a crime in a judicial sense, yet it is well settled that it forms no defence to the fact of guilt. Thus Judge Story, in a case already cited, after noticing that insanity, as a general rule, produces irresponsibility, went on to say, "An exception is, when the crime is committed by a party while in a fit of intoxication, the law allowing not a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime." Lord Hale says, "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect but temporary phrensy; but by the laws of England, such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."(*j*) And so Parke, B., a very authoritative English crown judge, said to a jury in 1837: "I must also tell you, that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished."(*k*) And Alderson, B., said in 1836: "If a man chooses to get drunk, it is his own voluntary act; it is very different from madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for."(*l*) In harmony with this is the whole current of English authority.(*m*)

§ 40. In this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defence to the *factum* of guilt;(*n*) the only point about which there has been any fluctuation, being the extent to which evidence of drunkenness is receivable to determine the exactness of the intent or the extent of deliberation.

§ 41. (*c*) *While intoxication* per se *is no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is admissible for the purpose of determining the precise degree.*—Great caution is undoubtedly necessary in the application of this doctrine, for, as has already been remarked, there are few cases of premeditated violent homicide, in which the defendant does not previously nerve himself for the encounter by liquor,

(*i*) Co. Litt. 247, *a*.

(*j*) 1 Hale, 7; 4 Black. Com. 26; 1 Gabbett, C. L., 9; and see a very learned article in 6 Law Rep. (N. S.) 554.

(*k*) R. *v*. Thomas, 7 C. & P. 817.

(*l*) R. *v*. Meakin, 7 C. & P. 297.

(*m*) Burrow's case, 1 Lewin, C. C. 75; Rennie's case, 1 Lewin, C. C. 76; 1 Russell on Crimes, 8.

(*n*) U. S. *v*. Clarke, 2 Cranch, C. C. R. 158; U. S. *v*. McGlue, 1 Curtis, C. C. R. 1; People *v*. Pine, 2 Barbour, 566; State *v*. Bullock, 13 Alab. 413; State *v*. Stark, 1 Strob. 479; U. S. *v*. Cornell, 2 Mason, 91; U. S. *v*. Forbes Crabbe, 558; State *v*. Harlow, 21 Mo. 446; Kelly, *v*. State, 3 Smedes & Mar. 518; Cornwall *v*. State, Mar. & Yer. 147; Pirtle *v*. State, 9 Humph. 663; State *v*. John, 8 Ired. 330; State *v*. Turner, 1 Wright, 30; Schaller *v*. State, 14 Mo. 502; People *v*. Robinson, 1 Harris, C. C. 649; Com. *v*. Hawkins, Gray (Mass.), 463; Wh. on Homicide, 369; People *v*. Hammill, 2 Parker, C. R. (N. Y.) 223; People *v*. Robinson, ibid. 235; Mercer *v*. State, 17 Geor. 146; Carter *v*. State, 12 Texas, 500. Intoxication is no defence in an indictment for perjury, People *v*. Wilby, 2 Parker, C. R. (N. Y.), 19.

and there would in future be none at all, if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation *aliunde,* and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life, or that there was no positive premeditation.

To disprove *malice,* drunkenness is certainly irrelevant. Thus, in Massachusetts, the law is that intoxication, at the time of committing a homicide, is not entitled to any weight in determining whether the provocation was such as to reduce the crime from murder to manslaughter(*a*). Such seems to be the present (1860) leaning in Ohio(*b*).

On the other hand, in New York, on a trial of an indictment for murder with a club, in a sudden affray, it was held admissible to prove that the prisoner was intoxicated at the time; and where a witness, then present, well knowing the prisoner, after describing his appearance and conduct, was asked to give his opinion whether the prisoner was intoxicated, and the court excluded such evidence, this was held ground for a new trial(*c*). So on a trial for murder, the defendant's counsel requested the court to charge, "that if it appeared from the evidence that the condition of the prisoner from intoxication was such as to show that there was no motive or intention to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused, and it was held that the charge should have been given, as the question of intent was material to the degree of the crime(*d*).

It should be observed, however, that the New York cases hang in part on peculiarities of the statutes of that state, which make premeditation an ingredient of murder. It is otherwise in Massachusetts, and in those states where the common law distinction between murder and manslaughter remains untouched. When such is the case, drunkenness, it is submitted, cannot be received for the purpose of showing the offence is *manslaughter,* and not *murder.*

Drunkenness may become material under the statutes resolving murder into two degrees, in which the distinguishing test is a specific intent to take life. Thus, in the Philadelphia riot cases of 1844, where it was shown that bodies of men were inflamed by sectarian and local prejudices, and blinded by a wild apprehension of danger to such an extent as to make them incapable of discrimination, or of precise or specific purpose, it was held that they could not be considered as guilty of that species of "wilful and deliberate" murder which

(*a*) Commonwealth *v.* Hawkins, 3 Gray (Mass.), 463.
(*b*) Nichols *v.* State, 8 Ohio (N. Y) 435.
(*c*) Eastwood *v.* People, 3 Parker, C R. (N. Y.) 25.
(*d*) Rogers *v.* People, 3 Parker, C. R. (N. Y.) 632. See also People *v.* Rogers, 4 C. R. (N. Y.) 18, quoted post, § 41, note *g.*

constitutes murder in the first degree.(*o*) Precisely analogous to this is the case of the drunkard, who in a fight slays an antagonist without any prior premeditation. In his intoxication he is incapable of such mental action as the term "premeditated" describes. His mental condition may be such as to deprive him of the capacity to form a "specific intent" to take life, or to do anything else. And yet at the same time, at common law, the offence would, strictly speaking, fall under the head of murder, for it would possess the incident of malice, and would be independent of that of provocation. Under such circumstances the offence properly is to be ranked as murder in the second degree, and such has repeatedly been decided by the courts.(*p*) In 1858, however,

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(*o*) Wharton on Homicide, 371–2.

(*p*) Com. *v.* Jones, 1 Leigh. 612; Com. *v.* Haggerty, Lewis' C. L. 403; Pirtle *v.* State, 9 Humph. 434; Swan *v.* State, 4 Humph. 131; People *v.* Hammill, 2 Parker, C. R. (N. Y.) 223; People *v.* Robinson, 2 Parker, C. R. (N. Y.) 235; State *v.* Harlowe, 21 Miss. (6 Bennett) 446; People *v.* Eastman, 4 Kernan (N. Y.) 562; Penns. *v.* McFall, Addison, 257; R. *v.* Cruse, 8 C. & P. 541; R. *v.* Monkhouse, 4 Cox, C. C. 55. See People *v.* Rodgers, 4 E. P. Smith, N. Y. 18. In a case in Tennessee, the court thus speak: "Upon the trial, there was evidence that the prisoner was intoxicated at the time he committed the homicide. Upon the subject of the defendant's intoxication the judge told the jury that 'voluntary intoxication is no excuse for the commission of crime; on the contrary, it is considered by our law as rather an aggravation; yet if the defendant was so deeply intoxicated by spirituous liquors at the time of the killing, as to be incapable of forming in his mind a design deliberately and premeditately to do the act, the killing, under such a state of intoxication, would only be murder in the second degree.' It is insisted that his honor did not state the principle upon this subject, as it has been ruled by this court. In the case of Swan *v.* the State, Judge Reese, who delivered the opinion of the court, says: 'But although drunkenness in point of law constitutes no excuse or justification for crime, still, when the nature and essence of a crime are made to depend by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status? Is it one of self-possession favorable to a fixed purpose by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits? In such a case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is, did the act proceed from sudden passion, or from deliberation or premeditation? What was the mental status at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes, has been in point of fact committed. In these remarks the court intend to be understood as distinctly indicating that a degree of drunkenness, by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation, although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury in determining whether the killing was done with premeditation and deliberation.' The whole subject was ably reviewed by Judge Turley, in the case of Pirtle *v.* the State. In delivering the opinion of the court in that case, the judge says, at page 671: 'It will frequently happen necessarily, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison or by lying in wait, that it will be a vexed question, whether the killing has been the result of sudden passion produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation; and in all such cases, whatever is able to cast light upon the mental status of the offenders, is legitimate proof; and among others, the fact that he was at the time drunk; not that this will excuse and mitigate the offence, if it were done wilfully, deliberately, maliciously and premeditately (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such

a majority of the Supreme Court of Missouri held the law to be that drunkenness does not mitigate a crime; and that it cannot be taken into consideration

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as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation.' Here the court explicitly lays down the rule to be, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light upon the mental state of the offender, is not alone that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design deliberately and premeditately to do an act; for the court says that in the state of drunkenness referred to, a party well may be guilty of killing wilfully, deliberately, maliciously and premeditately; and if he so kill, he is guilty as though he were sober. The principle laid down by the court is, that when the question is—Can drunkenness be taken into consideration, determining whether the party be guilty of murder in the second degree? the answer must be that it cannot; but when the question is—What was the actual mental state of the perpetrator at the time the act was done, was it one of deliberation and preparation? then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditately and deliberately done. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case it is murder, though the perpetrator was drunk; and no degree of drunkenness will excuse in such case, unless by means of drunkenness, an habitual or fixed madness be caused. The law in such cases does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which it is implied having been proved, the law presumes its existence, and proof in opposition to this presumption is irrelevant and inadmissible. Hence if a party cannot show he was so drunk as not to be capable of entertaining a malicious feeling, the conclusion of the law is against him. But when the question is—whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison and by lying in wait) must be perpetrated wilfully, deliberately, maliciously and premeditately. The jury must ascertain, as a matter of fact, that the accused was in this state of mind when the act was done. Now, according to the cases of Swan *v.* the State, and Pirtle *v.* the State, any fact that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their consideration; and, among other facts, any state of drunkenness being proved, it is a legitimate subject of inquiry, as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passions excited and rashly perpetrate a criminal act. Now, it is unphilosophical for us to assume that such a man would, in the given case, be chargeable with the same degree of premeditation and deliberation that we would ascribe to a sober man, perpetrating the same act upon a like provocation. It is in this view of the question that this court held, in Swan's case and in Pirtle's case, that the drunkenness of a party might be looked to by the jury, with the other facts in the case, to enable them to decide whether the killing were done deliberately and premeditately. But his honor the Circuit Judge, told the jury that drunkenness was an aggravation of the offence, unless the defendant was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditately to do the act. In this charge there is error, for which the judgment must be reversed. Reverse the judgment and remand the cause for another trial." Hale *v.* State, 11 Humph. 154. See post, § 1075, &c.

In 1858, Denio J., delivering the opinion of the Court of Appeals, said:—

"Where a principle in law is found to be well established by a series of authentic precedents, and especially when, as in this case, there is no conflict of authority, it is unnecessary for the judges to vindicate its wisdom or policy.

"It will, moreover, occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimi-

by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately, and premeditately, so as to constitute the crime committed murder in the first degree. Judge Richardson dissented, holding that although a homicide committed wilfully, deliberately and premeditately is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditately.(*pp*)

§ 42. The same general view is taken as to the question of *intent*. Thus in an Ohio case, it was very properly held, that when the charge was knowingly passing counterfeit money, with intent to cheat, the drunkenness of the defendant at the time of the offence was a fit subject for the consideration of the jury, there being no ground to suppose that the defendant knew the money to be counterfeit *before* he was drunk.(*q*) And when the defendant was indicted for an attempt to commit suicide by drowning, and it was alleged that she was at the time unconscious of the nature of her act from drunkenness, Jervis, C. J., said to the jury: "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?"(*r*) So, again, when the charge was assault with intent to murder, Patterson, J., said: "A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may find them guilty of an assault."(*s*)

§ 43. Beyond this the advance has been fluctuating. The furthest step taken was in an English case, decided in 1819,(*t*) where Holroyd, J., is re-

(*pp*) State *v.* Cross, 6 Jones, Missouri, 332.

(*q*) Pigman *v.* State, 15 Ohio, 555, which case was afterwards considered and confined to its peculiar state of facts, in Nichols *v.* State, 8 Ohio S. R. (N. S.) 435. See to the same point, U. S. *v.* Roudenbush, 1 Bald. 514.

(*r*) R. *v.* Moore, reported 6 Law Rep. (N. S.) 581.

(*s*) R. *v.* Cruse, 8 C. & P. 541. (*t*) R. *v.* Grindley 1 Russ. on Cr. 8, note *n*.

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nation as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society. I am of the opinion that in cases of homicide, the fact that the accused was under the influence of liquor, may be given in evidence in his behalf. The effect which the evidence ought to have upon the verdict will depend upon the other circumstances of the case. It must generally happen, in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct, and, therefore, I am of opinion that it would never be correct to exclude the proof altogether. That it would sometimes be right to advise the jury that it ought to have no influence upon the case, is I think clear from the foregoing authorities. In a case of lengthened premeditation, of lying in wait, or where the death was by poisoning, or in the case of wanton killing without any provocation, such an instruction would plainly be proper." (People *v.* Rodgers, 4 E. P. Smith, N. Y. 18.)

ported by Sir W. Russell, who adopts his opinion as text law, to have said, that the fact of drunkenness might be taken into consideration to determine the question whether an act was premeditated or done only with sudden heat and impulse. This would make drunkenness an item in every question of provocation or hot blood, and would of course open the way to the same difficulties as to general policy, which we have already pointed out in another connection. In 1835, however, this case was expressly repudiated by Parks, J., who said, in referring to Holroyd, J.'s, language, as just given, "Highly as I respect that late excellent judge, I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion. There is no doubt that that case is not law. I think there would be no safety in human life, if it were to be considered as law."(*u*) But the very next year, Alderson, B., in a case of stabbing, retraced at least a part of the retreat which had been thus so emphatically sounded. "It is my duty to tell you," he said, "that the prisoner being intoxicated, does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for. *However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.*"(*v*) Perhaps this is doing no more than reiterating the principle we have already announced, that when there is evidence of *sober* premeditation, intermediate drunkenness cannot be received to affect the question of intent; but that, when there is no such evidence, it can. And it would hardly be possible to strain farther than this the following charge, in 1837, by Parke, B. (to be distinguished from Park, J., whose opinion, two years before, has been just noticed): "I must tell you, that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so; he must take the consequence of his own voluntary act; or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given; because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication, than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a

(*u*) R. *v*. Carrol, 7 C. & P. 145.

(*v*) R. *v*. Meakin, 7 C. & P. 297.

barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse. You will decide whether the subsequent act does not furnish the best means of judging what the nature of the previous expression really was."(*w*)

§ 44. The American cases present the same general result, depending in principle, if not in terms, on the position that where the encounter was sudden, and the defendant, prior to such encounter, had no malice or old grudge, intoxication at the time of the encounter, can be taken into consideration, to ascertain whether the defendant, when under a legal provocation, acted from malice or from sudden passion,(*x*) and whether there was deliberation, or a specific intention to take life.(*m*) Under ordinary circumstances, however, when malice is either express or implied, the court will tell the jury that the fact of intoxication does not lower the offence to manslaughter.(*n*)

5th. MEDICAL WITNESSES AS EXPERTS.

§ 45. The American authorities falling under this head may be considered as establishing the following points:—

(*a*) Professional men, experts in psychological medicine, who have personally examined the party, may be asked whether he was insane or not.(*y*) Such, in fact, has been the uniform and undisputed course in practice in all cases where the question has arisen. The English rule is equally definite.(*z*)

§ 46. (*b*) Even though the witness has not had the opportunity of personal inspection, he may be asked for his opinion on an assumed state of facts, or upon the evidence given on trial, if he has heard the whole of it;(*a*) though now the better opinion seems to be that he cannot be asked to give his judgment as to the truth or falsity of the facts, but that they must be put to him as a case stated.(*aa*) The latter restriction is now definitely settled in England.(*b*)

(*w*) R. *v.* Thomas, 7 C. & P. 817.

(*x*) Pa. *v.* McFall, Add. 257; Swan *v.* State, 4 Humph. 136; State *v.* Bullock, 13 Alab. 413; Cornwall *v.* State, Mart. & Yer. 147; Kelly *v.* State, 3 Sm. & Mars. 518; State *v.* McCants, 1 Spear, 384; Pirtle *v.* State, 9 Humph. 663; U. S. *v.* Roudenbush, 1 Bald. 514; Swan *v.* State, 4 Humph. 136; Haile *v.* State, 11 Humph. 154. People *v.* Hammil, 2 Parker, C. R. (N. Y.) 223; People *v.* Robinson, Ibid. 235; State *v.* Harlowe, 21 Mis. (6 Bennet), 446; Com. *v.* Hawkins, 3 Gray (Mass.) 463.

(*m*) Ante, § 41.

(*n*) Nichols *v.* State, 8 Ohio S. R. (N. S.) 435.

(*y*) Com. *v.* Rogers, 7 Metc. 500; M'Allister *v.* State, 17 Alab. 434; Clark *v.* State, 12 Ohio, 483.

(*z*) R. *v.* Searle, 1 Mood. & Rob. 75; R. *v.* Offord, 5 C. & P. 168. See a learned note on this point in 7 Bost. Law Rep. 692. M. Briand (Méd. Lég. 552, Paris, 1852), says, "Appelés à faire un rapport sur l'état moral d'un prevenu ou d'un accusè, les médecins ne s' immiscent point alors dans les fonctions des juges ou des jurées, mais ils eclairent la conscience des uns et des autres." See also Manuel de Méd. Lég. de M. Orfila, t. i. 399, Paris, 1848.

(*a*) Com. *v.* Rogers, 7 Metc. 500; M'Allister *v.* State, 17 Alab. 434; Lake *v.* People, 1 Harris C. C. 495, S. C. 2 Kernan, 358; People *v.* Thurston, 2 Parker, C. R. 49; Negro Jerry *v.* Townshend, 9 Md. 145; Clark *v.* State, 12 Ohio, 483; Com. *v.* Wood, MSS. Phil. 1836; U. S. *v.* McGlue, 1 Curtis C. C. 9; Potts *v.* House, 6 Georgia, 324; Com. *v.* Mosler, MSS. Phil. 1845. Bennett & Heard, Lead. Cas. 105.

(*aa*) U. S. *v.* McGlue, 1 Curtis, 1; Woodbury *v.* Goodyear, 7 Gray, 469; People *v.* McCann, 3 Parker, Cr. R. (N. Y.) 272.

(*b*) R. *v.* Wright. R. & R. 451; R. *v.* Frances, 4 Cox, C. C. 57; opinion of judges,

§ 47. The common law has already been defined to be the experience of the past and the wisdom of the present age applied to the exigencies of the particular case; and in this sense it includes not only the decisions of the courts, but the opinions of experts on the particular branches to which their attention has been devoted.(*bb*) Thus the evidence of persons acquainted with navigation is admissible upon the facts as developed in evidence in cases of collision,(*c*) or loss from alleged unseaworthiness;(*d*) of persons conversant with handwriting as to whether a paper was forged;(*e*) of seal engravers as to the genuineness of an impression;(*f*) of artists, as to whether a picture is an original or a copy;(*g*) of postmasters, as to the genuineness of a postmark;(*h*) of scientific engineers, as to the effect of an enbankment on a harbor;(*i*) of practical surveyors, as to whether certain marks were intended as boundaries or terriors;(*j*) and of naturalists, as to whether the habits of certain fish were such as to enable them to overcome certain obstructions in a river.(*k*) And so nothing is more common than to examine a surgeon as to whether death resulted from natural causes, or from certain artificial agencies which may be the subject of inquiry.(*l*) On this principle the opinion of medical men as to whether particular symptoms, supposing them to exist, constitute insanity, is part of the law of the case. It should be observed, however, as the cases in the note show, that the witness is not to be asked whether on the whole evidence of the case his opinion is that the patient was insane—for that, indeed, would be taking the jury's place—but whether if a certain state of facts be true the inference of insanity would result therefrom.(*m*)

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post, n (*r*); Doe d. Bainbrigge *v.* Bainbrigge, 4 Cox, C. C. 454; though see *contra*, R. *v.* Searle, 1 Mood. & Rob. 75; R. *v.* Offord, 5 C. & P. 168.

(*bb*) State *v.* Knight, 43 Maine, 12.

(*c*) Malton *v.* Nesbit, 1 C. & P. 70; Fenwick *v.* Bell, 1 C. & K. 312; Thornton *v.* Royal Exch. Co. Peak, 25.

(*d*) Beckwith *v.* Sydebotham, 1 Camp. 116.

(*e*) Bevett *v.* Braham, 4 T. R. 497; Hammond's Case, 2 Greenl. 33; Moody *v.* Rowell, 17 Pick. 490; Com. *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55; Hubley *v.* Vanhorne, 7 S. & R. 185; Lodge *v.* Phipher, 11 S. & R. 333. Post, § 1460.

(*f*) Folkes *v.* Chadd, 3 Dougl. 187.

(*g*) Ibid.

(*h*) Abbey *v.* Lill, 5 Bing. 299.

(*i*) Folkes *v.* Chadd, 3 Dougl. 157.

(*j*) Davis *v.* Mason, 4 Pick, 156.

(*k*) Cottrill *v.* Mason, 3 Fairf. 222.

(*l*) See cases quoted in Wharton on Homicide, 241-4; and see also 1 Stark. Ev. 154; Phil. and Am. on Ev. 899; 1 Green. on Ev. § 440.

(*m*) See 3 Greenlf. on Ev. § 5. Lake *v.* People, 1 Harris, C. C. 495. But see S. C. 2 Kernan, 358. In answer to an inquiry by the House of Lords, whether "a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, can be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?" The English judges, replied: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But when the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

It has already been seen that after much fluctuation, the American courts seem

The following decisions on analogous points may be noticed here :—

If a surgical witness testify as an expert, he may, having examined a wound, give his testimony as to the nature of the instrument which inflicted it,(*n*) and as to whether such wound was adequate to the production of death.(*nn*)

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coming to this position. If the medical witnesses happen to have been present during the whole trial, they may be asked their opinion as to the particular facts, supposing them to be true: but the determination of the truth or falsity of the evidence itself should be reserved exclusively for the jury.

"The opinions of professional men on a question of this description," says Chief Justice Shaw, in a late case, "are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinion of witnesses, who know nothing of the actual facts of the case, is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases, where the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and professions have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science, because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked, whether in their opinion a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of death, in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground, that the opinion of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it."

One caution, in regard to this point, it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses, as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: "If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person, in any supposed circumstances." Com. *v.* Rodgers, 7 Metc. 5. Still more recent authorities have taken the ground that medical witnesses cannot "draw inferences of fact from the evidence" but are restricted to "declaring their opinion on a known or hypothetical state of facts." (U. S. *v.* McGlue, 1 Curtis, 1; Woodbury *v.* Goodyear, 7 Gray, 467.) See Boston Law Reporter, July, 1859, and Elwell's Malpractice, chapters 18 and 19, where the subject is reviewed.

(*n*) State *v.* Knights, 43 Maine, 11.

(*nn*) Livingston's Case, 14 Grattan, 592.

Physicians, who are not experts in analytical chemistry, are admissible to form an analysis of stomach in cases of poisoning.(*o*)

Evidence of scientific persons in a capital trial, as to any distinction evinced by scientific investigation between the appearance of stains of human blood and those of animals, is properly admissible.(*p*)

Maps and diagrams may be used by scientific witnesses, to render intelligible their verbal testimony.(*q*)

On a trial for murder, a medical witness testified that he saw defendant on the evening of the day after the killing, conversed with him, and then thought him deranged; that he thought the insanity was *delirium tremens;* that he knew defendant's habits of drinking, and supposed drinking to be the cause of his insanity; and that he had been present and heard all the evidence. The witness then stated, under objection, how long he thought defendant had been in this state of delirium, but was not allowed to state whether, in his opinion, he was in this state on the night of the alleged killing. It was held there was no error.(*r*)

On the trial of an indictment for selling unwholesome meat, it was held that physicians might be allowed to testify that the eating of unwholesome meat does not always cause apparent sickness, and to state their opinion, founded on what other witnesses had testified, as to the disease of which the cow died, and whether the disease would cause fever, and whether the flesh of animals sick of fever was unwholesome.(*s*)

In a homicide trial in New York,(*t*) it appeared in evidence that the dwelling-house occupied by the deceased had been discovered to be on fire; that after the fire was extinguished, her dead body was discovered amid the rubbish, in one corner of the kitchen where her bed had stood, and where she had been accustomed to sleep; that the fire had been in that part of the house, and that a hole had been burned through the floor in that corner of the room, and that the fire had extended up the side walls of the room, had consumed the bed and bedding, and partly destroyed the bedstead; that the heap of rubbish among which the body had been found, consisted of bricks and mortar from the wall—of partially destroyed pumpkins and onions, which had been kept under the bed—of the bedstead, and of the cinders from the bed, bedding, and other articles which had been entirely consumed; that several physicians had made a *post-mortem* examination of the body, and had given it as their opinion that the body had been dead before it had been subjected to the action of fire for the reason among others, that portions of the body had been protected and had not suffered at all from the action of the fire, which could not have happened unless the body had lain perfectly still during the continuance of the fire. Upon the cross-examination of one of these physicians, the counsel for the prisoner asked the following question:

(*o*) State *v.* Hinkle, 6 Iowa, 380.
(*p*) State *v.* Knights, 43 Maine, 11.
(*q*) State *v.* Knights, 43 Maine, 11.
(*r*) People *v.* McCann, 3 Parker C. R. (N. Y.) 272.
(*s*) Goodrich *v.* People, 3 Parker C. R. (N. Y.) 622.
(*t*) People *v.* Bodine, 1 Denio, 288.

"Would not almost any protection and stillness of the body be accounted for, on the supposition that the bed-cords on the back of the bed were burned off and the body let down, and that then the bed had fallen upon it before life was entirely extinct?" This question was objected to by the counsel for the prosecution and excluded by the court, and exception was taken by the counsel for the prisoner and carried to the Supreme Court. That court held: "The question put to one of the physicians on his cross-examination by the prisoner's counsel, was in my opinion correctly overruled. This witness and other physicians had made a *post-mortem* examination of the person alleged to have been murdered, and they gave it as their opinion that the death had preceded the action of fire on the body. This opinion, as is stated in the bill of exceptions, was founded on the reason, among others, that portions of the body which had been protected by covering upon them, had not suffered at all from the action of the fire."

§ 48. (*c*) In this country the preponderating opinion is that witnesses, though not experts, who have for a given time had the opportunity of observing the patient, may be asked their opinion as to his sanity.(*n*) Such witnesses cannot, of course, be examined as to their opinions on a case stated, or on the facts developed in the case on trial, but only as to the results of their personal observation, just in the same way that a man ploughing on the shore can be examined as to the fact of a ship striking a shoal before him, when he could not be admitted to prove the cause of the disaster. And, on this principle, it has always been held admissible to ask subscribing witnesses as to their opinion of the testator's sanity at the time of the execution of the will.(*o*)

§ 49. In Massachusetts, however, and perhaps in England, the rule now is to limit the reception of non-professional opinion to subscribing witnesses.(*p*)

§ 50. *Medical Books.*—It has been held irregular to read to the jury on such an issue, either text books on insanity, or the statistics of lunacy drawn from charges or opinions of judges in other cases.(*q*) In one case in America, however, a physician was permitted to read in his testimony "the views and opinions of distinguished writers,"(*a*) and in England he is allowed to give

(*n*) Clary *v.* Clary, 2 Iredell, 78; Clark *v.* State, 12 Ohio, 483; Grant *v.* Thompson, 4 Connect. 203; Rambler *v.* Tryon, 7 S. & R. 90; Wogan *v.* Small, 11 S. & R. 141; Morse *v.* Crawford, 17 Vt. 499; Lester *v.* Pittsford, 7 Vt. 158; Gibson *v.* Gibson, 9 Yerger, 329; Potts *v.* House, 6 Georg. 324; Colver *v.* Haslam, 7 Barbour, 374; Baldwin *v.* State, 12 Missouri, 223; De Whitt *v.* Barley, 13 Barbour, 550; Kinne *v.* Kinne, 9 Conn. 102; Norris *v.* State, 16 Alab. 776; Wheeler *v.* Wheeler, 3 Hagg. 574; and see 7 Bost. Law Rep. (N. S.) 696, where these cases are cited.

(*o*) Chase *v.* Lincoln, 3 Mass. 237; Poole *v.* Richardson, ib. 330; Rambler *v.* Tryon, 7 S. & R. 90; Buckminster *v.* Perry, 4 Mass. 593; Grant *v.* Thompson, 4 Conn. 203; Sheafe *v.* Rowe, 2 Lees R. 415; Wogan *v.* Small, 11 S. & R. 141.

(*p*) Com. *v.* Wilson, 1 Gray, 337; Collier *v.* Simpson, 5 Car. & P. 74; Cocks *v.* Purdy, 2 Car. & K. 270; 1 Greenl. Ev. § 440.

(*q*) Com. *v.* Wilson, 1 Gray, 337: Gehrke *v.* State, 13 Texas, 568; Collier *v.* Simpson, 5 C. & P. 74; Cocks *v.* Purdy, 2 C. & K. 270; Carter *v.* State, 2 Carter, 617; Melvin *v.* Easley, 1 Jones, 586; R. *v.* Cranch, 1 Cox C. C. 94; though see Luning *v.* State, 1 Chandler, 178.

(*a*) Bowman *v.* Woods, 1 Iowa R. 441.

"grounds of his judgment," "which may be in some degree founded on books as part of his general knowledge."(b)

6th. BY WHOM AND HOW THE DEFENCE OF INSANITY MAY BE TAKEN.

§ 51. Whatever may once have been thought, it is now generally settled in practice that the defence of insanity may be taken by the friends and counsel of a prisoner, even though this course be objected to by himself. Such has been lately declared to be the law in Louisiana in a case directly in point.(r)

(b) Collins v. Simpson, 5 C. & P. 73.
(r) In this case we print from the paper book :—

SUPREME COURT OF THE STATE OF LOUISIANA.

The Court met Monday, April 9th, 1855.

Present, their Honors Thomas Slidell, Chief Justice; Cornelius Voorhies, A. M. Buchanan, A. N. Ogden, H. M. Spafford, associate justices.

3838. The State of Louisiana, Appellee, *vs.* James Patton, Appellant. } Appeal from 1st District Court, New Orleans.

Spafford, Justice, delivered the opinion of the Court.

Upon the trial of James Patton for the murder of Walter Turnbull, the following bill of exceptions was taken by the prisoner's counsel :—

Be it remembered, that on the trial of this cause, on the 20th day of March, 1854, after the evidence on the part of the State was closed, and when the counsel of the prisoner were proceeding to prove by the evidence of witnesses the insanity of the said prisoner, at the time of the killing set forth on the indictment, and a long time before, and ever since the said killing, the said prisoner arose and objected to and repudiated the said defence, and insisted upon discharging his counsel, and submitting his case to the jury without any further evidence or action of his counsel in his defence; his counsel opposed and remonstrated against the prisoner's being permitted to do so, alleging that they were prepared to prove the defence by clear and irresistible testimony; but the court overruled the objection of the said counsel, and permitted the prisoner to discharge his counsel, and refused to hear them further on his defence, and gave the case to the jury without any further evidence or pleading on his behalf; to all which opinion and ruling of said court the defendant's said counsel excepts, and prays his exceptions may be signed, &c.

(Signed) John B. Robertson, *Judge.*

There was a verdict of "guilty without capital punishment"—and, after the former counsel had in the quality of *amici curiæ* attempted to obtain a new trial and arrest of judgment without success, the prisoner was sentenced to hard labor for life in the penitentiary.

From this judgment the present appeal has been taken :—

The sanity or insanity of the prisoner is a matter of fact; the admissibility of evidence to establish his insanity, under the circumstances detailed in the bill of exceptions, is a matter of law, and the only matter which the constitution authorizes this tribunal to decide.

The case is so extraordinary in its circumstances that we are left without the aid of precedents.

In support of the ruling of the district judge, it has been urged that every man is presumed to be sane until the contrary appears, and that a person on trial for an alleged offence has a constitutional right to discharge his counsel at any moment, to repudiate their action on the spot, and to be heard by himself; hence the inference is deduced that the judge could not have admitted the evidence, against the protest or the prisoner, without reversing the ordinary presumption, and presuming insanity.

§ 52. In an English case, a man was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane, and he was allowed by the judge to suggest questions, to be put by the learned judge to the witnesses for the prosecution, to negative the supposition that he was insane, and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence was an incorrect one; and, on the contrary, their evidence tended

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In criminal trials, it is important to keep ever in mind the distinction between law and fact, between the functions of a judge and those of a jury.

It was for the jury, and the jury alone, to determine whether there was insanity or not, after hearing the evidence and the instructions of the court as to the principles of law applicable to the case.

By receiving the proffered evidence for what it might be worth, the judge would have decided no question of fact; he would merely have told the jury, "the law permits you to hear and weigh this evidence; whether it proves anything it is for you to say."

By rejecting it, he deprived the jury of some of the means of arriving at an enlightened conclusion upon a vital point peculiarly within their province, and, in effect decided himself, and without the aid of all the evidence within his reach, that the prisoner was sane.

It is idle to say that the legal presumption, and the prisoner's own declaration, appearance, and conduct on the trial, established his sanity to the satisfaction of both judge and jury;—for presumption may be overthrown, declarations may be unfounded, and conduct and appearances may be deceitful; and the prisoner's counsel, sworn officers of the court, with their professional character at stake upon the loyalty of their conduct, alleged that they stood there prepared to prove by what they deemed clear and irresistible testimony that the accused was insane at the time of the homicide, long before, and ever since; so that the sole inquiry now is, not whether they or the court were right as to the fact of sanity upon which we can have no opinion, but, whether they should have been allowed to put the testimony they had at hand before the jury, to be weighed with the counter evidence.

If the prisoner was insane at the time of the trial, as counsel offered to prove, he was incompetent to conduct his own defence unaided, to discharge his counsel, or to waive a right.

Upon the supposition that the counsel were mistaken in regard to the weight of the evidence they wished to offer, as they may have been, still its introduction could do the prisoner no harm, nor could it estop him from any other defence he might choose to make on his own account; neither could it prejudice the State, for it is to be presumed that the jury would have given the testimony its proper weight; if, on the other hand, the counsel were not mistaken as to the legal effect of this evidence, the consequences of its rejection would be deplorable indeed.

The overruling necessity of the case seems to demand that, whenever a previous soundness of mind and consequent accountability for his acts are in question, the rule that he may control or discharge his counsel, at pleasure, should be so far relaxed as to permit them to offer evidence on those points, even against his will. Considering, therefore, that it would be more in accordance with sound legal principles and with the humane spirit which pervades even the criminal law, to allow the rejected testimony to go before the jury, the cause must be remanded for that purpose.

It was said in argument, on behalf of the State, that the alleged insanity was, at most, but a monomania upon another topic, which could not exempt the prisoner from responsibility for the homicide.

The judge will instruct the jury in regard to the principles of law which govern this subject, when all the facts shall have been heard. At present, the discussion is premature.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be reversed, the verdict of the jury set aside, and the cause remanded for a new trial according to law. See State *v.* Patton, 10 La. R. 299, where this is reported.

to establish it more clearly, and the prisoner was acquitted on the ground of insanity.(*s*)

§ 53. If one who had committed a capital offence become non compos mentis before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.(*t*) By the common law, if it be doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, it shall be tried by the jury who are charged to try the indictment,(*u*) by an inquest of office, to be returned by the sheriff of the county wherein the court exists;(*v*) or, being a collateral issne, the fact may be pleaded and replied to ore tenus, and a venire awarded, returnable instanter, in the nature of an inquest of office.(*w*) If it be found by the jury that the party only feigns himself lunatic, and he still refuse to answer, he was, before the 7 and 8 Geo. IV. c. 28, s. 2, dealt with as one who stood mute, and as if he had confessed the indictment; but now, by virtue of that enactment, a plea of not guilty may be pleaded. The principal point to be considered by the jury would be, whether the defendant was of sufficient intellect to comprehend the course of the proceedings on the trial, so as to be able to make a proper defence.(*x*) Whether the prisoner was sane or insane at the time the act was committed, is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party.(*y*)

§ 54. In Massachusetts, where one, having committed a homicide, was sent to the house of correction, pursuant to stat. 1797, c. 61, s. 3, as a person dangerous to go at large, and was then tried for murder, and acquitted on the ground of insanity, the court remanded him to the house of correction till he should be duly discharged.(*z*) But by a subsequent statute it is provided that "when any person indicted for an offence shall, on trial, be acquitted by the jury, by reason of insanity, the jury, on giving their verdict of not guilty, shall state it was given for such cause, and thereupon, if the discharge or going at large of such insane person shall be considered manifestly dangerous to the peace and safety of the community, the court may order him to be committed to the State lunatic hospital; otherwise he shall be discharged."(*a*) In Massachusetts, in case of insanity, "the grand jury shall certify that fact to the court," and thereupon the court is required to take order on the premises.(*b*) The test of insanity, when set up to prevent a trial, is, whether the prisoner is mentally competent to make a rational defence.(*c*) On a preliminary trial to determine whether the defendant is sane enough to make a rational defence, the defendant is not entitled to peremptory challenges; but

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(*s*) R. *v.* Pearce, 9 C. & P. 667.

(*t*) Hale's Sum. 10; 1 Hawk. o. 1, s. 3; 4 Bla. Com. 24.

(*u*) Bac. Ab. "Idiot" (B.); R. *v.* Ley, 1 Lewin, 239; 1 Russ. C. and M. 14.

(*v*) Id. 1 Hawk. p. 6, c. 1, s. 4.

(*w*) Fost. 46; 1 Lev. 61; Russ. C. and M., by Greaves, 14.

(*x*) See R. *v.* Pritchard, 7 C. and P. 303, 305; 1 Lewin, 84, S. C.

(*y*) R. *v.* Haswell, R. and R. 458.

(*z*) Com. *v.* Meriam, 7 Mass. 168. See Com. *v.* Braley, 1 Mass. 103; 13 Mass. 299; Com. *v.* Battes, 1 Mass. 95.

(*a*) Rev. Stat. Mass. c. 138, s. 13. (*b*) Ibid. o. 136, s. 15.

(*c*) Freeman *v.* People, 4 Denio, 10.

challenges for cause may be made.(*d*) In New York, "no act done by a person in a state of insanity can be punished as an offence; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state."(*e*)

In Pennsylvania, the revised act (1860) provides as follows: "In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of the offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court before whom the trial is had shall have power to order him to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind. The same proceedings may be had if any person indicted for an offence shall, upon arraignment, be found to be a lunatic, by a jury lawfully impanelled for the purpose; or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, the court shall direct such finding to be recorded, and may proceed as aforesaid.(*f*) In every case in which any person charged with any offence shall be brought before the court to be discharged for want of prosecution, and shall, by the oath or affirmation of one or more credible persons, appear to be insane, the court shall order the district attorney to send before the grand jury a written allegation of such insanity in the nature of a bill of indictment; and thereupon the said grand jury shall make inquiry into the case, as in cases of crimes, and make presentment of their finding to said court thereon; and thereupon the court shall order a jury to be impanelled to try the insanity of such person; but before a trial thereof be ordered, the court shall direct notice thereof to be given to the next of kin of such person, by publication or otherwise, as the case requires; and if the jury shall find such person to be insane, the like proceedings may be had as aforesaid. If the kindred or friends of any person who may have been acquitted as aforesaid, on the ground of insanity, or in the default of such, the guardians, overseers, or supervisors of any county, township, or place, shall give security in such amount as shall be satisfactory to the court, with condition that such lunatic shall be restrained from the commission of any offence, by seclusion or otherwise, it shall be lawful for the court to make an order for the enlargement of such lunatic, and his delivery to his kindred or friends, or, as the case may be, to such guardians, overseers, or supervisors. The estate and effects of every such lunatic shall, in all cases, be liable to the county for the reimbursement of all costs and expenses paid by such county in pursuance of such order; but if any person acquitted on the grounds of insanity shall have no estate or effects, the county, township, or place to which such lunatic may be chargeable under the laws

(*d*) Freeman *v.* People, 4 Denio, 10.
(*e*) 2 Rev. Stat. 582-3.
(*f*) Rev. Act, 1860, p. 446.

of this commonwealth relating to the support and employment of the poor shall, after notice of his detention aforesaid, be liable for all costs and expenses as aforesaid, in like manner as if he had become a charge upon any township not liable for his support under the laws aforesaid."

The finding of a jury upon a preliminary issue, to the effect that the prisoner was then sane, cannot be taken into consideration upon the question of insanity set up as a defence, upon the trial of the indictment; and where the court, on the trial of the indictment, refused to permit evidence to be given that the prisoner was insane at any time after the finding of the verdict on the preliminary issue, and excluded the opinions of medical witnesses formed from an observation of the prisoner after that time, as to his insanity when the offence was committed, such ruling was held erroneous.(*g*)

He who incites a madman to do a murder or other crime is a principal offender, and as much punishable as if he had done it himself.(*h*)

7th. Presumption of sanity, and when such presumption shifts.

§ 55. Every man is presumed to be sane until the contrary be proved; and the better opinion is that such defence must be made out beyond reasonable doubt.(*hh*) In New York, however, it has been ruled that on a trial for murder, where the killing is admitted, and the defence is insanity, the issue and the burden of proof are the same, and it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime; and that as sanity is a necessary condition to constitute the crime, the prisoner is entitled to any doubt resting upon this question.(*i*) In Massachusetts it is said that a preponderance of testimony will suffice.(*ii*)

§ 56. When habitual insanity is proved to have existed prior to the commission of an act, it will be presumed to have continued, unless the contrary be proved, down to the specific time.(*j*) It is otherwise, however, when the proof is of temporary or spasmodic mania,(*k*) or of delirium tremens.(*kk*)

8th. How far evidence of prior insane acts is admissible.

§ 57. Evidence of prior insane conduct and declarations will always be received;(*l*) and so of hereditary insanity.(*ll*)

(*g*) Rev. Act, 1860, p. 446. (*h*) 1 Hawk. c. 1, s. 7; post, § 112. (*hh*) See post, § 711.

(*i*) People *v.* McCann, 16 N. Y. (2 Smith) 58.

(*ii*) Com. *v.* Rogers, 7 Metc. 500; Com. *v.* Eddy, 9 Law Rep. (n. s.) 611.

(*j*) State *v.* Spencer, 1 Zabriskie, 196; State *v.* Huting, 6 Bennett, 464; State *v.* Bringer, 5 Alab. 244; State *v.* Starke, 1 Strobh. 479; R. *v.* Stokes, 3 C. & K. 188; R. *v.* Taylor, 4 Cox, C. C. 155; Cartwright *v.* Cartwright, 1 Phillimore, 100; Hoge *v.* Fisher, 1 P. C. C. R. 163; Hix *v.* Whittemore, 4 Metc. 545; 1 Jarm. on Wills (2d Am. ed.) 65; Wh. & St. Med. Jur. § 33.

(*k*) Ibid., Lewis *v.* Baird, 3 McLean, 55.

(*kk*) State *v.* Sewell, 3 Jones' Law (N. C.) 245.

(*l*) Vance *v.* Com., 2 Virginia Cases, 132; U. S. *v.* Sharp, 1 Peters, C. C. 118; McAllister *v.* State, 17 Alab. 434; McLean *v.* State, 16 Alab. 672; Lake *v.* People, 1 Parker, C. C. 495. Insanity of the prisoner, at the instant of the commission of the offence, can only be established by evidence tending to prove that he was insane at some period before or afterwards. People *v.* March, 6 Cal. 543.

(*ll*) R. *v.* Tucket, 1 Cox, C. C. 103; R. *v.* Oxford, 9 C. & P. 525; Smith *v.* Kramer, 1 Am. Law Reg. 353; Wh. & St. Med. Jur. § 108.

Where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven is no temporary malady, but that it is notorious, and of the same species as that with which other members of the family have been afflicted.(*m*)

II. Infants.

§ 58. Infants, so far as their civil relations are concerned, comprise all persons under the age of twenty-one, but criminal responsibility attaches at a much earlier period.(*n*) Within seven years of age, however, there can be no conviction for a capital offencc; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted.(*o*) It has indeed been said, generally, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of fourteen years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances that an infant under the age of discretion, and of the age of seven or upwards, could distinguish between good and evil, as if one of the age of nine or ten years, kill another and hide the body, or make excuses, or hide himself, or commit any other crime knowingly and maliciously, he may be convicted and condemned. (*oo*)

It must be left to the discretion of the judge, upon the circumstances of the case, how far an infant under that age is *capax doli*, or hath knowledge to discern betwixt good and evil.(*p*) At Bury Summer Assizes, 1748, William York, a boy of ten years of age, was convicted before Lord Chief Justice Wiles for the murder of a girl about five years of age, and received sentence of death. But the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges, whether it were proper to execute him or not upon the special circumstance of the case. Several reprieves took place, till at last, at the Summer Assizes, 1757, he had the benefit of his majesty's pardon, upon condition of his entering immediately into the sea service.(*q*) In a modern English case it was considered that if a child, more than seven and under fourteen years of age, is indicted for felony, it should be left to the jury to say whether the offence was committed by the prisoner, and if so, whether at the time of the offence the prisoner had a guilty knowledge that he or she was doing wrong. And the presumption of law is, that

(*m*) State *v.* Christmas, 6 Jones, N. C. (Law) 471.
(*n*) 1 Inst. 2; Burn's Justice, 29th ed., tit. Children.
(*o*) 1 Hale, 19, 20; 4 Bla. Com. 23; R. *v.* Giles, 1 Moody, C. C. 166; People *v.* Townsend, 3 Hill (N. Y.) 479.
(*oo*) State *v.* Doherty, 2 Overton, 80; Godfrey *v.* State, 31 Alab. 323.
(*p*) Hale's Sum. 43; 1 Hawk. c. 1, s. 8; 1 Hal. 18; 4 Bla. Com. 24; and see R. *v.* Wild, 1 Mood. C. C. 452.
(*q*) 1 Hale, 26; R. *v.* Wild, 1 Mood. C. C. 452; Fost. 70.

a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence.(*r*)

§ 59. The intent, and the guilty knowledge, instead of being inferred, as with adults, from the nature of the act, must be proved by distinct and substantive evidence.(*s*)

§ 60. In a trial for murder in Massachusetts, where the defendant was a boy of twelve years of age, the jury acquitted, notwithstanding the strength of the evidence.(*t*) And where the defendant, a boy of thirteen, was charged with theft, and it appeared that at the time of the alleged larceny he was intoxicated, the circumstances were held to require an acquittal.(*u*) But in New Jersey a boy of twelve years was convicted, on his own confession, very imperfectly sustained by circumstantial corroboration, of murder, was sentenced, and executed.(*v*) Such, however, is the only case of the execution of a child of such tender years since that of Alice de Wallborough, who at the age of five years(*w*) was burnt, in the middle of the seventeenth century, for killing her mistress; and it is submitted that it is the only instance on record where an infant of any age was executed on his own confession. It is agreed on all sides, however, that when fourteen arrives, criminal responsibility attaches.(*x*)

§ 61. An infant under fourteen is presumed by law unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though in other felonies *malitia supplet ætatem* in some cases, yet it seems, as to this fact, the law presumes him impotent, as well as wanting discretion.(*y*) Nor is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offence.(*z*) But he may be a principal in the second degree if he aid and assist in the commission of this offence, as well as other felonies, and it appear that he had a mischievous discretion; for the excuse of impotency will not in such case apply.(*a*) And an infant under fourteen may be convicted of an assault with intent to commit a rape;(*b*) or of an assault under the 7 Will. IV. s. 1, Vict. c. 85, s. 11.(*c*) After he passes fourteen, the presumption dies; and in a recent case in Delaware, a boy just arrived at that age was convicted of the consummated offence.(*d*)

§ 62. An infant may be guilty of forcible entry, in respect of personal actual violence,(*e*) and the justices may fine him therefor, but yet it shall be

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(*r*) R. *v.* Owen, 4 C. & P. 236.

(*s*) R. *v.* Smith, 1 Cox, C. C. 260.

(*t*) Com. *v.* Elliot, 4 Boston Law Report, 329.

(*u*) Com. *v.* French, Thacher's C. C. 163.

(*v*) State *v.* Guild, 5 Halstead, 163. See also State *v.* Bostwick, 4 Harrington, 563.

(*w*) 1 Hale, 29.

(*x*) State *v.* Sorn, 9 Humph. 175; State *v.* Bostwick, 4 Harring. 563; State *v.* Handy, Ibid. 566.

(*y*) 1 Hale, 630. And see R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Groomridge, 7 C. & P. 582.

(*z*) R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 C. & P. 118; Lewis, C. L. 558.

(*a*) 1 Hale, 630.

(*b*) Com. *v.* Green, 2 Pick. 380; R. *v.* Eldershaw, 3 C. & P. 396. In New York *contra;* People *v.* Randolph, 2 Parker, C. R. 213. Post, § 1134.

(*c*) R. *v.* Brimilow, 2 Mood. C. C. 122; 9 C. & P. 366, S. C.

(*d*) State *v.* Handy, 4 Harring. 566.

(*e*) 1 Hawk. c. 24, s. 35.

good discretion in the justices of the peace to forbear the imprisonment of such infant,(*f*) because it is said that he shall not be subject to corporal punishment, by force of the general words of any statute wherein he is not expressly named.(*g*) So in regard to other misdemeanors attended with a notorious breach of the peace, such as riot, battery, or the like, an infant is as liable as a person of full age.(*h*) So he is liable for perjury or cheating.(*i*) An infant under twenty-one is not responsible for not repairing a bridge or highway, or other such acts of omission,(*j*) as though he may be convicted on a penal statute.(*k*)

§ 63. Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and defend himself in person or by attorney, and it is an error to assign him a guardian, and to try the case on a plea pleaded for him by the guardian.(*l*)

§ 64. It has been said in North Carolina, that when the defence on an indictment for murder is, that the prisoner was under the age of presumed capacity, the onus of proof lies upon the prisoner. If the age can be ascertained by inspection, the court and jury must decide.(*m*)

§ 65. An infant of two years, on whose land a nuisance is created, cannot be made criminally responsible for it.(*n*)

(*f*) Dalt. c. 126. (*g*) Hawk. c. 64, s. 35.
(*h*) 1 Hale, 20, 21; 4 Bla. Com. 22; Bullock *v.* Babcock, 3 Wend. 390.
(*i*) 3 Bac. Abr. Infancy (H). (*j*) Bla. Com. 22; Co. Lit. 257.
(*k*) See 4 Bla. Com. 308; 2 B. & P. 93, 530; 2 T. R. 545. Post, § 519.
(*l*) Word *v.* Com. 3 Leigh, 743. (*m*) State *v.* Arnold, 13 Iredell, 185.
(*n*) People *v.* Townsend, 3 Hill (N. Y.) 479.

The criminal liability of infants is elaborately discussed in a learned article in 5 Law Rep. (N. S.) 364, under the following heads:—

1. Their liability below the age of seven years.
2. Their liability between the ages of seven and fourteen years.
3. Their liability above the age of fourteen years.
4. Confessions of an infant.

From this article we make the following extracts:—

1. *Their liability below the age of seven years.*

It is laid down by most elementary writers on criminal law, that if an infant be under seven years of age, he cannot be guilty of felony, whatever circumstances may appear proving his discretion; for, *ex presumptione juris*, he cannot have discretion, and no averment shall be received against that presumption. 1 Hale's Pleas of the Crown, 27; Plowden, 19 a; Dalton's Justice, c. 147, p 334; 1 Hawk. P. C. 2; 4 Bl. Comm. 22, 23.

It is conceived, however, that this question is not well founded, and that if an infant under seven is proved to have sufficient discretion, and to know good from evil, he is liable to prosecution, as well as one above that age. The maxim *malitia supplet ætatem*, applies as well to one under as to one above the age of seven years. There seems to be no reason why any one like Crichton, Pascal, or White, at a very early age exhibiting evidence of unusual mental development and strong powers of mind, and a capacity of knowing good from evil, should not be as responsible for his intelligent acts on the day before, as well as the day after his arrival at the age of seven years. The assumption of seven years as the commencement of criminal responsibility is entirely arbitrary; and the fact, that elementary writers have quite generally agreed upon such a principle of law, can hardly be relied upon as a defence, should a case arise where the facts clearly show that an infant under seven had, with actual malice and knowledge of his wrongful act, committed an offence under the law. Besides, this point may be considered not entirely without direct authority, for there is a precedent in the Register, fol. 309, b, of a pardon granted to an infant within seven years, who was indicted for homicide, the jury having found that he did the fact before he was seven years old.—1 Hale's Pleas of the Crown, p. 28, n. e.

III. Feme coverts.

III. FEME COVERTS.
1st. How feme coverts are to be indicted, § 67.
(a) Indictments against the wife alone, § 67.
(b) Indictment against the wife jointly with her husband, § 69.
(c) Misnomer in indictment, § 70.
2d. Where the marital relation is a defence, § 71.
(a) Husband's presence and coercion, § 71.
(b) Where the offence appertains chiefly to the husband, § 77.
(c) Where the offence appertains chiefly to the wife, § 78.
(d) Cases involving conspiracy and concert, § 79.
(e) Husband and wife as accessaries, § 80.

1st. How feme coverts are to be indicted.

§ 67. (*a.*) *Indictments against the wife alone.*—So far as concerns the pleading, there is no objection to the indictment naming the wife singly. It is not

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2. *Their liability between the age of seven and fourteen.*

But, whatever may be the law relative to persons under the age of seven, all authorities agree that at that age criminal responsibility commences, and subject to the presumption in favor of infants, they are amenable for any and all crimes committed by them, whether felonies or misdemeanors.

This may be considered—

a. In the instances where infants under fourteen have been indicted.

b. To convict children under fourteen, the prosecution must clearly prove that the infant in doing the act knew that he was doing wrong.

c. The liability of infants for the crime of rape.

d. The fact of guilty knowledge must be distinctly made out.

The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of R. *v.* Owen, 4 Carrington & Payne, 236 (1830), where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head containing a few coals, which the girl herself said she had taken from the heap. Littledale, J., in summing up to the jury, remarked—"In this case there are two questions: First, did the prisoner take the coals? and second, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner is only ten years of age, and, unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong." The jury returned a verdict of "Not guilty," adding—"We do not think the prisoner had any guilty knowledge."

So in People *v.* Davis, Wheeler, C. C. 230 (1823), in an indictment for larceny, the defendant being not yet fourteen years old by a few weeks, the taking was clearly proved, but no evidence was offered of his capacity to commit crime, and the jury was instructed that the law presumes an infant under fourteen incapable of committing crimes, "and in order to show his liability, it was necessary to prove his capacity," and there being no evidence either way upon the point, the defendant was acquitted. The same principle was adopted in Walker's case, 5 City Hall Recorder, 137 (1820).

This doctrine was again distinctly affirmed in the Queen *v.* Smith, 1 Cox, C. C. 260 (1845), where a boy ten years of age was indicted for maliciously setting fire to a hayrick. The act of firing was clearly proved, but there was no proof of a malicious intention. Erle, J., told the jury—"Where a child is under the age of seven years, the law presumes him incapable of committing a crime; after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty; but between

necessary that the husband should be included as a joint defendant, even though he was living with her at the time,(o) or was jointly participant with

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the ages of seven and fourteen no presumption of law arises at all, and that which is termed a malicious intent, a guilty knowledge that he was doing wrong, must be proved by the evidence, and cannot be presumed from the mere commission of the act."

This fact of guilty knowledge may often be proved from the circumstances of the case; as, if the prisoner conceals himself, denies the act, or in any way shows a consciousness that he was doing wrong.

Thus in the case of State *v.* Doherty, 2 Overton (term 1806), where a girl between twelve and thirteen years of age was indicted for murder, the jury was instructed—"that if an infant is under fourteen and not less than seven, the presumption of law was, that he could not discern between right and wrong. But this presumption is removed if from the circumstances it appears the person discovered a consciousness of wrong.

"That this fact of guilty knowledge may appear from the circumstances of the case, see Stage's case, 5 City Hall Recorder, 177 (1821), where a boy of the age of eight years was indicted for the larceny of a lady's dressing box and jewelry. The owner detected the boy going out of the house with the box under his arm; she seized him, and he tried to bite her and retain the box by force; he then began to cry, and said another boy told him to take away the box. No other evidence of capacity was offered. The jury were told that they must be satisfied that he had a capacity of knowing good from evil; that this might be proved by extrinsic testimony, or it might arise from the circumstances of the case. Here a concealment and an attempt to escape appear. It was for the jury to say that the defendant knew that he was doing wrong." The defendant was convicted.

3. *The l ability of infants above the age of fourteen.*

Here all authorities agree that, with but a single class of exceptions, entire criminal responsibility commences, and the presumption of incompetency wholly ceases. Blackstone on this point says: "The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not requiring a judge (see R. *v.* Sutton, 4 Nev. & Mann.) on a highway and other similar offences; for not having the command of his fortune till twenty-one; he wants the capacity to do these things which the law requires. But where there is any notorious breach of the peace a riot, or a battery, or the like (which infants, when full grown, are at least as liable as others to commit), for these an infant, above the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one years." See also 1 Hale, P. C. 20–22.

4. *Confessions of an infant.*

The question has been much discussed whether the confessions of an infant are admissible against him, in proof of the commission of crime; and it has been sometimes thought that, as in a criminal case an infant is not bound by his admissions and declarations, so in a criminal case his declarations of his own guilt are not admissible, and if so, are not a sufficient proof of the commission of the crime.

But this reasoning seems not to be supported, and it is well settled upon the authorities that the confessions of an infant, if otherwise competent, are admissible against him in the same manner as confessions of adults. Rex *v.* Wild, 2 Moody, 452 (1835); R. *v.* Upchurch, 1 Ib. C. C. 465 (1835); Mather *v.* Clark, 2 Aiken, 209 (Vermont, 1827); Commonwealth *v.* Zard, cited Ros. Cr. Ev. p. 31, note.

This question seems to have received more consideration in this country than in England. Thus, in the State *v.* Aaron, 1 Southard (New Jersey, 1818), a slave of the age of ten years and ten months was indicted for murder, and it was much discussed whether his confessions of the crime were admissible in evidence. It was held that they were admissible, but to furnish the ground of a conviction, they ought to be clear and pregnant, and corroborated by circumstances, and understandingly.

One of the most striking criminal trials to be found on record was that of the State *v.* Guild, 5 Halstead, 163 (New Jersey, 1828). There the prisoner, aged twelve years and five months, was indicted for the murder of Catharine Beakes; his own confessions were the principal evidence, the *corpus delicti* being otherwise proved. The court held this sufficient, and the boy was convicted and executed.

(o) R. *v.* Fenner, 1 Siderfin, R. 410, 2 Keble, 468; R. *v.* Jordan, 2 Keb. 634; State *v.* Collins, 1 McCord, 355; Com. *v.* Lewis, 1 Metc. 151; R. *v.* Foxby, 6 Mod. 41; R. *v.* Sergeant, 1 Ry. & Mood. 352.

her in the offence.(*p*) But it is right and proper, in the latter case, that there should be a joinder, and though a non-joinder is no defence, nor does a demurrer lie for want of it, the court may on motion compel it. And where the offence is joint the wife cannot be convicted without the husband.(*q*)

§ 68. The indictment need not negative coercion.(*r*)

§ 69. (*b.*) *Indictments against the wife jointly with the husband.*—Such indictments, on the face of the record, are undoubtedly good, and will be sustained on demurrer, on arrest of judgment, or in error.(*s*) And this rule has been specifically applied to indictments for assault and battery;(*t*) for keeping a bawdy house;(*u*) for keeping a gaming house;(*v*) for tippling house;(*w*) for forcible entry and detainer;(*x*) for murder;(*y*) and for treason.(*z*)

After a conviction of husband and wife jointly, the court may affirm the judgment as to the husband, and reverse as to the wife.(*a*)

§ 70. (*c.*) *Misnomer in indictment.*—If a *feme covert* be indicted as a *feme sole*, her proper course is to plead the misnomer in abatement, for if she pleads over, she cannot take advantage of it.(*b*) She must set her marriage in her plea, and prove it affirmatively.(*c*) The practice on such a plea will be discussed hereafter.(*d*)

2d. WHERE THE MARITAL RELATION IS A DEFENCE.

§ 71. (*a.*) *Husband's presence and coercion.*—A wife or feme covert is so much favored in respect of that power and authority which her husband has over her, that, in general, if a felony less than murder be committed by her in company with or in the presence of her husband, the presumption of law is that she acted under his immediate coercion, and she will be excused from punishment.(*e*) But if she commit a crime of her own voluntary act, or by the bare command of her husband in his absence, or, as it is held by the old writers, be guilty of treason, murder, or robbery, or any other crime, *malum in se*, and prohibited by the law of nature, or which is heinous in its

(*p*) Somerset's case, 2 St. Trials, 951, 1616; R. *v.* Crofts, 2 Strange, 1120.

(*q*) Rather *v.* State, 1 Porter, 132.

(*r*) State *v.* Nelson, 29 Maine, 329.

(*s*) R. *v.* Hammond, 1 Leach, 499; R. *v.* Mathews, 1 Eng. R. 549; State *v.* Parkerson, 1 Strobh. 169; R. *v.* Dixon, 10 Mod. 335; R. *v* Crane, 8 C. & P. 541; *contra*, Com. *v.* Turner, 1 Mass. 476.

(*t*) State *v.* Parkerson, 1 Strobh. 169; R. *v.* Crane, 8 C. & P. 541.

(*u*) R. *v.* Williams, 10 Mod. 63; State *v.* Bentz, 11 Missouri, 28; 1 Hawk. c. 1, s. 12.

(*v*) R. *v.* Dixon, 10 Mod. 335.

(*w*) Com. *v.* Murphy, 2 Gray, 510.

(*x*) State *v.* Harvey, 3 N. Hamp. 65.

(*y*) R. *v.* Crane, 8 C. & P. 541; Com. *v.* Chapman, Phil. Pamp. 1831.

(*z*) Somerville's case, 1 Anderson R. 104.

(*a*) R. *v.* Mathews, 1 Eng. 549.

(*b*) R. *v.* Jones, Kel. 37. Post, § 236, 536.

(*c*) R. *v.* Atkinson, 1 Russ. 20; R. *v.* Hassell, 2 C. & P. 34; R. *v.* Woodward, 8 C. & P. 561.

(*d*) Post, § 538.

(*e*) 1 Hawk. c. 1, s. 2; 1 Hawk. c. 1, s. 1; Davis *v.* State, 15 Ohio, 72.

character, or dangerous in its consequences, even in company with, or by coercion of her husband, she is punishable as much as if she were sole.(*f*)

§ 72. It may be questioned, however, whether the coercion and presence of the husband is not now a good defence in all cases, and whether the exceptions taken as to the higher grades of felonies still obtains, and the better opinion now is not to recognize such an exception.(*g*)

§ 73. The prima facie presumption on trial is, that the wife acted under the coercion of the husband, provided he were actually present at the time the felony was committed. If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife. Such presumption is, however, prima facie only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple, and bedridden, or that the wife was the stronger of the two.(*h*)

§ 74. Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize money, it was holden that they might be indicted together, the wife as principal on the 49 Geo. III. c. 123, and the husband as accessary before the fact, at common law.(*i*) On a trial for a similar offence, Thompson, B., stopping the counsel for the prosecution, said, "I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption prima facie, and prima facie only, as is clearly laid down by Lord Hale,(*j*) that it was done under his coercion; but it is absolutely necessary that the husband should, in such a case, be actually present, and taking a part in the transaction. Here it is entirely the act of the wife. It is, indeed, in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came; and it was sufficient, if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it prima facie to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessary to the felony of the wife) can be referred to what was done in his absence."(*k*) In a later case,

(*f*) Com. *v.* Neal, 10 Mass. 152; Martin *v.* Com. 1 Mass. 347; Com. *v.* Trimmer, 1 Mass. 476; Jones *v.* State, 5 Blackford, 141, 192; 1 Hawk. c. 1, s. 9; 1 Hale, 47; Dalt. c. 157; R. *v.* Cruise, 8 C. & P. 541; 2 Moody, C. C. 53, S. C.

(*g*) 1 Rus. on Cr. by Greaves, 18, 25, note; 1 Bishop's Criminal Law, § 277.

(*h*) 1 Russell on Crimes, 21; State *v.* Parkerson, 1 Strohhart, 169; R. *v.* Stapleton, 1 Crawf. & Dix. C. C. 163; R. *v.* Price, 8 C. & P. 19; Com. *v.* Trimmer, 1 Mass. 476; R. *v.* Matthew, 1 Den. C. C. 596.

(*i*) Morris's case, 2 Leach, 1096; 1 Russ. 18; R. & R C. C. 270. And see R. *v.* Atkinson, cited 1 Russ. 24; R. *v.* Hill, 3 New Sess. Cas. 348; 1 Den. C. C. 453; 1 Temp. & M. 150. See 1 Russ. on Cr. 21.

(*j*) 1 Hale, 516.

(*k*) R. *v.* Hughes, 2 Lewin, 228; 1 Russell, 21. See also R. *v.* Hill, 3 New Sess. Cas. 348; 1 Den. C. C. 453.

however, the common sergeant, after consulting Bosanquet and Coltman, JJ., held that the wife was entitled to an acquittal on an indictment for counterfeiting, where it appeared that she uttered the money in the presence of her husband.(*l*) And a woman who went from shop to shop uttering base coin, her husband accompanying her each time to the door, but not going in, it was holden by Bayley, J., to be under her husband's coercion.(*m*)

§ 75. But, as has been said, the coercion of the husband is only presumption till the contrary appear; for if, upon the evidence, it can clearly appear that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she seems to be guilty as well as the husband.(*n*) Thus, if a woman receive stolen goods into her house, knowing them so to be, or lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knoweth thereof, do forsake his house and her company, and make his abode elsewhere, he shall not be charged for her offence; whereas the law otherwise will impute the fault to him, and not to her (*o*) Where, in a case of arson, it appeared that the husband, though present, was a cripple and bedridden in the room, it was held that the presumption of coercion was repelled.(*p*) But where a husband and wife were convicted, jointly, of receiving stolen goods, it was holden that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband.(*q*) A married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath.(*r*) So, where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable.(*s*)

§ 76. A married woman who, in the absence of her husband, sells liquor illegally, is responsible unless she prove that she did so under his command or influence.(*t*)

§ 77. (*b.*) *When the offence appertains chiefly to the husband.*—In proceedings instituted in behalf of the State against husband and wife for obstructing a road, the wife cannot be convicted unless the husband is also.(*u*) A feme covert, on whose premises her husband has erected a nuisance, cannot be punished criminally for its existence.(*v*)

The husband and wife together may be indicted for forcible entry and detainer, though in such case the wife's punishment will be nominal;(*w*) and

(*l*) R. *v.* Price, 8 C. & P. 19.

(*m*) MS. Durham Spring Ass. 1829; Matthew's Digest, 26; Conolly's case, 2 Lewin, 229.

(*n*) 1 Hale, 576.

(*o*) Dalt. c. 157.

(*p*) R. *v.* Pollard, 8 C. & P. 541, cited in R. *v.* Cruse, 2 M. C. C. 53; R. *v.* Matthews, 1 Eng. R. 549.

(*q*) R. *v.* Archer, R. & M. 143.

(*r*) R. *v.* Dicks, 1 Russ. 16.

(*s*) R. *v.* Hammond, 1 Leach, 447.

(*t*) Com. *v.* Murphy, 2 Gray, 510.

(*u*) Rather *v.* State, 1 Port. 132.

(*v*) People *v.* Townsend, 3 Hill, N. Y. 479.

(*w*) State *v.* Harvey, 3 New Hampshire, 65.

it is said that as a married woman, by her own act (but not in respect to what is done by others, at her command, because all such commands of hers are void), may commit the same offence; thereupon, after the justice's view of the force, she shall be imprisoned therefor, and she may be fined in such case; but such fine, set upon the wife, shall not be levied upon the husband; for the husband shall never be charged for the act or default of the wife, but when he is made a party to the action, and judgment against him and his wife.(*x*)

Where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Charles Squire, and Hannah, his wife, were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner, Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body, deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds which he had received. Upon this Lawrence, J., directed the jury that, as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though if the husband had allowed sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty; but that here the fact was otherwise; and therefore, though *in foro conscientiæ*, the wife was equally guilty with her husband, yet, in point of law, she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.(*y*)

In an early case in Massachusetts, where the jury found a special verdict to the effect that a feme covert committed an assault and battery in company with, and commanded by J. N., her husband, the court held that no offence was found.(*z*)

§ 78. (*c*.) *Where the offence appertains chiefly to the wife.*—A wife living apart from her husband may be indicted alone, and punished, for keeping a house of ill-fame.(*a*) So she may be indicted together with her husband, and punished with him, for the same offence; for the malfeasance relates to the government of the house, in which the wife has a principal share; and constitutes an offence which may generally be presumed to be managed by the intrigues of her sex.(*b*) So she may be indicted for keeping a gaming house.(*c*)

(*x*) Dalt. c. 126; Hussey's case, 9 Rep. 72; Foster's case, 11 Rep. 61; Burns' Justice, 29th ed. tit. Wife.

(*y*) R. *v*. Squire and Wife, Stafford Lent Assizes, 1799; Burns' Justice, 29th ed. tit. Wife.

(*z*) Com. *v*. Neal, 10 Mass. 152.

(*a*) Com. *v*. Lewis, 1 Met. 151.

(*b*) 1 Hawk. c. 1, s. 12; State *v*. Bentz, 11 Misso. 27.

(*c*) R. *v*. Dixon, 10 Mod. 335.

A wife who, in the absence of her husband, though in the house where they live and trade together, sells intoxicating liquors, under such circumstances as would, but for her coverture, prove her to be a common seller, may be indicted as such, unless it appears that she acted by his command or under his coercion or influence.(cc)

§ 79. (*d.*) *Cases involving conspiracy and concert.*—In conspiracy and riot it will not suffice to join the husband and wife alone; and if all the parties named, except the husband and wife, be acquitted, judgment against the latter will be arrested.(*d*)

§ 80. (*e.*) *Husband and wife as accessaries.*—If a married woman incite her husband to the commission of a felony, she is an accessary before the fact;(*e*) but she cannot be treated as an accessory for receiving her husband, knowing that he has committed a felony;(*f*) nor for receiving goods feloniously stolen by him;(*g*) nor for concealing a felony jointly with her husband.(*h*) And she will not be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she be merely passive.(*i*)

§ 81. By a late learned writer, the following statement of the law is given:—

1st. There is no objection in law to an indictment against the wife alone, charging her directly with the offence.

2d. There is no objection in law to an indictment charging a husband and wife jointly with the commission of the offence.

3d. If upon trial of the wife alone, or jointly with her husband, it appear in evidence that the husband was actually present when the wife committed the act, his coercing will be presumed; but this presumption may be rebutted by the circumstances of the case (*j*)

(*cc*) Commonwealth *v.* Murphy, 2 Gray (Mass.) 510.

(*d*) Com. *v.* Manson, 2 Ashmead, 31; 1 Hawk. c. 72, s. 8. Post, § 431.

(*e*) 1 Hale, 516; 2 Hawk. c. 29, s. 34. (*f*) 1 Hale, 47.

(*g*) R. *v.* Brooks, 14 Eng. Law & Eq. 580. (*h*) Id., 1 Hawk. c. 1, s. 10.

(*i*) 1 R. *v.* Squire, 1 Russ. 20; Jery Arch. C. L., 9th. ed. 17.

(*j*) 6 Law Rep. N. S. 254. For these positions the following authorities are cited. The King *v.* Fenner, 1 Siderfin R. 410, S. C. 2 Keble R. 408. King *v.* Jordau, 2 Keble, 634; 1682. Dr. Foster's case, 11 Coke R. 61. Somersett's case, 2 State Trials, 951; 1616. R. *v.* Crofts, 2 Strange, 1120, 1740. R. *v.* Foxby, 6 Mod. 11, 178, 213, 239; 1705. R. *v.* E. Taylor, 3 Burrow, 1679, 1765. R. *v.* Sergeant, 1 Ryan & Moody, N. P. R. 352; 1826. R. *v.* Sarah Harrell, 1 Ryan & Moody, N. P. R. 296; 1825. State *v.* Collins, 1 M'Cord, 353; S. C., 1821. Commonwealth *v.* Lewis, 1 Met. 151; 1840. 1 Russell on Crimes, 1st ed. 26; 1 Russell on Crimes, 433; 1 Salk. 384; 1 Russell on Crimes, 26; 4 Bl. Com. 29. R. *v.* Hammond, 1 Leach. 499, case 196; 1787. Somerville's case, 1 Anderson R. 104. R. *v.* Williams, 10 Modern, 63, S. C. 1 Salk. 384; 1702. Brook's case, 2 Rolle, R. S. R. *v.* Dixon, 10 Modern, 335. R. *v.* Williams, 10 Modern, 63, Salk. 384. R. *v.* Crane, 8 Carr. & Payne, 541; 1838. State *v.* Harvey, 3 N. Hamp. 65; 1824. State *v.* Bentz, 11 Missouri, 28; 1847. Commonwealth *v.* Trimmer, 1 Mass. 476; 1805. State *v.* Parkerson, 1 Strobhart, 169; 1847. R. *v.* Ingram, 1 Salk. 384; 1711. Dey's case, 37 Edw. 3, cited 1 Hale's P. C. 147. Keyling's R. 31; 16 Car. 2. Connolly's case, 2 Lewis, C. C. 229; 1829. R. *v.* John Wm. Price and Sarah Price, 8 Carr. & Payne, 19; 1837. R. *v.* Archer, 1 Moody, 143; 1826. R. *v.* Matthews, 1 Eng. Law & Eq. R. 549; 1850; S. C. 14 Jur. 513; 1 Denison, C. C. 549. R. *v.* Brooks, 14 Eng. Law & Eq. R. 111; 1853. R. *v.* Brady and wife, 3 Cox, 425; 1849. State *v.* Nelson, 29 Maine, 329; 1849. R. *v.* Henry and Elizabeth Polard, 8 Carr. & Payne, 553, note g.; 1838. R. *v.* S. Morris and John Morris, Russell

IV. Persons in certain extreme cases presumed ignorant either of law or fact.

§ 82. Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law, of which all are presumed to have knowledge.(*jj*) As this rule, however, presupposes an opportunity of knowing the law, if no such opportunity exists, the rule is suspended. Where, therefore, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the stat. 39 G. III. c. 37 passed, and before notice of it could have reached the place where the offence was committed; the judges held that he could not have been tried before that act passed; and that, as he could not have heard of it, he ought to be pardoned.(*k*) A foreigner, however, cannot be excused on the ground that he does not know the law.(*l*)

§ 83. There is a class of cases in which ignorance, or mistake of fact, will be an excuse;(*m*) as, for instance, if a man intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence,(*n*) or where under an erroneous impression, that the act is necessary in self-defence, he kills the supposed aggressor, in which case it is manslaughter or excusable homicide, as the case may be.(*o*) So a taking by mere accident, or in a joke, or mistaking another's property for one's own, is neither legally nor morally a crime.(*p*) So, where upon the trial of an indictment for the felonious taking of a deed, it appeared that the defendant had contracted verbally to sell certain real estate to B.; that they met to settle the contract, and agreed upon a final meeting for that purpose; that, in the meantime, the defendant delivered to B., confidentially, a deed, that he might ascertain its correctness, neither party considering the business settled; that B. gave the deed to his counsel to examine the title, and, if satisfactory, to leave it at the registry to be recorded, which was done; that, upon the meeting for a final settlement at the registry office, a dispute arose between the parties, on a collateral point, and the defendant asked the register for the deed, and, on receiving it,

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& Ryan, 270; 1814. R. *v.* Hughes, 2 Levin C. C. 229; 1812. City Counoil *v.* Van Rowen, 2 M'Cord, 465; S. C. 1823. Uhl's case (6 Grattan, 711), 1849. Davis *v.* The State, 15 Ohio, 72; 1 Hale's P. C. 45; 2 Carr. P Kir. 903; 1 Hale P. C. 47. Somerville's case, 1 Anderson, 104. Somersett's case, 1 State Trials, 28, 29; 1615. R. *v.* Buncombe, 1 Cox, 183. Rather *v.* State, 1 Porter, 132; 1834. Reeve's Domestic Relations, 69. Hasbrouck *v.* Weaver, 10 Johnson, 247; 1813. Williamson *v.* State, 16 Ala. 431. R. *v.* Hassall, 2 Carr. & Payne, 434; 1826. R. *v.* T. Woodward and Margaret Woodward, 8 Carr. & Payne, 561; 1838. Com. *v.* Lewis, 1 Met. 151; 1840. State *v.* Nelson, 29 Maine, 329; 1849.

(*jj*) 1 Hale, 42; Winchart *v.* State, 6 Indiana, 30; R. *v.* Price, 3 Per. & D. 421; 11 Ad. & El. 727; R. *v.* Esop, 7 C. & P. 456; Com. *v.* Bagby, 7 Pick. 279; R. *v.* Good, 1 Car. & P. 185; R. *v.* Hoatson, 2 C. & K. 777. The Ann, 1 Gaills, 62. Winehart *v.* State, 6 Ind. 30.

(*k*) R. *v.* Bailey, R. & R. 1.

(*l*) R. *v.* Esop, 7 C. & P. 456.

(*m*) See Broom's Leg. Max. 190, 1 Story Eq. Jur. § 210; Myers *v.* State, 1 Com. 502; R. *v.* Allday, 8 C. & P. 136; Com. *v.* Rogers, 7 Metc. 500; Com. *v.* Kirby, 2 Cush. 577; U. S. *v.* Pearce, 2 McLean, 14.

(*n*) 1 Hale, 42, 43; 4 Bl. Com. 27; R. *v.* Levett, Cro. Car. 538. See ante, § 17.

(*o*) 2 Hale, 507. Post, § 1026.

(*p*) See post, § 1860.

destroyed it, calling upon those present to witness the act; it was held that, if the defendant honestly thought he had a right to the paper, the idea of a felonious intent was excluded.(*q*) So, also, where an innocent merchant vessel so conducts herself as to produce the belief she is piratical, a vessel capturing her is not liable to forfeiture.(*r*) This rule proceeds upon a supposition, that the original intention was lawful; for, if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong or mischievous, the actor is criminally responsible for whatever consequence may ensue.(*s*) Thus it has been held that where an aggressor assaults a peace officer in ignorance of his official rank, he is responsible for the graver offence.(*t*)

§ 84. In New York, to prevent the ignorance of a recent act from injuring a party, it is provided that no act of the legislature shall take effect until twenty days after it is passed, unless there be a special provision to the contrary.(*u*)

It is no defence to an indictment for a crime that it was the custom of the country to do the act that constituted the crime.(*v*)

V. Corporations.

§ 85. In the ancient case of the Abbot of St. Bennet's *v.* The Mayor, &c., of Norwich,(*w*) Pigot said *arguendo* that a "corporation cannot do a personal tort to another, as a battery or wounding, nor can they do treason or felony, so far as the corporation is concerned. Much the same language is used in the case of Sutton's Hospital;(*x*) and in Orr *v.* The Bank,(*y*) it was expressly ruled, that a corporation, as such, could not through its agents be guilty of an assault and battery. It has been more recently held in England that such a body was not subject to be indicted for a violation of the Foreign Establishment Act.(*z*) And Lord Holt is reported, in an anonymous case, to have laid it down generally, that a corporation is not indictable at all, though its individual members are.(*a*)

(*q*) Com. *v.* Weld, Thacher's C. C. 157.

(*r*) The Mariana Flora, 11 Wheat. 11. See also Clow *v.* Wright, Brayt. 118.

(*s*) 4 Bl. Com. 27.

(*t*) U. S. *v.* Liddle, 2 Wash. C. C. 205; U. S. *v.* Ortega, 4 Wash. C. C. 531; U. S. *v.* Benner, Baldwin, 234.

(*u*) 1 R. S. 244, s. 12, Barbour's C. T. 252.

(*v*) Bankus *v.* State, 4 Indiana, 114.

(*w*) Y. B. 21 Ed. 4, 7, 13.

(*x*) 10 Coke's Rep. 326.

(*y*) 1 Ohio, 36.

(*z*) King of the Two Sicilies *v.* Wilcox, 14 Jur. 751.

(*a*) Anon. 12 Mod. 559. In the State *v.* Great Works Co. 2 Appleton, 11, Weston, C. J., states the law thus: "A corporation is created by law for certain beneficial purposes. It can neither commit a crime or misdemeanor by any positive or affirmative act, or incite others to do so as a corporation. While assembled at a corporate meeting, a majority may by vote, entered upon their records, require an agent to commit a battery; but if he does, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offence thus indicted by them, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted either as principals, or as aiding and abetting, or procuring an offence to be committed,

§ 86. This general proposition of Lord Holt has, however, received considerable qualification in modern times. It has been thought by Mr. Kyd to apply only to the case of crimes and misdemeanors.(b) And the result of the authorities in England and in this country seems now to be that a corporation may be indicted for a breach of duty imposed on it by law, though not for a felony or for public wrongs involving personal violence, as riots or assaults.(c) Thus an indictment will lie at common law against a corporation for not repairing a road, a bridge, or a wharf, where by statute or prescription it is bound so to do;(d) or for disobedience to an order of justices for the construction of works in pursuance of a statute.(e) And this, though a specific remedy be given for the breach of duty, by the act of incorporation, if there be no negative words.(f)

§ 87. Whether this criminal liability extends to acts of misfeasance is more doubtful. In Maine,(g) it was held that a mill company could not be indicted for a nuisance in the erection of a dam on a navigable river, by an agent.(h) But in England,(i) after a full consideration of the authorities, a contrary principle was established. It was ruled there that an indictment lay at common law against an incorporated railway company for cutting through and obstructing a highway, in a manner not conformable to the powers conferred on it by Act of Parliament. The case was put on general grounds; and the distinctions which had been attempted between nonfeasance and misfeasance overthrown. Indeed, since it has been settled against some of the earlier authorities, that trespass, or case for a private nuisance would lie against a corporation,(j) no good reason can be assigned why the same acts, when to the injury of the public at large, may not equally be the basis of criminal proceedings.(k) And such is now generally considered to be the law.(l)

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according to its character or magnitude." As to the liability of the individual members, see further, Kane *v.* The People, 3 Wend. 363; State *v.* Godfrey, 3 Fairf. 361; Edge *v.* Com. 7 Barr, 275; Queen *v.* R. R. Co. 9 Q. B. 326.

(b) Kyd on Corporation, 225–6.

(c) Per Patteson, J., 3 Q. B. 232; Com. *v.* Worcester Turnpike Co. 3 Pick. 327; State *v.* Great Works Co. 2 Appleton, 41; People *v.* Corporation of Albany, 11 Wend. 539.

(d) Ibid. Lyme Regis *v.* Henley, 3 B. & Adol. 77; Rex *v.* Birm. R. R. Co. 3 Q. B. 523; 3 Railw. Co. 148; S. C. 9 C. & P. 469; Rex *v.* Severn R. R. Co. 2 B. & Ad. 646; Rex *v.* Commissioners, 2 M. & S. 86; Simpson *v.* State, 10 Yerg. 525; State *v.* N. J. Turnpike Co. 1 Harr. 222; State *v.* Patton, 4 Ired. N. C. 16; see Anon. Loft, 556.

(e) Rex *v.* Birm. R. R. Co. ut supra.

(f) Susquehanna Road *v.* The People, 15 Wend. 267; but see Com. *v.* Turnpike Co. 2 Virg. Cas. 362.

(g) State *v.* Great Works Co. 2 Appleton, 20 Maine, 41.

(h) See to same point, 6 Vin. Abr. 309, Corp. Z. pl. 2.

(i) R. *v.* Great North of Eng. Railway, 9 Q. B. 315.

(j) Chestnut Hill Turnpike *v.* Ruttee, 4 S. & R. 6; Mayor of Lynn *v.* Turner, Cowp. 86; Manard *v.* Monmouthshire Canal Co. 4 M. & G. 452; Lynn Regis *v.* Henley, 1 New Cases (House of Lords), 222; 3 B. & Ad. 77; Eastern Counties R. Co. *v.* Broom, 2 English Reports, 406; Duter *v.* The Troy R. R. Co. 2 Hill, 629.

(l) Com. *v.* Proprietors, 2 Gray, 339; State *v.* Morris R. R. 3 Zab. 360; Angell & Ames on Cor. § 394, 396.

(k) Lord Denman, in the case in 9 Q. B., uses this convincing reasoning: "We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal pro-

§ 88. It is clear that no indictment lies against a corporation for riot, assault, or for felony;(*m*) nor for any offence necessarily involving malicious motive.(*n*)

§ 89. The proper mode of proceeding to compel an appearance to an indictment in England, is by distress infinite.(*o*) A fine seems the usual penalty inflicted,(*p*) though Lord Holt said, in an indictment against the inhabitants of a county, for not repairing, that an attachment might go against all to "catch as many as one can of them."(*q*)

§ 90. Quasi corporations, as counties, townships, parishes, have long been held subject to indictment for a neglect of the duties imposed on them by law, as, for not maintaining a road or bridge,(*r*) or for not opening them when laid out.(*s*) In two ancient cases, acts of misfeasance, as digging in the highway, in one, and levying a nuisance in the other, were charged in the indictment, but both went off on other points.(*t u*)

CHAPTER III.

PRINCIPAL AND ACCESSARY.(*v*)

I. STATUTES, § 91.
    UNITED STATES, § 91.
        Aiding, advising, &c., felony on high seas, § 91.
        Concealing or aiding felon, § 92.

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ceedings; of this there is no doubt. But the public know nothing of the former; and the latter, if they are identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain; except the remedy be indictment against those who truly commit it, that is, the corporation, acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

(*m*) R. *v.* Birming. R. R. Co. 3 Q. B. 223, 236, 9 C. & P. 467.

(*n*) Com. *v.* Proprietors, 2 Gray, 339; R. *v.* Willcox, 1 Simons, N. S. 335.

(*o*) Rev. *v.* Birming. R. R. Co. 3 Q. B. 223, per Patteson, J.; S. C. 9 C. & P. 469, per Parke, B., see 6 Viner, Abr. 310, and Angell and Ames Corp. 526, 2d ed.

(*p*) Rex *v.* Birm. R. R. Co., ut supra.

(*q*) Reg. *v.* Inhab. of Wilts, Cas. Tem. Holt, 340; but see Morgan *v.* Corporation of Carmathan, 3 Keble, 350.

(*r*) Rex *v.* Dixon, 12 Mod. 198; Rex *v.* Strington, 2 Wms. Saunders, 167, notes; Rex *v.* Inhab. of Clifton, 5 T. R. 498; Rex *v.* Inhab. of Sheffield, 2 T. R. 106; Rex *v.* Inhab. Id. 573; Rex *v.* Mayor, &c., 3 East, 86; State *v.* Town of Fletcher, 13 Verm. 124; State *v.* Dover, 10 N. H. 394; State *v.* Wittingham, 7 Verm. 391; Moyer *v.* Leicester, 9 Mass. 247; Biddle *v.* Proprietors, 1 Mass. 169.

(*s*) State *v.* Kittering, 5 Greenleaf, 254.

(*t*) R. *v.* Shelderton, 2 Keb. 221; R. *v.* Vill. of Hornsey, 1 Roll. R. 406.

(*u*) By a recent statute in Massachusetts it is provided:—

"SECT. 1. Whenever any corporation which has been indicted under the statutes of this Commonwealth, shall fail to appear after being duly served with process, its default shall be recorded, and the charges in the indictment shall be taken to be true, and judgment shall be rendered accordingly.

"SECT. 2. Whenever judgment shall be rendered on default as aforesaid, the court having jurisdiction of the case may issue a warrant of distress, to compel the payment of the penalty prescribed by law, together with all costs, and lawful interest.

"SECT. 3. This act shall take effect from and after its passage." [*Approved, May* 24, 1851.]

(*v*) For forms of indictments against accessaries, see Wh. Prec., as follows:—

(97) Against accessary before the fact, together with the principal.

MASSACHUSETTS, § 93.
Aiding or advising felon, § 93.
May be indicted for substantive felony, § 94.
Accessary before fact, may be tried in the county where the offence was committed, § 95.
Concealing or harboring felon, § 96.
Not necessary that principal felon should have been convicted, § 97.

NEW YORK, § 98.
Principal in second degree, and accessary before fact, punishment of, § 98.
Accessary after fact, punishment of, § 99.
Where indictment may be found, § 100.
Principal need not have been convicted, § 101.
Accessary to kidnapping, &c., § 102.

PENNSYLVANIA, § 103.
Accessaries before the fact, § 103.
Accessaries after the fact, § 104.

VIRGINIA, § 107.
Where indictment may be found, § 107.
Accessaries to be attached, &c., § 108.
Harboring horse stealers, &c., § 109.
Liability of accessary in case of principal, § 109.
Standing mute, &c., § 110.

OHIO, § 111.
Punishment for aiding and abetting, &c., 111.

II. PRINCIPALS AND ACCESSARIES GENERALLY, § 112.
1st. PRINCIPALS IN THE FIRST DEGREE, §112.
2d. PRINCIPALS IN THE SECOND DEGREE, § 116.
3d. ACCESSARIES BEFORE THE FACT, § 134.
4th. ACCESSARIES AFTER THE FACT, § 146.
5th. LIABILITY OF PRINCIPAL FOR CRIMINAL ACT OF AGENT, § 151.
(*a*) Where the agent acts directly under the principal's commands, § 152.
(*b*) Where the agent is acting at the time in the line of the principal's business, but without specific instructions, § 153.
(*c*) Where the principal resides out of the jurisdiction, § 154.

I. STATUTES.

UNITED STATES.

§ 91. That every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon

(98) Against an accessary before the fact, the principal being convicted.
(99) Against accessary after the fact, with the principal.
(100) Against an accessary after the fact, the principal being convicted.
(101) Against accessary before the fact generally in Massachusetts.
(102) Indictment against an accessary before the fact in murder, at common law.
(103) Against accessaries before the fact in Massachusetts.
(104) Against an accessary for harboring a principal felon in murder.
(105) Against an accessary to a burglary, after the fact.
(106) Against principal and accessaries before the fact in burglary.
(107) Against accessary before the fact to suicide. First count against suicide as principal in the first degree, and against party aiding him as principal in the second degree.
(108) Second count against defendant for murdering suicide.
(109) Against a defendant in murder who is an accessary before the fact in one county to a murder committed in another.
(110) [For other forms of indictments against accessaries in homicide, see post, 132, 156, &c.]
(111) Larceny. Principal and accessary before the fact.
(112) Against accessary for receiving stolen goods.
(113) Against accessary for receiving the principal felon.

the seas, which shall affect the life of such person, and such person or persons, shall thereupon do or commit such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be accessary to such piracies before the fact, and every such person, being thereof convicted, shall suffer death. (Act of April 30, 1790, s. 10.)

§ 92. That after any murder, felony, robbery, or other piracy whatsoever, aforesaid is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal, any such pirate or robber, or receive or take into his custody any ship, vessels, goods, or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged, to be accessary to such piracy or robbery, after the fact: and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.(*a*) (Ibid. § 11.)

MASSACHUSETTS.

§ 93. Every person, who shall be aiding in the commission of any offence, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, or who shall be accessary thereto before the fact, by counselling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner, which is or shall be prescribed for the punishment of the principal felon.(*b*) (Rev. Stat. chap. 133, § 1.)

§ 94. Every person, who shall counsel, hire, or otherwise procure any offence to be committed, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, may be indicted and convicted as an accessary before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case, may be punished in the same manner as if convicted of being accessary before the fact.(*c*) (Ibid. § 2.)

§ 95. Any person charged with the offence mentioned in the preceding section, may be indicted, tried, and punished in the same court and the same county, where the principal felon might be indicted and tried, although the offence of counselling, hiring, or procuring the commission of such felony may have been committed on

(*a*) For accessaries before the fact to piracy, see Wh. Prec., 1080, 1081. If a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself, which render himself liable as principal. U. S. *v.* Libby, 1 W. & M. 221. See also U. S. *v.* Crane, 4 McLean, 317.

(*b*) See as to this, post, § 137.

(*c*) It was said by the Supreme Court that stat. 1784, c. 65 (from which the above section was drawn), providing that if any person shall aid, assist, &c., any person to commit murder, he shall be considered as an accessary before the fact, refers to a person not *present*, aiding, &c. If the party be in such a situation as to be able to afford assistance to the principal although not literally present, he will be a principal. Com. *v.* Knapp, 9 Pick, 496.

As will be seen more fully hereafter, the English statute of 7 Geo. III. c. 64, s. 9, of which the above is in most respects a transcript, has been ruled only to extend to those cases in which, before the statute, the accessary was liable either with or after the principal, and not to make those liable who before could never have been tried. See post § 122; see also Wh. Prec. 1[illegible]7.

the high seas, or on land, either within or without the limits of this state.(*d*) (Ibid. § 3.)

§ 96. Every person, not standing in the relation of husband or wife, parent or grand-parent, child or grand-child, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbor, conceal, maintain, or assist any principal felon, or accessary before the fact, or shall give such offender any other aid, knowing that he had committed a felony, or had been accessary thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed accessary after the fact, and shall be punished by imprisonment, in the state prison, not more than seven years, or in the county jail, not more than three years, or by fine not exceeding one thousand dollars.(*e*) (Ibid. § 4.)

§ 97. Every person, who shall become an accessary after the fact, to any felony either at common law, or by any statute now made, or which shall hereafter be made, may be indicted, convicted, and punished, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, by any court having jurisdiction to try the principal felon, and either in the county, where such person shall have become an accessary, or in the county where such principal felony shall have been committed. (Ibid. § 5.)

NEW YORK.

§ 98. Every person, who shall be a principal in the second degree, in the commission of any felony, or who shall be an accessary to a murder, before the fact, and every person who shall be an accessary to any felony, before the fact, shall, upon conviction, be punished in the same manner herein prescribed, with respect to principals in the first degree.(*f*) (2 R. Stat. 698, § 6, 1st edition.)

§ 99. Every person, who shall be convicted of having concealed any offender after the commission of any felony, or of having given such offender any other aid, knowing that he has committed a felony, with intent and in order that he may avoid or escape from arrest or trial, or conviction or punishment, and no others, shall be deemed an accessary after the fact, and upon conviction shall be punished by imprisonment in a state prison, not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.(*g*) (Ibid. § 7.)

§ 100. An indictment against an accessary to any felon, may be found in the county where the offence of such accessary shall have been committed, notwithstanding the principal offence was committed in another county; and the like proceeding shall be had thereon in all respects as if the principal offence had been committed in the same county. (Ibid. 727, § 48.)

§ 101. An accessary, before or after the fact, may be indicted, tried, convicted, and punished, notwithstanding the principal felon may have been pardoned, or otherwise discharged, after his conviction. (2 R. Stat. 727, § 49.)

§ 102. Every person who shall be convicted of having been an accessary after the fact of kidnapping or confinement, hereinbefore prohibited, shall be punished by imprisonment in a state prison, not exceeding six years, or in a county jail not

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(*d*) See as to this rule in Massachusetts at common law, post, § 135.

(*e*) This amplifies the common law rule, which makes the wife the only exception. See post, § 148.

(*f*) See as to accessaries to unconsummated felonies, post, § 98.

(*g*) See on this point, post, § 149.

exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.(*h*) (Ibid. p. 665, § 31.)

PENNSYLVANIA.

§ 103. If any person shall become an accessary before the fact, to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force or hereafter to be in force, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.(*i*)

(*h*) See People *v.* Gray, 25 Wend. 465.

(*i*) On this the revisors say: The principle of this section, which prescribes the same punishment against accessaries before the fact in felony, under the various synonymes of aiders, abettors, counsellors, comforters, &c., as against principals, is familiar to our criminal legislation. It is found in the seventh section of the act of 1718, entitled "An act for the advancement of justice," 1 Smith's Laws, 113; Brightly's Digest, 730; Title, Robbery and Larceny, No. 2. In the second section of the act of the 8th of March, 1780, entitled "An act for the amendment of the laws relative to the punishment of treason, robberies, misprision of treason, and other offences," 1 Smith's Laws, 499; Brightly's Digest, 730; Title, Robbery and Larceny, No. 1. In the second, third, and fifth sections of the act of the 5th of April, 1790, entitled "An act to reform the penal laws of this State," 2 Smith's Laws, 531; Brightly's Digest, 730; Title, Robbery and Larceny, No. 3; and in the fourth section of the act of the 23d of April, 1829, entitled "A further supplement to an act entitled 'An act to reform the penal laws of this Commonwealth,'" 10 Smith's Laws, 431; Brightly's Digest, 731, No. 3. There is, therefore, nothing new in the principle of this section, which is founded on the theory of the moral guilt of the accessary before the fact being equal to that of the principal offender. The new principle in the section is that which makes the accessary before the fact, guilty of a substantive offence, and which subjects him to punishment for his crime, without postponing it until the conviction of the actual perpetrator. Or more precisely speaking, which abolishes in felonies the technical distinction now existing between accessaries before the fact and principal offenders.

This was always the law as regards misdemeanors in which there are no accessaries, all being regarded by law as principals. In felony, however, except in certain cases about to be noticed, an accessary cannot be tried before the conviction or outlawry of his principal, unless tried with him. In felonies of frequent occurrence, this was found a great and serious evil, which called for and received partial legislative correction. As early as the act of the 31st of May, 1718, 1 Smith's Laws, 105, it was provided that persons harboring, concealing, or receiving robbers, burglars, felons, or thieves, or receiving or buying any goods or chattels that should have been feloniously taken or stolen by any such robbers, &c., knowing the same to be stolen, might be proceeded against as is therein directed. And that if any such principal felon *could not be taken, so as to be prosecuted and convicted* for such offence, that nevertheless it shall be lawful to prosecute and punish every such person buying or receiving any goods stolen by such principal felon, knowing the same to be stolen, although the principal felon should not be convicted of the felony.

This, however, embraced only one class of accessaries, to wit: Receivers of stolen goods, in cases where the principal was not amenable to justice. Afterwards, by the act of the 23d of September, 1791, 3 Smith's Laws, 41; Brightly's Digest, 731; Title, Robbery, &c., No. 12, it was provided "in all cases of felonies of death, robbery, and burglary, it shall be lawful to punish *receivers* of such felons, robbers, and burglars, by a fine and imprisonment, although the principal felons, robbers, and burglars cannot be taken, so as to be prosecuted and tried for said offences; which conviction and sentence of said receivers shall exempt them from being prosecuted as accessaries after the fact in case the principal felon, robber, or burglar shall afterwards be taken and convicted. This act extended only to accessaries after the fact, in cases in which the principals could not be taken.

The act of the 11th of April, 1825, 8 Smith's Laws, 438; Brightly's Digest, 731; Title, Robbery and Larceny, No. 13, was passed to avoid a difficulty which afterwards arose in the prosecutions of receivers of stolen goods, in cases in which the principals were amenable to justice. The act of 1718, was taken from the fourth section of 4th and 5th Anne, chapter 31, which only authorized proceedings against such receivers before the conviction or attainder of their principals, when such principals could not be taken. Foster, in his discourse on accomplices, section 6, page 373, says on this point: "I know attempts have been made, under various shapes, to prosecute the receiver as for a misdemeanor, while the principal hath been in custody and amenable, but not con-

§ 104. If any person shall become an accessary after the fact, to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force, or that may be hereafter in force, he may be indicted and convicted as an accessary after the fact, to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessary after the fact to the same felony, if convicted as an accessary, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become accessary, had been committed at the same place as the principal felony: *Provided always*, That no person who shall be once duly tried for any such offence, whether as an accessary after the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.(*ii*) (Rev. Acts, 1860; Bill II. § 44.)

§ 105. Every principal in the second degree, or accessary before the fact, to any felony punishable under this act, for whom no punishment has been hereinbefore provided, shall be punishable in the same manner as the principal in the first degree is by this act punishable. Every accessary after the fact to any felony, punishable under this act, for whom no punishment has been hereinbefore provided, shall, on conviction, be sentenced to a fine not exceeding five hundred dollars, and to undergo an imprisonment, with or without labor, at the discretion of the court, not exceeding two years. And every person who shall counsel, aid, or abet the commission of any misdemeanor, punishable under this act, for whom no punishment has been

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victed. But I think such devices illegal." The act of 1825 solved the difficulty, by declaring that receivers of property, knowing it to have been feloniously stolen, may be prosecuted, although the principal be not before convicted, and whether he is amenable to justice or not.

It will thus be seen that all our legislation with regard to the trial of accessaries to felonies, before the conviction of their principals, applies only to accessaries after the fact; a class of offenders who have had no primary connection with the original crime, and whose guilt only consists in having given comfort and succor to the actual offender after its perpetration.

Except in cases of receivers of stolen goods, this offence is often almost venial, consisting frequently in parents and friends, influenced by the ties of blood, or the impulses of affection, giving aid and comfort to an offender whose crime they abominate and deplore. It seems strange that the common law privilege, which exempted accessaries from liability to justice until the conviction or attainder of the principal, should be taken away in cases of accessaries after the fact, and left in those of accessaries before the fact, whose guilt is always as great, and often much greater, than that of the principal. The forty-fifth section proposes putting our statute laws on the subject of accessaries to felonies in harmony with justice and reason.

(*ii*) "This section is only an extension of the existing laws, which, as will be seen from the preceding remarks, subjected accessaries after the fact, and receivers, to punishment before the conviction or attainder of their principals. It embraces such accessaries not only in common law felonies, but those created, or which hereafter may be created, by statute. It authorizes the conviction of such offenders either with or after the conviction of the principals, or for a substantive offence, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. It also provides for the case of a party becoming an accessary after the fact in one county to a felony committed in another; giving jurisdiction over the crime of such accessary to the courts of the county having jurisdiction over the crime of the principal offender. This provision supplies the twenty-second and twenty-third sections of the act of 1718, 1 Smith's Laws, 112; Brightly's Digest, 642; Title, Penal Laws, Nos. 6 and 7, made, probably, to meet a doubt at common law, whether an accessary in one county to a felony in another, was indictable in either."—*Revisers' Report.*

hereinbefore provided, shall be liable to be proceeded against and punished as the principal offender.(*iii*) (Rev. Acts, Bill I., § 183.)

VIRGINIA.

§ 107. An accessary to a murder or a felony committed, shall be examined by the court of that county or corporation, and tried by the court in that district where he became accessary, and shall answer upon his arraignment, and receive such judgments, order, execution, pains and penalties as are used in other cases of murder and felony.(*g*) (R. L. vol. i. 104.)

§ 108. If any be accused of an act done as principal, they that be accused as accessary shall be attached also, and safely kept in custody until the principal be attainted or delivered. (R. L. vol. i. 126.)

§ 109. Persons knowingly harboring horse-stealers, or receiving from them stolen horses, are to be deemed and punished as accessaries. And if the principal felon cannot be taken so as to be prosecuted and convicted of such offence, nevertheless the accessary may be punished as for a misdemeanor, although the principal felon be not before convicted of the felony, which shall exempt the offender from being punished as accessary, if the principal offender shall afterwards be taken and convicted. (R. L. vol. l. 179; see post, § 136.)

§ 110. If any principal offenders shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above twenty persons returned to be of the

(*iii*) "This section has been introduced to simplify the complications now existing in our criminal legislation in reference to the punishment of accessaries. As the guilt of principal offenders in the second degree, and accessaries before the fact, is morally the same with that of the principal offender, their punishment has been made the same. A general provision has also been made in this section to embrace the cases of accessaries after the fact, in felonies, and power is given to the courts to inflict, within certain limits, upon such offenders, a punishment proportionate to their crime, except in the cases of such accessaries as are otherwise provided for in the code. Accessaries before the fact to misdemeanors are now punishable in the same manner, at the common law, as the principal, there being, in fact, no such crime known to the common law as an accessary before the fact to a misdemeanor; all such accessaries being deemed principals. The last clause of the section is framed with a view to this principle. The existing legislation on the subject of accessaries, is found in the twenty-third section of the act of 31st May, 1718, entitled 'An act for the advancement of justice, and the more certain administration thereof.' 1 Smith's Laws, 105. Brightly's Digest, 642, No. 7. The second section of the act of the 5th April, 1790, entitled 'An act to reform the penal laws of this State.' 2 Smith's Laws, 531. Brightly's Digest, 644, No. 20. The act of the 11th April, 1825, entitled 'A further supplement to the penal laws of this Commonwealth.' 8 Smith's Laws, 438. Brightly's Digest, 645, No. 29. The fifteenth section of the act of the 31st May, 1718, entitled 'An act for the advancement of justice, and the more certain administration thereof.' 1 Smith's Laws, 105. Brightly's Digest, 731, No. 11. The fourth section of the act of the 23d of April, 1829, entitled 'A further supplement to an act entitled 'An act to reform the penal laws of this Commonwealth." 10 Smith's Laws, 435. Brightly's Digest, 51, No. 2, and many other acts in which the punishment of accessaries before the fact are declared to be the same with that of the principals.

"§ 184. This section is new. It is founded on the principle that if the offender has fully suffered the punishment inflicted by law upon his crime, he should be restored to society without any further legal taint. This follows as a logical consequence, from the principle of our penal system, that the great object of punishment is the reformation of the offender. In effect, the object of this statute is at present attained through the pardon of the Governor, which is continually invoked to restore such persons to their competency as witnesses, after they have fulfilled the sentence of the law. A large portion of the pardons actually granted by our governors, are given to persons so circumstanced. In England this principle has been introduced into their recent legislation. Pennsylvania, who may justly boast of being the pioneer in the amelioration of the penal laws, will hardly be disposed to be less liberal."—*Revisers' Report.*

(*g*) See as to particularity in indictment, post, § 142.

jury, it shall be lawful to proceed against any accessary either before or after the fact, in the same manner as if the principal felon had been attainted thereof, notwithstanding such principal shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before his attainder; such accessary to suffer the same punishment as the principal, if he had been attainted. (R. L. vol. i. p. 206.)

OHIO.

§ 111. That if any person shall aid,(h) abet, or procure any other person to commit any of the offences by this act made criminal, every person so offending shall, upon conviction thereof, be imprisoned in the penitentiary, and kept at hard labor, for any time between the respective periods for which the principal offender could be imprisoned for the principal offence; or if such principal offender would, on conviction, be punishable with death, or be imprisoned for life, then such aider, abettor, or procurer, shall be imprisoned for life, or be punished with death, as the occasion may require. (Crimes Act, § 36.)

II. PRINCIPALS AND ACCESSARIES GENERALLY.

1st. PRINCIPALS IN THE FIRST DEGREE.

§ 112. A principal in the first degree is, one who is the actor or actual perpetrator of the fact.(j) But it is not necessary that he should have committed the act with his own hands, or be actually present when the offence is consummated; for, if one lay poison purposely for another who takes it, and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree.(k) If he acts through the medium of an innocent(y) or insane medium,(z) or a slave,(a) he is guilty as principal in the first degree. Thus, in Sir William Courtenay's case, Lord Denman, C. J., charged the jury, "You will say whether you find that Courtenay was a dangerons and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and conferring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was done by his hand."(b) If the principal were insane when the act was committed, no one could be convicted as an aider or abettor.(c) If a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the fact was

(h) By the above section, aiding, abetting, or procuring a crime to be committed, is made a substantive, independent offence, and it is not necessary the principal should be convicted before the accessary is tried. Noland v. State, 19 Ohio, 131.

(j) 1 Hale, 233, 615.

(k) Vaux's case, 4 Co. 44 b.; Fost. 349; R. v. Harley, 4 C. & P. 369; 4 Cranch, 492. See Green v. State, 13 Mis. 382.

(y) R. v. Clifford, 2 Car. & Kir. 201; Com. v. Hill, 11 Mass. 36; Adams v. People, 1 Comstock, 173; R. v. Mazean, 9 C. & P. 676; R. v. Michael, 9 C. & P. 356.

(z) 1 Hale, 19; 4 Bla. Com. 23; R. v. Giles, 1 Moody, C. C. 166.

(a) Berry v. State, 10 Georgia, 511.

(b) R. v. Mears, 1 Boston Law Rep. 205; Hawk. c. 1, s. 7.

(c) R. v. Taylor, 8 Car. & P. 616.

committed, is *ex necessitate*, liable for the act of his agent, and a principal in the first degree.(*d*) So if A., by letter, desire B., an innocent agent, to write the name of "W. S." to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A. is a principal in the forgery, and it makes no difference that by the letter A. says to B. that he is "at liberty" to sign the name of W. S., and does not in express words direct him to do so. But if A., before the date of the letter sent to B., received by post a letter of an earlier date, purporting to have come from W. S., and bearing post-marks of earlier date, from which it may be inferred that he was authorized to make use of the name of W. S., the counsel of A., on his trial for the forgery, is entitled to state the contents of that letter, and to give it in evidence, with a view of showing that A. bona fide believed that he had the authority of W. S. for directing B. to sign the name of W. S. to the receipt.(*e*) But, if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessary before the fact.(*f*)

§ 113. While all who are present, aiding and abetting him who inflicts the mortal blow, in case of murder, are principals and criminals in the highest degree; it is not every intermeddling in a quarrel or affray from which death ensues, that constitutes an aiding and abetting to the murder. If, for instance, two men fight on a former grudge and of settled malice, and with intent to kill, of which the spectators are innocent, and they of a sudden take sides with the combatants and encourage them by words, and death ensue, it will not be murder in such persons.(*g*)

§ 114. One indicted as principal cannot be convicted on proof showing him to be only an accessary before the fact.(*h*)

§ 115. A non-resident principal, though at the time an inhabitant of a foreign state, may be liable for his agent's criminal acts in a particular jurisdiction.(*i*)

2d. PRINCIPALS IN THE SECOND DEGREE.

§ 116. Principals in the second degree are those who are present aiding and abetting at the commission of the fact. To constitute principals in the second degree there must be, in the first place, a participation in the act committed; and, in the second place, presence either actual or constructive at the time of its commission. But although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely

(*d*) Fost. 340; 1 East, P. C. 118; 1 Hawk. c. 31, s. 7; R. *v*. Palmer, 1 N. R. 96; 2 Leach, 978; Com. *v*. Hill, 11 Mass. 136.

(*e*) E. *v*. Clifford, 2 Car. & Kir. 201.

(*f*) R. *v*. Stewart, R. & R. 363; or, if he be present, a principal in the second degree, Fost. 349.

(*g*) State *v*. King et al., 2 Rice's S. C. Digest, 106.

(*h*) Hughes *v*. State, 12 Ala. 458.

(*i*) People *v*. Adams, 3 Denio, 190, 610; R. *v*. Garrett, 22 Law & Eq. 607; 6 Cox R. 260, Lord Campbell, C. J.; Com. *v*. Gillespie, 7 S. & R. 469, Duncan, J.

because he did not endeavor to prevent the felony, or apprehend the felon.(*j*) Something must be shown in the conduct of the bystander, which unmistakably evinces a design to encourage, incite, approve of, or in some manner afford aid, or consent to the act.(*jj*) It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions, in order to prevent surprise, or remained at a convenient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.(*k*)

He who attempts to strike with a deadly weapon one who is at the same time struck by another, with another deadly weapon, is joint principal in the offence.(*kk*)

§ 117. If a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself which render him liable as principal.(*l*)

§ 118. Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, all are guilty as principals.(*m*) So, it has been holden, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice.(*n*) But the act must also be the result of the confederacy; and if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act.(*o*) When H. and S. broke open a warehouse and stole thereout thirteen firkins of butter, &c., which they carried along the street thirty yards, and then fetched the prisoner who was apprised of the robbery, and he assisted in carrying the property away; he was held not a principal, the felony being complete before he interfered.(*p*)

§ 119. It was once held in England not to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a little before he had uttered it, joined him again in the street a short time after the

(*j*) 1 Hale, 439; Fost. 350. Connaughty *v.* State, 1 Wisc. 169.
(*jj*) Connaughty *v.* State, 1 Wis. 169.
(*k*) Jerv. Arch. 4. Thompson *v.* Com., 1 Metc. Ky. 13.
(*kk*) King *v.* State, 21 Geo. 220.
(*l*) U. S. *v.* Libby, 1 W. & M. 221.
(*m*) R. *v.* Standley, R. & R. 305; 1 Russ. 24; R. *v.* Passey, 7 C. & P. 282; R. *v.* Lockett, Id. 300.
(*n*) R. *v.* Moyre, 1 Leach, 314.
(*o*) R. *v.* White, Russ. & R. C. C. 99.
(*p*) R. *v.* King, Russ. & R. C. C. 332; R. *v.* McMakin, Russ. & R. C. C. 338.

uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended.(*q*)

Such is still undoubtedly the law where the offence is a felony, for then such an accomplice must be indicted as an accessary. But where it is a misdemeanor, he must be indicted as a principal.(*r*)

§ 120. If A. is charged with offence, and B. is charged with aiding and abetting him, it is essential to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder.(*s*)

§ 121. In the case of murder by duelling, in strictness, both the seconds are principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law, in this respect, has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree.(*t*) But all persons present at a prize-fight, having gone thither for the purpose of seeing the prize-fighters strike each other, are principals in the breach of the peace.(*u*)

§ 122. If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either.(*v*) Whether the advice of the defendant was the operative cause of the suicide is, it seems, immaterial. Thus, in an early case in Massachusetts,(*w*) it was said by Parker, C. J., in charging the jury, "The important fact to be inquired into is, whether the prisoner was instrumental in the death of *Jewett* (the deceased), by advice or otherwise. The government is not bound to prove that *Jewett* would not have hung himself had *Bowen's* counsel never reached his ear. The very act of advising to the commission of a crime is, in itself, unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise: as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given." All present at the time of committing an offence are principals, although only one acts, if they are confederates, and engaged in the common design of which the offence is a part.(*x*) Where, however, the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a principal, because he was not-present, nor as an accessary before the fact at common law, because the principal cannot be convicted, nor as guilty of a substantive

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(*q*) R. *v.* Davis, Russ. & R. C. C. 113; and see R. *v.* Else, Russ. & R. C. C. 142.

(*r*) R. *v.* Greenwood, 9 Eng. Law & Eq. 535. (*s*) R. *v.* Cruise, 8 C. & P. 541.

(*t*) 1 Hale, 422, 452, post, § 959, 990, 996.

(*u*) R. *v.* Perkins, 4 C. & P. 537; R. *v.* Murphy, 6 C. & P. 103; R. *v.* Young, 8 C. & P. 645.

(*v*) R. *v.* Dyson, Russ. & R. C. 533; R. *v.* Russell, Moody, C. C. 366; R. *v.* Allison, 8 C. & P. 418.

(*w*) Com. *v.* Bowen, 13 Mass. 359; see Wharton's Preced. 107.

(*x*) Green *v.* State, 13 Miss. 382.

felony under 7 Geo. 3, c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried. And it is also held in England, that if a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not, and that the person who furnished her with the poison for that purpose will, if absent when she took it, be an accessary before the fact only.(*y*)

§ 123. If several combine to forge an instrument, and each executes, by himself, a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.(*z*) As if A. counsel B. to make the paper, C. to engrave the paper, D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B. C. and D. may be indicted for forgery, and A. as an accessary;(*a*) for if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the other.(*b*)

§ 124. There must be presence, either actual or constructive, at the time of the commission of the offence. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him a principal in the second degree.(*c*) One who keeps guard while others act, thus assisting them, is, in the eyes of the law, present and responsible, as if actually present.(*d*) If several act in concert, to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others, with the possession of such goods, and another of them entices him away, that the man who has the goods may carry them off, all are guilty of felony as principals.(*e*) In case of stealing in a shop, if several are acting in concert, some in the shop and some out, and the property is stolen by one of those in the shop, those who are on the outside are equally guilty as principals, in the offence of stealing in a shop.(*f*) There are other cases, where a party absent may be liable as principal: as he that puts poison into anything to poison another, and leaves it, though not present

(*y*) R. *v.* Leddington, 9 C. & P. 79; R. *v.* Russell, M. C. C. 356.
(*z*) R. *v.* Bingley, Russ. & R. C. C. 446; R. *v.* Kelley, Russ. & R. C. C. 421.
(*a*) R. *v.* Dale, Moody, C. C. 307.
(*b*) R. *v.* Kirkwood, Moody, C. C. 304.
(*c*) Fost. 347, 350; see R. *v.* Borthwick et al., 1 Doug. 207; 1 Leach, 66; 2 Hawk. c. 29, s. 7, 8; 1 Russ. 31; 1 Hale, 555; R. *v.* Gogerly and others, R. & R. 343; R. *v.* Owen, 1 Mood. C. C. 96; Com. *v.* Knapp, 9 Pick. 496; State *v.* Harden, 2 Dev. & Bat. 407; State *v.* Coleman, 5 Porter, 32.
(*d*) State *v.* Town, Wright's Ohio R. 75.
(*e*) R. *v.* Standley, Russ. & R. C. C. 305.
(*f*) R. *v.* Gogerly, Russ. & Ry. C. C. 343; and see R. *v.* Owen, 1 Ry. & M. C. C. 96; R. *v.* Borthwick, 1 Dougl. 207.

when it is taken; so it seems all that are present when the poison is so infused, and consenting thereto, are principals.(g) Turning out a wild beast with intent to do mischief, so that thereupon death ensues, the party offending is guilty of murder as a principal (h)

§ 125. A person, however, is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so if necessary.(i)

§ 126. Persons not sufficiently near to give assistance, are not principals. Thus, where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return, when he passed the note, and divide the produce. The three had before been concerned in uttering another forged note; but at the time this note was uttering in Portsmouth, the other two stayed at Gosport. The jury found all three guilty, but, on a case reserved, the judges were clear, that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and, therefore, they were recommended for a pardon.(j) Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.(k) And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessaries before the fact.(l) Presence, however, during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.(m)

§ 127. All those who assemble themselves together, with an intent even to commit a trespass, the execution whereof causes a felony to be committed; and continue together, abetting one another, till they have actually put their design into execution; and also all those who are present when felony is committed, and abet the doing of it, are principals in felony.(n) So if several persons come to a house with intent to commit an affray, and one be killed, while the rest are engaged in riotous or illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder.(o) And where persons combine to stand by one another in a breach of the

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(g) Hale's Sum. 216.

(h) Fost. 349; 1 Hale, 514.

(i) United States v. Burr, 4 Cranch, 492.

(j) R. v. Soares, Atkinson & Brighton, 2 East, P. C. 974; Russ. & Ry. C. C. 25, S. C.; and see R. v. Stewart & others, Russ. & R. C. C. 363; R. v. Badcock and others, Russ. & R. C. C. 249; R. v. Manners, 7 C. & P. 801. Post, § 1449.

(k) R. v. Kelly, R. & R. 421.

(l) R. v. Soares, R. & R. 25; R. v. Davis, Id. 113; R. v. Elsee, Id. 142: R. v. Badcock, Id. 249; R. v. Manners, 7 C. & P. 801.

(m) R. v. Bingley, R. & R. 446. See 2 East, P. C. 768.

(n) Fost. 351, 352; 2 Hawk. c. 29, s. 9; R. v. Howell, 9 C. & P. 437; Brennan v. People, 15 Illinois, 511.

(o) Dalt. J., c. 161; 1 Hale, 439; Hawk. b. 2, c. 29, s. 8.

peace, with a general resolution to resist all opposers; and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though at the time of the fact, some of them were at such a distance as to be out of view.(*p*) Thus where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are principals in such murder.(*q*) So, to use the language of an able judge, where divers persons resolve severally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and, in doing so, happen to kill a man, they are all guilty of murder, for they who unlawfully engage in such bold disturbances of the public peace, in opposition to, and in defiance of, the justice of the nation, must at their peril, abide the event of their actions. Malice, in such a killing, is implied by the law, in all who are engaged in the unlawful enterprise; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary to prevent riotous combinations committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicides attaches exclusively to its actual perpetrators.(*r*)

§ 128. If, as it was laid down in another case, during a scene of unlawful violence, an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in any of their unlawful doings, such a homicide would be murder, at common law, in all the parties engaged in the affray. "It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated, in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and, from a simultaneous fire, innocent persons, their wives or children in their houses, should be killed by some of the missiles discharged—shall the violaters of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this

(*p*) R. *v.* Howell, 9 C. & P. 437.
(*q*) U. S. *v.* Ross, 1 Gallison, 624. See Brennan *v.* People, 15 Illinois, 511.
(*r*) Com. *v.* Daley, 4 Penn. Law Journ., 156, by King, President.

principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefits of impracticable niceties, in order to their indemnity from the consequences of their own conduct?"(*s*)

§ 129. The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and, therefore, it need not be made in indictments.(*t*) Such is only the case, however, where the punishment is the same for the two divisions.(*u*) But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.(*v*) In an indictment for murder, if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present, is, in contemplation of law, the injury of each and every of them.(*w*) There are cases, however, where the provisions of a statute require the distinction to be observed; thus an indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, &c., is to be understood as charging that he caused it to be done in his presence, and that he aided, being present; in other words, as charging him as principal in the second degree, and not as accessary.(*x*)

§ 130. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent, or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.(*y*) By the ancient law, principals in the second degree could not be tried until the principal had been convicted and outlawed.(*z*) Such, however, is no longer the case, and the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.(*a*) So on an indictment for murder, the court may, in their discretion, try the principal in the second degree before the principal in the first degree.(*aa*)

§ 131. At common law, in treason, and in misdemeanors, the highest and

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(*s*) Com. *v.* Hare, 4 Penn. Law Journ. 259.

(*t*) State *v.* Fley and Rochelle, 2 Brevard, 338; State *v.* Green, 4 Strobhart, 128.

(*u*) 2 Hawk. c. 25, s. 64; Mackally's case, 9 Co., 67 b; Fost. 345.

(*v*) 1 East, P. C. 348, 350; R. *v.* Home, 1 Leach, 473.

(*w*) State *v.* Mair, 1 Cox's R. 453; Foster, 551; State *v.* Fley and Roohelle, 2 Brevard, 338; R. *v.* Borthwick, Doug. 207; 1 East, P. C. 350; Post, § 598.

(*x*) See Rasnick's case, 2 Virg. Ca. 356; Hoffman *v.* Com., 6 Randolph, 685.

(*y*) State *v.* Fley and Rochelle, 2 Rice's S. C. Digest, 104; 2 Brevard, 338.

(*z*) Foster, 347.

(*a*) R. *v.* Taylor, 1 Leach, 360; Benson *v.* Offley, 2 Shaw, 270; 3 Mod. 121; R. *v.* Wallis, Salk. 334; R. *v.* Towle, R. & R. 314; 3 Price, 145; 2 Marsh, 465; Archibald's C. P. 6.

(*aa*) Boyd *v.* State, 17 Geo. 194.

lowest of offences, there are no accessaries, all concerned being principals.(*b*) Thus, the master who knowingly permits his slave, while under his control, to retail liquor, in a house belonging to the master, is himself guilty of the offence of keeping a tippling-house, and liable to the penalty.(*c*) And so where A. and one B. were indicted for uttering counterfeit coin, and the evidence was that the uttering charged in the indictment was effected by B. in the absence of A., but proof was given that, before the uttering, the two prisoners were acting together in concert, and the jury found that they were, on the evening in question, engaged in the common purpose of uttering counterfeit coin, it was held that A. was rightly convicted as a principal.(*d*) So, also, if A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals, for the misdemeanor of attempting to set the malt-house on fire, although A. was not present at the time of the attempt.(*e*) So, a man who, though at a distance, is concerned in the furnishing of lottery tickets to another, to be sold in a place where their sale is prohibited, is guilty as principal in such sale.(*f*) So, in New York, it is ruled that there are no accessaries in petit larceny; but all concerned in the commission of the offence are principals.(*g*) From this doctrine it follows that an averment of the commission of a misdemeanor by a principal is sustained by proof of its commission by an agent.(*h*)

§ 132. In the United States courts, however, as will be seen more fully hereafter, the reason of the common law doctrine that in treason all are principals, fails, and it is doubtful whether the doctrine itself applies to the offence as limited by the constitution.(*i*) The principle, on the other hand, is said by an elementary writer of much learning, to be in force in the several states, and he consequently argues that, in treason against the state of Virginia, accessaries may exist.(*j*)

§ 133. Upon the trial of a principal in the second degree, it is competent for the government to offer in evidence an admission of his own guilt, made by the principal in the first degree, to establish the fact of such guilt in addition to the record of his conviction.(*k*)

(*b*) 3 Inst. 21, 438; 1 Hale, 233, 613; Dalt. J., c. 161; Fost. 341; 12 Co. 812; Co. Lit. 57; Hawk. b. 2, c. 29, s. 1; 4 Bla. Com. Cro. C. C. 49; R. *v.* Greenwood, 9 Eng. Law Eq. 535; Whitaker *v.* English, 1 Bay. 15; Chanit *v.* Parker, 1 Rep. Con. Ct. 333; State *v.* Goode, 1 Hawk. 463; Curlin *v.* State, 4 Yerger, 143; Com. *v.* McAtee, 8 Dana, 28; Com. *v.* Major, 6 Dana, 293; Com. *v.* Burns, 4 J. J. Marshall, 182; Com. *v.* Gillespie, 7 Serg. & Rawle, 469; U. S. *v.* Morrow, 4 Wash. C. C. 783; Com. *v.* Macomber, 3 Mars. 254; U. S. *v.* Mills, 7 Peters, 38; State *v.* Westfield, 1 Bailey, 132; State *v.* Barden, 1 Devereux, 518; Williams *v.* State, 12 S. & M. 58; Whitney *v.* Turner, 1 Scam. 253; State *v.* Cheek, 13 Ired. 114; Sanders *v.* State, 18 Ark. 198.

(*c*) Com. *v.* Major, 6 Dana's Kentucky R. 193.

(*d*) R. *v.* Greenwood, 9 Eng. Law & Eq. 535.

(*e*) Reg. *v.* Clayton, 1 Car. & Kir. 128.

(*f*) Com. *v.* Gillespie, 7 Serg. & Rawle, 469.

(*g*) Ward *v.* State, 6 Hill, N. Y. R. 144.

(*h*) Post, § 594.

(*i*) U. S. *v.* Burr, 4 Cranch, 472, 501.

(*j*) Davis' Criminal Law, 38. Post, § 2766, &c.

(*k*) Studstill, *v.* State, 7 Geo. 2.

3d. Accessaries before the fact.(*l*)

§ 134. An accessary before fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony.(*m*) The meaning of the word "command" is, where a person having control over another, as a master over a servant, orders a thing to be done.(*n*) To constitute a man accessary, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal.(*o*) The accessary is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat C., and he beat him so that he dies, A. is accessary to the murder.(*p*) So, if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessary to the burning of D.'s house.(*q*) And if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessary.(*r*) If procurement is through an intermediate agent, it is not necessary that the accessary should name the person to be procured to do the act.(*s*) The procurement need not be direct: it is sufficient if one or more persons become the medium through whom the work is done ;(*t*) it may be either by direct means, as by hire, counsel, or command; or indirect, by evincing an express liking, approbation, or assent to another's felonious design.(*u*) The concealment of the knowledge that a felony is to be committed, will not make the party concealing it an accessary before the fact ;(*v*) nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence.(*w*) The procurement must continue till the consummation of the offence; for, if the procurer of a felony repent,

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(*l*) For indictments under this head see Wharton's Precedents, as follows: Against accessary before the fact, together with principal, 97. Against an accessary before the fact, the principal being convicted, 98. Against accessary after the fact, with the principal, 99. Against accessary after the fact, the principal having been convicted, 99. Against accessary before the fact generally in Massachusetts, 101. Against accessary before the fact in murder, at common law, 102. Against accessary before the fact in murder, in Massachusetts, 103. Against an accessary for harboring a principal felon in murder, 104. Against an accessary after the fact in burglary, 105. Against principal and accessaries before the fact in same, 106. Against accessary before the fact to suicide. First count, against suicide as principal in the first degree, and against party aiding him as principal in the second degree, 107. Second count, against defendant for murdering suicide, 108. Against a defendant in murder, who is an accessary before the fact in one county to a murder committed in another, 109. Against principal and accessary before the fact in larceny, 111. Against accessary for receiving stolen goods, 112. Against accessary for receiving principal felon, 113. Against accessary to piracy before the fact, 1080. Against accessary to piracy after the fact, 1081.

(*m*) 1 Hale, 615.

(*n*) State *v.* Mann, 1 Haywood's N. C. R. 4.

(*o*) 1 Hale, 615; R. *v.* Gordon, 1 Leach, 515; 1 East, P. C. 352.

(*p*) 4 Bl. Com. 37; 1 Hale, 617.

(*q*) R. *v.* Saunders, Plowd. 475.

(*r*) Fost. 369, 370.

(*s*) R. *v.* Cooper, 5 C. & P. 535.

(*t*) Fost. 125; R. *v.* Somerset, 19 St. Trials, 804; R. *v.* Cooper, 5 C. & P. 535.

(*u*) 2 Hawk. c. 29, s. 11; People *v.* Norton, 8 Cowen, 137.

(*v*) 2 Hawk. c. 29, s. 23.

(*w*) 1 Hale, 616.

and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessary.(*x*) So, if the accessary order or advise one crime, and the principal intentionally commit another: as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A., instead of so doing he commit the same crime against B., the accessary will not be answerable;(*y*) but, if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise.(*z*) As has been seen, a party also procures a felony to be done by an insane or innocent medium, or a slave, is himself liable as a principal in the first degree.(*a*)

§ 135. At common law, the conviction of some one who has committed the crime must precede that of one guilty only as accessary.(*b*) A prisoner does not waive his right to call for the record of such conviction, by pleading.(*c*) The same rule was formerly laid down in Massachusetts.(*d*) In North Carolina, the principle has been somewhat expanded, it having been there held that the accessary is not liable to be tried while the principal is amenable to the laws of the state, and is still unconvicted.(*e*) But the conviction of the principal is not admissible evidence, until judgment has been rendered on the verdict.(*f*) In Massachusetts it has been held that at common law, an accessary, in a capital case, cannot be tried without his own consent, even where the principal has died before conviction.(*g*) But where there have been two principals, one of whom has been convicted, the other of whom is dead, he must answer notwithstanding the non-conviction of the second.(*h*) In Pennsylvania an accessary may be indicted without the conviction of the principal being averred, but his guilt must be averred, and the evidence must show that his guilt was legally established before the trial of the accessary.(*i*)

§ 136. In Virginia, in an early case, where the principal and accessary were charged in the same indictment for murder, and the principal was first tried and convicted of murder in the second degree, and before judgment was pronounced against him, the accessary was tried, and the jury found a verdict against him, subject to the opinion of the court, whether the accessary could be tried before the principal had judgment, he being in custody, convicted, as principal, it was decided that, under the statute, conviction alone, without attainder, is sufficient.(*j*)

An accessary is discharged by the acquittal of his principal on those charges whereon the indictment against himself is founded.(*k*)

(*x*) 1 Hale, 618. (*y*) 1 Hale, 617.

(*z*) Fost. 370 *et seq.*; but see 1 Hale, 687; 3 Inst. 51. (*a*) Ante, § 112.

(*b*) See Baron *v.* People, 1 Parker, C. C. 246.

(*c*) Fost. 360; 1 Hale, 623; U. S. *v.* Burr, 4 Cranch, 502.

(*d*) Com. *v.* Andrews, 3 Mass. 126; Com. *v.* Briggs, 5 Pick. 429; Com. *v.* Woodward, Thacher's C. C. 63.

(*e*) State *v.* Graff, 1 Murphy's R. 270; see State *v.* Goode, 1 Hawks, 463; Harty *v.* State, 3 Blackford's Ia. R. 386. (*f*) State *v.* Duncan, 6 Iredell, 98.

(*g*) Com. Phillips, 16 Mass. 423. (*h*) Com. *v.* Knapp, 10 Pick. 477.

(*i*) Holmes *v.* Commonwealth, 25 Penn. State R. (1 Casey) 221. See Revised Act, ante § 103.

(*j*) Com. *v.* Williamson, 2 Virg. C. 211. (*k*) U. S. *v.* Crane, 4 M'Lean, 317.

Conviction of the principal is *pima facie* evidence of his guilt, on the trial of the accessary.(*l*)

§ 137. In Massachusetts, however, as has been seen by the revised statutes, the accessary may be tried for a substantive felony, whether the principal be convicted or not; and the same provision exists in several of the states. So far as receiving stolen goods, knowing them to be stolen, is concerned, the modification is almost universal. In general, however, in other respects, the common law remains unchanged. It should be observed that the statute of 7. Geo. 4, c. 64, s. 9, which most of our American statutes copy, only applies where the accessary might at common law have been indicted with or without the conviction of the principal, and, therefore, where a defendant was indicted as accessary before the fact to the murder of S. N., she having, by his procurement, killed herself, it was holden that the statute did not apply.(*m*)

§ 138. Where the principal and accessary are tried together (which is in general the best and most usual way), if the principal plead otherwise than the general issue, the accessary shall not be bound to answer, until the principal's plea be first determined.(*n*) Where the general issue is pleaded, however, the jury must be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessary; but if they find the principal guilty, they are then to inquire of the accessary.(*o*)

§ 139. Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessary charged in the same indictment as accessary before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, the judges, it is said, were of opinion that the accessary should have been acquitted; for the indictment charged him as accessary to the burglary only, and the principal being acquitted of that, the accessary should be acquitted also.(*p*) In New York, "an indictment against an accessary to any felony may be found in the county where the offence of such accessary shall have been committed, notwithstanding the principal offence was committed in another county, and the like proceedings shall be had thereon in all respects, as if the principal offence had been committed in the same county.(*q*)

§ 140. In Tennessee, where a principal to a murder was sentenced to imprisonment for life, in accordance with the statute of 1838, c. 29, an accessary before the fact, subsequently tried and convicted (the jury bringing in a general verdict of guilty, without finding mitigating circumstances), was held to be properly sentenced to imprisonment for life.(*r*)

§ 141. An accessary cannot take advantage of an error in the record against the principal; and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessary of the principal's guilt.(*s*)

(*l*) Com. *v*. Knapp, 10 Pick. 477; State *v*. Duncan, 6 Iredell, 236. Post, § 149.
(*m*) R. *v*. Russell, 1 Mood. C. C. 356. See Post, § 964.
(*n*) 9 H. 7, 19; 1 Hale, 624; 2 Inst. 184.
(*o*) 1 Hale, 624; 2 Inst. 184. See Holmes *v*. Com., 1 Casey, 221.
(*p*) R. *v*. Donnelly and Vaughan, R. & R. 310; 2 Marsh. 571.
(*q*) Rev. Stat. part iv. Chap. II.; Tit. 4, art. II. § 48. Ante, § 100.
(*r*) Nuthill *v*. The State, 11 Humph. 247.
(*s*) State *v*. Duncan, 6 Iredell, 236; Com. *v*. Knapp, 10 Pick. 477.

At common law it is not necessary in an indictment against an accessary before the fact, in a felony to set out the conviction or execution of the principal. It is enough to aver the latter's guilt.(*t*)

§ 142. The indictment must show the offence to have been committed with as much particularity as is necessary in an indictment against the principal. Thus, in Virginia, when the indictment was as follows: "Amherst county, Superior Court of Law and Chancery, to wit: The grand jurors empanelled and sworn at September term, 1834, upon their oath present, that J. W. Dudley, late of the county of Amherst, laborer, with force and arms, in the county aforesaid, and within the jurisdiction of the said superior court, on the 1st day of September, 1834, did wilfully and knowingly, aid, abet, and counsel a certain W. M. Davis, in unlawfully, maliciously, and wilfully fighting a duel with pistols, with a certain W. M. Lambert, then and there being, the probable consequence of such weapons might be the death of the said Davis or the said Lambert, and the jurors upon their oaths say, that the said Dudley did, as aforesaid, aid, abet, and counsel the said Davis in fighting the said duel, which took place at the time, place, and manner aforesaid, against the form of the statute in such cases made and provided, and against the peace and dignity of this commonwealth;" Upshur, J., on demurrer said, "In an indictment for aiding and assisting in fighting a duel, it is indispensable to charge that a duel was fought. Perhaps it was the intention of the attorney to do so in this instance, and the language of the indictment may possibly be susceptible of a different construction; and, therefore, is wanting in that directness and precision of averment, which are necessary in an indictment. This defect being, in our opinion, fatal, we have not thought it necessary to turn our attention to other objections."(*u*)

§ 143. Under the criminal code of Illinois, which declares that, an accessary before the fact "shall be deemed and considered as principal and punished accordingly," an accessary may be indicted and convicted as a principal.(*v*)

§ 144. If the felony is not committed, he who counsels or commands its commission is not liable as accessary before the fact, but it seems he may be convicted for the attempt as a substantive misdemeanor.(*w*) In New York, on the trial of an indictment under the statute for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose: it was held sufficient to warrant a conviction, though the prisoner did not mean to be present at the commission of the offence, and K. never intended to commit it.(*x*)

§ 145. It is not material that an accessary should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessary encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessary of the offence.(*y*)

(*t*) State *v.* Sims, 2 Bail. S. C. Rep. 29; State *v.* Evans, *Ibid.* 66; Holmes *v.* Com., 1 Casey, 221.
(*u*) Com. *v.* Dudley, 6 Leigh's Va. R. 614.
(*v*) Baxter *v.* The People, 3 Gilman, 368.
(*w*) 2 East R. 5; Ch. C. L. 264.
(*x*) People *v.* Bush, 1 Hill, N. Y. R. 133.
(*y*) Keithler *v.* State, 10 S. & M. 192.

4th. Accessaries after the fact.

§ 146. An accessary after the fact is one who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon,(z) whether he be a principal or an accessary before the fact merely.(a) Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessary after the fact; as, for instance, that he concealed him in his house,(b) or shut the door against his pursuers, until he should have an opportunity of escaping,(c) or took money from him to allow him to escape,(d) or supplied him with money, a horse, or other necessaries, in order to enable him to escape,(e) or that the principal was in prison, and the defendant, before conviction, bribed the jailer to let him escape, or supplied him with materials to effect the same purpose.(f) Merely suffering the felon to escape, however, will not charge the party so doing, such amounting to a mere omission.(g) So, if a person supply a felon in prison with victuals or other necessaries for his sustenance;(h) or succor and sustain him if he be bailed out of prison;(i) or professionally attend a felon sick or wounded, although he know him to be a felon;(j) or speak or write in order to obtain a felon's pardon or deliverance,(k) or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly;(l) or even if he himself agree, for money, not to give evidence against the felon;(m) or know of the felony and do not discover it;(n) it seems that these acts will not be sufficient to make the party an accessary after the fact.

§ 147. Two things are laid down in the books as necessary to constitute a man accessary after the fact to the felony of another.

1. The felony must be complete.(o)

2. The defendant *must know that the felon is guilty*;(p) and this, therefore, is always averred in the indictment.(q) And though it seems to have been doubted whether an implied notice of the felony will not, in some cases, suffice, as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety,(r) it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge.(s) The only relation which excuses the harboring a felon, is that of a wife to her husband, because she

(z) 1 Hale, 618; 4 Bl. Com. 37.
(a) 2 Hawk. c. 29, s. 1; 3 P. Wms. 475.
(b) Dalt. 530, 531.
(c) 1 Hale, 619.
(d) 9 H. 4, 1.
(e) Hall's Sum. 218; 2 Hawk. c. 29, s. 26.
(f) 1 Hale, 621; Hawk. b. 2, c. 29, s. 26; Archbold by Jervis, 9.
(g) Hale, 619.
(h) 1 Hale, 620.
(i) Id.
(j) 1 Hale, 332.
(k) 26 Ass. 47.
(l) 3 Inst. 139; 1 Hale, 620.
(m) Moore, 8.
(n) 1 Hale, 371, 618.
(o) 1 Ch. C. L. 264; 1 Hale, 622; 2 Hawk. c. 29, s. 35.
(p) 1 Hale, 622; Hawk. b. 2, c. 29, s. 32; Com. Dig. Justices, T. 2.
(q) Hawk. b. 2, c. 29, s. 33.
(r) Dyer, 355; Staunf. 41 b.
(s) 1 Hale, 323, 622; 3 Peere Wms.

is considered as subject to his control, as well as bound to him by affection.(*t*) But at common law, no other ties, however near, will excuse; for if the husband protect the wife, the father his son, or a brother his brother, they contract the guilt, and are liable to the punishment of accessaries to the original felony.(*u*)

§ 149. Where the principal and accessary are joined in an indictment, and tried separately, the record of the principal's conviction is, prima facie, evidence of his guilt, upon the trial of the accessary; and as the burden of proof is on the accessary, he must show clearly that the principal ought not to have been convicted.(*v*) But the accessary, in such case, is not restricted to proof of facts that were not shown on the former trial, and which are incompatible with the guilt of the principal.(*w*) The record of the conviction of a slave before a court of magistrates and freeholders as principal in a felony (*i. e.*, murder), may be given in evidence on the trial of an indictment against a free white man as accessary before the fact.(*x*) In New York, a copy of the original minutes of the court, in which the principal was convicted, if entered according to the direction of the statute, is proper evidence against an accessary before the fact; it appearing that no record of judgment of such conviction has been signed and filed; and it is reasonable to suppose, that the original minutes are equally sufficient.(*y*) But the rough minutes or original entries, not inspected or approved by the court, according to the statutes, are not evidence.(*z*)

§ 150. In an indictment against a free white person, under the Georgia statute of 1840, for being accessary after the fact in the receipt of stolen goods, charging that a negro man slave, Bob, was the principal felon, and stole the goods, it was held, that in order to convict the defendant, the state must prove that Bob stole the goods; and that in all cases where a person is charged with being accessary after the fact, the guilt of the principal must be proved.(*a*)

5th. Liability of principal for criminal act of agent.

§ 151. The cases under this head may be classed as follows:—

§ 152. (*a.*) *Where the agent acts directly under the principal's commands.* —In this case there is no doubt as to the principal's liability. In misdemeanors the act may be charged to have been done by the principal himself, without reference to an agent.(*b*) Such, also, is the case in felonies, where the agent is innocent, insane, or a slave, in which case the party commanding

(*t*) 1 Hale, 621; Hawk. b. 2, c. 29, s. 34; 4 Bla. Com. 39; Com. Dig. Jus. T. 2.

(*u*) Ibid. In Massachusetts this is expanded. See ante, § 96.

(*v*) Com. *v.* Knapp, 10 Pick. 484; State *v.* Chittem, 2 Devereux, 49; State *v.* Duncan, 6 Iredell, 236.

(*w*) Com. *v.* Knapp, 10 Pick. 484.

(*x*) State *v.* Sims, 2 Bail. S. C. Rep. 29; State *v.* Crank, Ibid. 66.

(*y*) People *v.* Grap, 25 Wendell, 465.

(*z*) Ibid.

(*a*) Simmons *v.* State of Georgia, 4 Geo. 465.

(*b*) Ante, § 131.

the felony to be done, though absent at the time of its commission, is principal in the first degree.(c)

§ 153. (b.) *Where the agent is acting at the time in the line of the principal's business, but without specific instructions.*—In this case, as where a bar-keeper in a hotel sells liquor, or a salesman in a bookstore in the usual course of business sells a libellous book, or where a clerk publishes a libel in a newspaper, the principal is responsible, and, if there be no other evidence, may be convicted.(d) Even the fact that the principal, who was the publisher of a newspaper, was living at the time one hundred miles distant from the place of publication, was at the time sick and entirely ignorant of the libel being published, is no defence.(e) But it is otherwise in a prosecution for selling liquor, if it be proved that the sale was against the principal's express and *bona fide* commands.(f)

§ 154. (c.) *Where the principal resides out of the jurisdiction.*—In this case the principal is chargeable in the particular venue for his acts done in it, notwithstanding his non-residence at the time.(g)

CHAPTER IV.

IN WHAT COURTS INDICTMENTS ARE COGNIZABLE.

I. OF WHAT OFFENCES THE FEDERAL JUDICIARY HAS COGNIZANCE, § 156.
1st. WHAT FEDERAL JUDICIAL POWERS THE CONSTITUTION CREATES, § 157.
2d. HOW FAR THE FEDERAL COURTS HAVE A COMMON LAW POWER, § 163.
3d. WHAT IS THE STATUTORY JURISDICTION OF THE FEDERAL COURTS, § 174.
(a) Offences against the law of nations, § 175.
(b) Offences against federal sovereignty, § 176.
(c) Offences against the persons of individuals, § 177.
(d) Offences against property, § 178.
(e) Offences against public justice, § 179.
II. IN WHAT COURTS OFFENCES COGNIZABLE BY THE UNITED STATES, ARE TO BE TRIED, § 182.
1st. WHEN THE STATE AND THE FEDERAL COURTS HAVE CONCURRENT JURISDICTION, § 181.
2d. JURISDICTION AS TO HABEAS CORPUS, § 195.
3d. CRIMINAL JURISDICTION OF THE SENATE, § 198.
4th. CRIMINAL JURISDICTION OF THE SUPREME COURT, § 199.
(a) Original, § 200.
(b) Appellate from Circuit Court, § 201.
(c) Appellate from District Court, § 202.
(d) Appellate from Circuit Court for the District of Columbia, § 203.
(e) Appellate from the Territorial Courts, § 204.
(f) Appellate from the highest State Courts, § 205.
5th. CRIMINAL JURISDICTION OF CIRCUIT AND DISTRICT COURTS, § 208.
6th. CRIMINAL JURISDICTION OF TERRITORIAL COURTS, § 210.

(c) Ante, § 112–13, post, § 2436.

(d) R. *v.* Almon, 5 Burrows, 2686; R. *v.* Dodd, 2 Sessions Cases, 33; Com. *v.* Park, 1 Gray, 553; State *v.* Mathes, 1 Hill, S. C. 37; Britain *v.* State, 3 Humph. 203, 33; R. *v.* Gutch, Moody & M. 433; Com. *v.* Nichols, 10 Metc. 259; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Major, 6 Dana, 393; 1 Bennett & Heard Lead. Cas. 241, post, § 594.

(e) R. *v.* Gutch, Moody & M. 433.

(f) Com. *v.* Nichols, 10 Metc. 259. See post, § 2436.

(g) People *v.* Adams, 3 Denio, 190; Adams *v.* People, 1 Comstock, 173; R. *v.* Garrett, 22 Law & Eq. 607; 6 Cox, C. C. R. 260; Com. *v.* Gillespie, 7 S. & R. 469.

§ 155. It is not proposed, in the present chapter, to examine in what courts the criminal jurisdiction of the individual States is distributed. It is clear that every case not cognizable, either concurrently or exclusively, by the federal courts, must belong to the tribunals of the State within which it occurs; but so various and shifting are the State laws regulating the organization of criminal courts, that their examination would be of little value. It is frequently, however, a matter of great importance to determine whether a given crime is to be considered an offence against the State or the federal government, and, if the latter be the case, in what court it is to be tried.(*h*) It will be considered, therefore, under the present head:—

I. Of what offences the federal judiciary has cognizance.

II. In what courts offences cognizable by the United States are to be tried.

I. Of what offences the federal judiciary has cognizance.

§ 156. By the Constitution, no criminal jurisdiction is vested directly in any court; and, although it cannot be said to be a settled point that it was not the intention of the framers of the Constitution to vest exclusive jurisdiction in the Supreme Court in certain specified cases,(*i*) yet the weight of authority is, that Congress must, in all cases, make an act criminal before the federal courts can take cognizance thereof; and certainly the care that has been taken to vest in Congress the power to make all laws which may be necessary for the protection of the federal government, warrants this construction.(*j*)

1st. What federal judicial powers the Constitution creates.

§ 157. The powers given to Congress under this head, are—

§ 158. To provide for the punishment of counterfeiting the securities and current coin of the United States.(*k*)

§ 159. To define and punish piracies, felonies committed on the high seas, and offences against the law of nations.(*l*)

§ 160. To make rules for the government of the land and naval forces.(*m*)

§ 161. To provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States.(*n*)

§ 162. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be,

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(*h*) For a very clear dissertation on this head, see "Duponceau on Jurisdiction of the United States Courts."

(*i*) Const. U. S. art 3, § 2; U. S. *v.* Hudson et al. 7 Cranch, 32.

(*j*) 4 Tucker's Blackstone, app. 10. (*k*) Art. 1, § 8, cl. 6.

(*l*) Id. cl. 10. (*m*) Id. cl. 14. (*n*) Id. cl. 16.

for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;(*o*) and to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.(*p*)

2d. How far the federal courts have a common law power.

§ 163. It is said in a case which will presently be more fully noticed, and which is assumed, though perhaps erroneously, to have settled the law on this important question, that although it may be that the Supreme Court possesses jurisdiction derived immediately from the Constitution of which the legislative power cannot deprive it, all other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be invested with none but what the power ceded to the general government authorizes Congress to confer. Certain implied powers must necessarily result to courts of justice, from the nature of their institution, as to fine for contempt, to imprison for contumacy, and to enforce obedience to orders; but jurisdiction of crimes against the State, it was held, is not among these powers. Before an offence can become cognizable by the United States Courts, with the exception of the Supreme Court sitting in banc, the legislative authority of the Union must first recognize it as such, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.(*q*)

§ 165. By the "Act to establish the judicial courts of the United States," it is declared "that the Circuit Court shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Court of the crimes and offences cognizable therein."(*r*) This act confines the jurisdiction of offences against the United States, unless otherwise expressly specified, to the national courts; but as has been noticed, the inclination of authority is that a statute must expressly provide for the case, or the class of cases, under which it falls, or no punishment can be inflicted.(*s*)

§ 166. So far as concerns subordinate courts, it may now be considered the law that the United States has no common law criminal jurisdiction.

(*o*) Id. cl. 16.

(*p*) Cl. 18. In this section the word *necessary* has been construed to mean *needful*, *requisite*, *essential*, and *conducive to*, and gives Congress the choice of the means best calculated to exercise the powers they possess; and, under this construction, it has been held that Congress have power to inflict punishment in cases not specified by the Constitution, such power being implied as necessary and proper to the sanction of the laws, and the exercise of the delegated powers. M'Cullough *v.* State of Maryland, 4 Wheat. 413; U. S. *v.* Bevans, 3 Wheat. 336; Martin's Lessee *v.* Hunter, 3 Wheat. 304; Ex parte Bollman, 4 Cranch, 146; U. S. *v.* Fisher, 2 Cranch, 358, 396.

(*q*) U. S. *v.* Hudson & Goodwin, 7 Cranch, 32; U. S. *v.* Coolidge, 1 Wheat. 416.

(*r*) Act Sep. 24, 1789, § 11.

(*s*) M'Intyre *v.* Wood, 7 Cranch, 504; U. S. *v.* Hudson & Goodwin, 7 Cranch, 32.

But it is with great deference submitted, that though there has been a judgment to this effect by the Supreme Court, yet this judgment was entered in a case not argued, when the court, so far as the report shows, was unadvised of the important though unreported cases where the contrary was held. To show this a very brief history of the adjudications will suffice.

§ 167. The first case where the question arose was in the trial of Henfield, for illegally enlisting in a French privateer; a case tried in 1793, but for the first time reported in 1850.(*t*) In this case Chief Justice Jay, Judge Wilson, and Judge Iredell, of the Supreme Court, and Judge Peters, of the District Court, concurred in holding that all violations of treaties, of the law of nations, and of the common law, so far as federal sovereignty is concerned, are indictable in the federal courts without statute. Almost at the same time, before Judge Iredell, Judge Wilson, and Judge Peters, an American citizen was convicted, at common law, for sending a threatening letter to the British Minister.(*u*) Then came Isaac Williams's case, where the same law was held by Chief Justice Ellsworth.(*v*)

§ 168. Such was the state of the law when Judge Chase, in Worrall's case(*w*) (Chief Justice Jay, Judge Wilson, and Judge Iredell being no longer on the bench, and Chief Justice Ellsworth being abroad), without waiting to learn what had been decided by his predecessors, startled both his colleague and the bar, by announcing that he would entertain no indictment at common law. No reports being then, or for a long time afterwards, published, of the prior rulings to the contrary, it is not to be wondered that the judges who came on the bench after Judge Chase, supposed that he stated the practice correctly. In this view Judge Washington seems to have held that there could be no indictment for perjury at common law in the courts of the United States,(*x*) and Chief Justice Marshall,(*y*) in more than one case, treats the same point as if settled by consent.(*z*) But in a case which occurred in the Circuit Court of Massachusetts,(*a*) on an indictment for an offence committed on the high seas, the question arose, directly, whether the Circuit Court had jurisdiction to punish offences against the United States, which had not been defined, and to which no punishment had been affixed. The judge admitting that the courts of the United States were of limited jurisdiction, and could exercise no authority not expressly granted to them, contended, that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law, and that, if this distinction was made, it would dissipate the whole difficulty and obscurity of the subject. Congress, he said, might, under the Constitution, confide to the

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(*t*) Wharton's State Trials, 49.

(*u*) U. S. *v.* Ravara, Wharton's St. Tr. 91; 2 Dallas, 297.

(*v*) Wharton's State Trials, 651. (*w*) 2 Dall. 297; Wharton's St. Tr. 189.

(*x*) See 1 W. C. C. R. 84; the report of which case appears to be defective in the conclusion of Judge Washington's opinion.

(*y*) U. S. *v.* Burr, 4 Cranch, 500.

(*z*) U. S. *v.* Bevans, 3 Wheat. 336; U. S. *v.* Wiltberger, 5 Wheat. 76.

(*a*) U. S. *v.* Coolidge, 1 Gall. 488.

Circuit Courts jurisdiction of all offences against the United States, and they had conferred on them jurisdiction of almost all; that by the judiciary act the Circuit Courts have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that or another statute of the United States otherwise provides; that, in order to ascertain what are crimes and offences against the United States, recourse must be had to the common law, taken in connection with the Constitution; and that Congress has provided for the punishment of many crimes which it has not defined, an explanation and definition of which can only be found in the common law. The inference, he urged, was plain, that the Circuit Courts have cognizance of all offences against the United States; that what these offences were, depended upon the common law, applied to the powers confided to the United States; that the Circuit Courts, having such cognizance, might punish by fine and imprisonment where no punishment was specially provided by statute; that the admiralty was a court of extensive criminal, as well as civil, jurisdiction; and that offences of admiralty were exclusively cognizable by the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed. The District Judge dissenting, the case came before the Supreme Court of the United States; and it is evident, from the reported case,(*b*) that a strong desire existed in the minds of the judges to hear the whole question of the extent of jurisdiction reargued. The Attorney General, however, declining to do so, being unwilling to attempt to shake the United States *v.* Hudson & Goodwin;(*c*) by the authority of that case the court felt themselves bound, and so certified to the Circuit Court.(*d*)

§ 169. But even assuming, as was said on another occasion,(*e*) that the doctrine that the common law, *as a source of jurisdiction*, does not control the federal courts, is now finally established, it by no means follows that the common law, *as a rule for the exercise of a jurisdiction previously given*, does not apply undiminished, except so far as interferes with the positive statute. Thus, it may be argued, that as Congress has power to "define and punish offences against the law of nations," the jurisdiction of the States is thereby divested of the particular subject-matter; and that, consequently, as the jurisdiction exists somewhere, it exists in the federal courts, ready to be exercised through the statutory medium, when Congress specifies the procedure, but when no legislation has taken place, through the agency of the common law forms. Marbury *v.* Madison(*f*) tends to the doctrine, that the federal jurisdiction in this and kindred cases is exclusive; and such is the express ruling of Com. *v.* Kosloff,(*g*) where Chief Justice Tilghman refused to take

(*b*) 1 Wheat. 415. (*c*) 7 Cranch, 32.

(*d*) Chancellor Kent does not seem to think that the case of U. S. *v.* Coolidge should be governed by the same principle as those of U. S. *v.* Hudson, and U. S. *v.* Worrall, the one a libel and the other an attempt to bribe a commissioner of the revenue, the two latter being decided on the ground that the Constitution had given to the courts no jurisdiction in such cases; whereas, the case of Coolidge was one of admiralty, over which the federal courts seem to have a general and exclusive jurisdiction. Kent's Comm. vol. i. p. 338.

(*e*) Wharton St. Tr. 87. (*f*) 1 Cranch, 137. (*g*) 5 S. & R. 545.

cognizance of a suit respecting a consul. The pregnant inquiry pressed home in the latter case, "Is the Constitution to be so construed as to exclude the jurisdiction of all inferior courts, and yet suffer the authority of the Supreme Court to be dormant, until called into action by law," &c., gives no obscure intimation of the leaning of that wise and clear-headed judge on this very point.

§ 170. It is not inconsistent, therefore, with the doctrine discarding the common law as an origin of jurisdiction to the federal courts, to hold that where an express subject-matter is ceded to the federal government, by the Constitution, that subject-matter is to be acted upon through the medium of common law forms. This distinction is dwelt upon by the late Mr. Duponceau, in his notice of Henfield's case.

§ 171. "Judge Wilson, who presided at this trial, in his charge to the jury, took the ground of its being also an offence at *common law*, of which the law of nations was a part, and maintained the doctrine that the *common law* was to be looked to for the definition and punishment of the offence. This ground has not been adverted to in argument, or, at least, very slightly. But it would seem that the *common law*, considered as a municipal system, had nothing to do with this case. The law of nations being the common law of the civilized world, may be said indeed to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people, and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country in a war. Every branch of the natural administration, each within its district, and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *propio vigore*, whenever it is not altered or modified by particular national statutes or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state. Judge Wilson, therefore, in my opinion, rather weakened than strengthened the ground of the prosecution in placing the law of nations on the same footing with the municipal or local *common law*, and deriving its authority exclusively from the latter. It was considering the subject in the narrowest point of view."(*h*)

§ 172. A distinction of a parallel character is taken by Mr. Dallas, in his speech in Worrall's case, where he argues that in the case in the text the defendant was indicted for an infraction of a treaty, which is the supreme law of the land, and that, consequently, that case is no authority for the position that at common law alone any offence against the sovereignty of the United States is indictable. There are, however, great difficulties in the way of giving the federal courts criminal jurisdiction over infractions of treaties, or of the law of nations, and at the same time refusing them such jurisdiction

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(*h*) Dup. Jur. 3.

over common law offences. If the common law is inadmissible to execute the jurisdiction in the latter case, the question is a critical one, whether the former can be taken in to help out the jurisdiction of the latter; and such, in fact, appears to have been the view of Judge Wilson, who, declining to place the case on the narrow ground of the law of nations alone, declared the offence to be cognizable at common law.

§ 173. Supposing, therefore, that Henfield's case is in such direct conflict with U. S. *v.* Coolidge, and U. S. *v.* Hudson, that either the former or the two latter must fall, the question arises, which is to be considered as law? Henfield's case, it is true, was not reviewed by the court in banc, but the ruling of the court at the trial, was made after a full and ample discussion by counsel distinguished for their learning and sagacity, and received the assent both of Judge Peters, as the District Judge, and of all the judges of the Supreme Court but one. Chief Justice Jay, to whom, as a constitutional lawyer, no one can be pronounced superior, and to whom, of all the judges who ever sat on that bench, the character of a cotemporaneous expositor most properly belongs, announced the jurisdiction in advance with great solemnity, in a charge which exhibits grave deliberation.(*i*) Judge Wilson and Judge Iredell, both of whom sat in the constitutional convention, proclaimed the same doctrine at the trial. The prosecution was instituted by Mr. Edmund Randolph, certainly not of that class which leaned to an enlarged view of the judicial power, and his official opinion as attorney-general was given beforehand, that the offence was one which the federal courts have power to punish. Mr. Jefferson, almost at the same moment, in substance, directed Mr. Morris to explain to the British court, that the acquittal arose, not from want of power to punish, but a doubt in the minds of the jury as to the guilty intent;(*j*) and Chief Justice Marshall, many years afterwards, lamented the verdict of the jury, not as the necessary result of a lack of jurisdiction, but as a melancholy exhibition of party zeal.(*k*) By none of these is there the least intimation of a doubt as to the jurisdiction of the court; and when the character of the men themselves is recollected—the sound, wary, and experienced judgment of Chief Justice Jay—the singular sagacity of Mr. Jefferson in every branch of our system, and his peculiar sensitiveness to judicial encroachments—and the excellent capacity and long experience of Judge Iredell, Judge Wilson, and Judge Peters—it cannot now be said that the jurisdiction was assumed inconsiderately or acquiesced in blindly. It undoubtedly was exercised, because the united opinion of the day required its exercise. It was exercised in conformity with the opinion announced by Washington in his proclamation of neutrality—a paper unanimously adopted by the cabinet as a correct exposition to foreign states, of the power of the federal government—that the federal government in such cases could, through its courts, punish the offender.(*l*) How far this opinion is to be considered as shaken in U. S. *v.* Hudson, where the proceedings were

(*i*) Wharton's St. Trials, p. 49. (*j*) Ibid. 89. (*k*) Ibid.
(*l*) 10 Wash. Writ. by Sparks, 535, ante, § 167.

ex parte, and U. S. *v.* Coolidge, where the attorney-general abandoned the question, is yet to be determined.(*m*) But however this may be on the merits, the line of recent decisions puts it beyond doubt that the federal courts will not now take jurisdiction over any crimes which have not been placed directly under their control by act of Congress.(*n*)

3d. WHAT IS THE STATUTORY JURISDICTION OF THE FEDERAL COURTS.

§ 174. It remains to consider such offences as are brought within the jurisdiction of the federal courts by act of Congress. These may be classed under two heads; first, cases which arise under the statute providing that if any offence shall be committed in any fort, dock-yard, navy-yard, arsenal, armory, or magazine, or in any other place, ceded to the United States, such offence shall, upon a conviction in any court of the United States, having cognizance thereof, be liable to and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such State;(*o*) secondly, cases which, by particular statutes, are expressly made the subjects of federal jurisdiction. The offences thus particularly enumerated by Congress, may be collected under five general heads; first, those against the laws of nations; secondly, those against federal sovereignty; thirdly, offences against the persons of individuals; fourthly, offences against property; and, fifthly, offences against public justice.

§ 175. (*a.*) Under the first head, namely, offences against the law of nations, may be classed, the accepting and exercising, by a citizen, a commission to serve a foreign state against a state at peace with the United States;(*p*) fitting out and arming, within the limits of the United States, any vessel for a foreign state, to cruise against a state at peace with the United States;(*q*) increasing or assisting, within the United States, any force of armed vessels of a foreign state at war with a state with which the United States are at peace;(*r*) setting on foot within the United States, any military expedition against a state at peace with the United States;(*s*) suing forth, or executing any writ or process against any foreign minister, or his servants, the writs being also declared void;(*t*) and violating any passport; or in any other way infracting the law of nations, by violence to an ambassador, or foreign minister, or their domestics.(*u*)

§ 176. (*b.*) Under the second head, namely, offences against federal sovereignty, may be classed, treason against the United States and mis-

(*m*) Wharton's State Trials, p. 87, 88. Another remarkable instance of this jurisdiction being accepted as a matter of course, is found in U. S. *v.* Meyer, cited Whar. Prec. 955, *note*.

(*n*) Anon. 1 Wash. C. C. 84; U. S. *v.* Maurice, 2 Brock. 96; U. S. *v.* New Bedford Bridge, 1 Woodb. & Minot. 401; U. S. *v.* Lancaster, 2 McLean, 431.

(*o*) Act of March 3, 1825, sect. 3. (*p*) Act 20th April, 1818, sect. 1.

(*q*) Ibid. sect. 3. (*r*) Ibid. sect. 5. (*s*) Ibid. sect. 6.

(*t*) Act 30th April, 1790, sects. 25 and 26. (*u*) Ibid. sect. 27.

prision of treason;(*v*) holding any treasonable correspondence with a foreign government;(*w*) enlisting by a citizen within, or going out of the United States with intent to enlist in the service of any foreign state;(*x*) fitting out and arming a vessel by a citizen of the United States, out of the United States, with intent to cruise against citizens of the United States;(*y*) opening or in any way detaining, by any person employed in the post-office department, any letter or bag of letters not containing money; secreting, embezzling, or destroying any letter, packet, bag, or mail of letters containing money, or deserting the charge of, or carrying, letters illegally, by a person having charge of the mails;(*z*) robbing or attempting to rob the mail, stealing the mail, or stealing from the mail or post-office, any packet, containing any article of value, taking any letter, or package, as aforesaid, not containing any article of value;(*a*) ripping, cutting, or otherwise injuring mail bags with intent to steal;(*b*) being accessary to any of the aforesaid crimes;(*c*) receiving articles stolen from the mails, or being accessary thereto after the fact;(*d*) counterfeiting or aiding voluntarily in counterfeiting, or uttering, or offering for sale any counterfeit public securities, with intent to defraud;(*e*) forging, counterfeiting, or aiding in forging, or counterfeiting any treasury note, or uttering, or attempting to utter such forged note;(*f*) forging, or aiding in forging any writing, in order to obtain money from the United States;(*g*) having in possession any such writing as aforesaid with intent to defraud the United States;(*h*) forging or being accessary to the forgery of any certificate of debt, or other public security of the United States, or of any letters patent issued by the President, or check on the treasury of the United States;(*i*) forging or being accessary to the forgery of any letter of attorney, or other instrument to convey any of the public stock of the United States, or of the Bank of the United States, or to receive any annuity, pension, or any other debt as aforesaid;(*j*) counterfeiting, or knowingly availing oneself of any counterfeited sea letter, passport, or certificate of registry;(*k*) counterfeiting, or being accessary to the counterfeiting of any instrument purporting to be an official copy of the registry of any vessel in the collector's office, or of a license to carry on the coasting trade, or fishery, or of a certificate of ownership, or clearance, or of a permit, debenture or other official document, granted by any collector, or other authorized officer of the customs of the United States; or altering or abstracting, or of being accessary to the altering or abstracting of any of the foregoing instruments, or passing, or attempting to pass any such altered instruments knowing them to be so altered with an intent to defraud;(*l*) counterfeiting, forging,

(*v*) Act 30th April, 1790, sects. 1, 2.
(*w*) Act 30th Jan., 1790, sect. 1.
(*x*) Act 20th April, 1818, sect. 2.
(*y*) Ibid. sect. 4.
(*z*) Act March 3, 1825, sect. 21.
(*a*) Ibid. sect. 22.
(*b*) Ibid. sect. 23.
(*c*) Ibid. sect. 24.
(*d*) Ibid. sect. 45.
(*e*) Act 30th April, 1790, sect. 14.
(*f*) Acts 30th June, 1812, sect. 10; 26th December, 1814, sect. 4; March 4th, 1814; Dec. 24th, 1814; Feb. 25th, 1816.
(*g*) Act March 3d, 1823, sect. 1.
(*h*) Ibid. sect. 2.
(*i*) Act March 3d, 1825, sect. 17.
(*j*) Ibid. sect. 18.
(*k*) Act 2d March, 1803, sect. 1.
(*l*) Act March 3d, 1825, sect. 19.

or uttering, or being accessary thereto, of any gold or silver coins of the United States, or any foreign coins made current in the United States, or bringing into the United States, with intent to defraud, such simulated coin;(*m*) counterfeiting, or being accessary thereto, of any copper coin of the United States, or bringing any counterfeit copper coin into the United States, with intent to defraud;(*n*) debasing the gold or silver coin, struck at the mint of the United States, by any officer of the United States, employed at the mint, with an intent to defraud, or the embezzling, by such officer of any coins or other metals committed to his charge;(*o*) scaling, or diminishing any of the gold or silver coins iu actual use or circulation in the United States;(*p*) it being provided that nothing in the last act shall deprive the courts of the individual States of jurisdiction under their own municipal laws over offences made punishable by it;(*q*) forging, or counterfeiting, or being accessary to such forgery, or passing, or attempting to pass any forged notes of the Bank of the United States;(*r*) engraving, or possessing counterfeit plates with an intent to use the same, or having any simulated bank notes of said bank with intent to use, or permit the same to be used in forging any such bank note (*s*) circulating notes of banks, or corporations created by act of Congress, whose charters have expired, by any director or other person, having under his control the property of any such corporation;(*t*) importing into the United States, with intent to hold, or dispose of as a slave, any negro, mulatto, or person of color;(*u*) purchasing, selling, or holding as a slave any such aforesaid person, imported from a foreign country;(*v*) fitting out a vessel for the slave trade by a resident in the United States;(*w*) the being interested in, or serving on board such vessel, or serving on board a foreign vessel so engaged, by a citizen;(*x*) transporting any negro, or person of color, in any vessel of less than forty tons burden, for the purpose of selling, or disposing of him as a slave: the act not extending to transportation on any waters within the jurisdiction of the United States of any negro not imported contrary to law;(*y*) landing, by a citizen of the United States, from any vessel, or any foreign shore, and seizing any negro not held to service by the laws of the United States, or decoying, or forcibly carrying away, or receiving such negro on board of such vessel, with intent to make him a slave;(*z*) aiding and abetting, in any of the aforesaid acts, or on the high seas, delivering to any other vessel such negro, or landing him on shore, with intent to make him a slave;(*a*) and committing piracy under color of a commission from a foreign state, or being accessary thereto.(*b*)

(*m*) Acts 3d March, 1825, sect. 20; 21st April, 1806, sects. 1 and 2.
(*n*) Act 3d March, 1825, sect. 21. (*o*) Ibid. sect. 24.
(*p*) Act 21st April, 1806, sect. 3. (*q*) Ibid. sect. 4.
(*r*) Act 10th April, 1816, sect. 18. (*s*) Ibid. sect. 19.
(*t*) Act 7th July, 1837, sect. 1.
(*u*) Act 20th April, 1818, sect. 1. (*v*) Ibid. sect. 7.
(*w*) Acts 22d March, 1794, sect. 1; 20th April, 1818, sect. 2; 10th May, 1800, sect. 1.
(*x*) Ibid.
(*y*) Act 2d March, 1807, sect. 8.
(*z*) Act 15th May, 1820, sect. 4. (*a*) Ibid. sect. 5.
(*b*) Act 30th April, 1790, sects. 8, 9, 10, 11.

§ 177. (*c.*) Under the third head, namely, offences against the persons of individuals, may be classed murder, or manslaughter, in any fort, dockyard, or other place, or district of country under the sole and exclusive jurisdiction of the United States;(*c*) murders, manslaughter, or rape, upon the high seas, or in any river, haven, basin, or other like place out of the jurisdiction of the United States, which, if committed within the body of a county, would, by the laws of the United States, be punished by death;(*d*) concealing one's knowledge of the commission of murder or any other felony upon the high seas, or in any fort, dockyard, or other place under the sole and exclusive jurisdiction of the United States, and not disclosing the same;(*e*) knowingly and wittingly aiding and assisting in the committing of any murder, robbery, or any other piracy upon the seas;(*f*) forcing an officer or mariner on shore, or leaving him behind in a foreign port, without justifiable cause, by any master or commander of a vessel belonging to citizens of the United States;(*g*) beating or wounding any of a ship's crew, from malice, by any master or other officer of any American ship on the high seas;(*h*) maiming or disfiguring any person, in any place on land, under the sole and exclusive jurisdiction of the United States, or in any vessel of the United States, on the high seas;(*i*) committing an assault on another, in any place within the admiralty jurisdiction of the United States, on board of any vessel belonging wholly or in part to the United States, or any citizen thereof, with a dangerous weapon, or with the intention to commit a mayhem or rape;(*j*) and breaking into any vessel, on the high seas, with an intent to kill, commit a rape, or to do or perpetrate any other felony.(*k*)

§ 178. (*d.*) Under the fourth head, namely, offences against property, may be classed, embezzling or purloining any arms or other ordnance belonging to the United States, by any person having the charge or custody thereof, for purposes of gain, and to impede the service of the United States;(*l*) burning, or aiding to burn, any dwelling-house, store, or other building, within any fort, dock-yard, or other place under the jurisdiction of the United States;(*m*) setting fire to, or burning, or aiding to set fire to, or burn, any arsenal, armory, &c., of the United States, or any vessel built or building, or any materials, victuals, or other public stores;(*n*) taking and carrying

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(*c*) Act 30th April, 1790, sects. 3 and 7.

(*d*) Ibid. sects. 7 and 12; act 3d March, 1825, sect. 4.

(*e*) Act 30th April, 1790, sect. 6.

(*f*) Ibid. sect. 10.

(*g*) Act 3d March, 1825, sect. 10.

(*h*) Act 3d March, 1835, sect. 3.

(*i*) Act 30th April, 1790, sect. 13.

(*j*) Act 3d March, 1825, sect. 22.

(*k*) Ibid. sect. 7. A ship lying at anchor between Boston and Chelsea, off Constitution Wharf, at the distance of one-fourth or one-third of a mile from said wharf, in water of the depth of four or five fathoms at low tide, and between one-third and half a mile's distance from the navy yard in Charlestown, is within the body of the county of Suffolk; and an offence so committed on board a merchant ship so situate, owned by a citizen or citizens of the United States, is exclusively cognizable by the courts of the State. Com. *v.* Peters, 12 Metcalf, 387.

(*l*) Act 30th April, 1790, sect. 16; see act 23d Aug. 1842, sect. 4.

(*m*) Act 3d March, 1828, sect. 1.

(*n*) Ibid. sect. 2. By the same act it is provided that if any offence shall be committed in any of the places aforesaid, for which no punishment is specially provided by the laws of the United States, offenders shall be liable to the same punishment as,

away, with intent to steal, the personal goods of another from within any of the places under the sole and exclusive cognizance of the United States, or being accessary thereto;(*o*) receiving such goods, knowing them to be stolen, or harboring any felons or thieves, knowing them to be such;(*p*) robbing on the high seas, or running away with a vessel or any goods and merchandise to the value of fifty dollars, by the captain or a mariner, or yielding up such vessel voluntarily to a pirate, or laying violent hands by a seaman upon the commander to prevent his fighting in defence of his ship or goods, or making a revolt or mutiny, or attempting to create a revolt or mutiny;(*q*) committing piracy or robbery under color of a commission from a foreign state, or being accessary thereto;(*r*) robbing any vessel, or the crew thereof, upon the high seas, or landing from a piratical vessel and committing a robbery on shore, the state jurisdiction in such a case being preserved;(*s*) confederating or attempting to corrupt any commander, master, or mariner, to run away with any vessel, or to turn pirate, or to deal or trade with any pirate, knowing him to be such, or confining the master, or endeavoring to make a revolt;(*t*) attacking any vessel belonging in whole or in part to the United States, or to any citizen thereof, upon the high seas, with intent unlawfully to plunder, or being accessary thereto;(*u*) breaking into any vessel on the high seas with intent to rob or commit any other felony, or unlawfully and maliciously cutting, spoiling, or destroying any cordage, cable, buoy, headfast, or other like articles, belonging to any vessel, or being accessary thereto;(*v*) buying, receiving, or concealing any money or goods which have been stolen on the high seas, or any other of the aforementioned places, knowing them to have been stolen;(*w*) plundering or stealing any money or goods belonging to any vessel which shall be wrecked or cast away upon the sea, or wilfully obstructing the escape of any person from such vessel, or showing false lights, or extinguishing true lights, with intent to bring any vessel into danger or distress, or being accessary thereto;(*x*) setting on fire or burning, or otherwise destroying, any vessel of war of the United States, afloat on the high seas, or causing the same to be done, or being accessary thereto, the jurisdiction of courts martial being reserved;(*y*) destroying a vessel on the high seas by the owner, or any other party, or causing or being accessary to the same;(*z*) committing mutiny by the crew of any American ship on the high seas, or being accessary to the same;(*a*) attempting, by combination, conspiracy, or in any other manner, to stir up mutiny, or unlawfully to confine the master;(*b*) conspiring, combining, and confederating by

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by the laws of the State in which such fort or other place may be situated, is provided for like cases.

(*o*) Act 30th April, 1790, sect. 16; see act 23d Aug. 1842. (*p*) Ibid. sect. 17.
(*q*) Acts 30th April, 1790, sect. 8; 3d March, 1835, sects. 1 and 2.
(*r*) Act 30th April, 1790, sects. 9, 10, and 11. (*s*) Act 15th May, 1820, sect. 3.
(*t*) Act 30th April, 1790, sect. 12. (*u*) Act 3d March, 1825, sect. 6.
(*v*) Ibid. sect. 7. (*w*) Ibid. sect. 8. (*x*) Ibid. sect. 9.
(*y*) Ibid. sect. 11. (*z*) Act 26th March, 1804, sects. 1 and 2.
(*a*) Act 3d March, 1835, sect. 1. This act repeals partially the 8th sect. act 30th April, 1790.
(*b*) Ibid. sect. 2.

persons either on the high seas, or within the United States, with others either within or without the United States, to cast away any vessel, or to procure the same to be done, with the intent to injure any underwriter, or building, or fitting out any vessel, with intent that the same shall be cast away, burnt, or destroyed, for the purpose aforesaid, or being accessary thereto.(*c*)

§ 179. Under the fifth head, namely, offences against public justice, may be classed, bribing any United States judge with intent to obtain any opinion, judgment, or decree in any suit depending before him;(*d*) receiving such bribe;(*e*) obstructing any officer of the United States in the service of any legal writ or process whatsoever;(*f*) rescuing any person committed for, or convicted of any offence against the United States;(*g*) demanding and receiving, by reason of his office, any greater fees than those allowed by law, by a public officer, or his deputy;(*h*) endeavoring to impede, intimidate, or influence any juror, witness, or officer in any court of the United States in the discharge of his duties, or by threats or force obstructing, or impeding, or endeavoring to impede the due administration of justice therein;(*i*) bribing, or attempting to bribe the president, or any director of the bank of the United States;(*j*) committing perjury, or causing another to do so, in any suit or controversy depending in any of the courts of the United States, or in any deposition taken in pursuance of the laws of the United States;(*k*) swearing or affirming falsely, or causing another to do so, in any proceeding when an oath or affirmation shall be required to be taken or administered, by or under any law of the United States;(*l*) making a false oath touching the expenditure of public money, or in support of any claim against the United States;(*m*) making a false oath concerning anything material to the point in question, upon examination before the president of the Senate, speaker of the House of Representatives, chairman of committee of the whole or of any standing or select committee of either house;(*n*) taking a false oath in any of the cases where by virtue of the revenue laws an oath or affirmation is required from any person;(*o*) taking a false oath or affirmation in any of the cases in which an oath or affirmation is authorized by any of the insolvent laws of the United States;(*p*) and extortion by any officer of the United States under or by color of his office.(*q*)

§ 180. By clauses in several of the acts referred to, it is expressly declared, that nothing therein shall be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States, over offences made cognizable by these acts. Such is the case, as has been noticed,

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(*c*) Act 3d March, 1825, sect. 23.
(*d*) Act 30th April, 1790, sect. 21.
(*e*) Ibid. sect. 21.
(*f*) Ibid. sect. 22.
(*g*) Ibid. sect. 23.
(*h*) Act 8th May, 1792, sect. 7.
(*i*) Act 2d March, 1831, sect. 2.
(*j*) Act 2d March, 1819, sect. 4.
(*k*) Act 30th April, 1790, sect. 18.
(*l*) Act 3d March, 1825, sect. 13.
(*m*) Act 3d March, 1813, sect. 3.
(*n*) Acts 3d May, 1798; 8th Feb. 1817.
(*o*) Act 2d March, 1799, sect. 88.
(*p*) Acts 6th Jan. 1800, sect. 4; 6th June, 1798; 2d March, 1831, sect. 5.
(*q*) 3d March, 1825, sect. 12.

with the crimes of forging, coining, and counterfeiting.(*r*) By the act establishing and regulating the post-office department, authority is given to the federal officers to prosecute in the State courts for offences against the department.(*s*) Acts have also been passed by Congress,(*t*) giving jurisdiction to the courts of certain States over offences against the revenue,(*u*) and vesting authority in the collectors to sue for certain offences in the State courts generally.

II. In what courts offences cognizable by the United States are to be tried.

§ 181. 1st. When the State and the federal courts have concurrent jurisdiction.

§ 182. By the judiciary act, it has been determined by the Supreme Court, exclusive jurisdiction is vested in the federal courts of all offences cognizable under the authority of the United States, unless where the laws of the United States shall otherwise direct.(*v*) It is clear, therefore, that unless in enacting a criminal statute, Congress expressly declares a concurrent jurisdiction to belong to State tribunals, they cannot take cognizance of the designated offences, but, on the contrary, are deprived of whatever jurisdiction they may heretofore have exercised. In the language of Judge Washington, in delivering the opinion of the Supreme Court, in a leading case, "Congress cannot *confer* jurisdiction upon any courts, but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts."(*w*)

§ 183. It appears, then, that under the Constitution, Congress possesses power to pass any laws it may deem necessary and proper for carrying on the government. Under this power the judiciary act was passed, vesting in the courts of the United States the exclusive power to punish crimes against the United States, except where a concurrent jurisdiction is given to the State courts; and it has just been shown, that Congress has no power to grant concurrent jurisdiction to the State courts, but only to declare that they are not to be prohibited from exercising a concurrent jurisdiction in certain cases, which, though made by act of Congress, national offences, and punishable in the national courts, are likewise offences against the several States, and may, therefore, be punished by State tribunals. Congress, how-

(*r*) Acts April 21, 1806, chap. 49; March 3, 1823, chap. 166; March 3, 1825, chap. 276. See post, § 1500, &c.

(*s*) Act March 3, 1825, chap. 275.

(*t*) Acts 3d March, 1806, chap. 14; 21st April, 1808, chap. 51; 3d March, 1815, chap. 246.

(*u*) Act of March 3, 1797; Act of March 2, 1799; Act of March 2, 1821; Act of March 1, 1823; Act of May 28, 1830, &c.

(*v*) Huston *v.* Moore, 5 Wheat. 27.

(*w*) Ibid. 5 Wheat. 27. See U. S. *v.* Ames, Boston L. Rep. v. 9, p. 295.

ever, has seen fit to give jurisdiction to State courts,(*x*) "concurrently with the federal courts, of all complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures, arising and payable under an act of Congress, passed or to be passed for the collection of any direct tax or internal duties; and the same power was given to the State courts as is vested in the United States District Courts, to mitigate or remit any fine, penalty, or forfeiture."(*y*)

§ 184. Under these acts, and others, conferring similar concurrent jurisdiction on the State courts, many conflicting decisions have arisen; nor is this the only difficulty which has followed the attempt thus to confer jurisdiction upon the State tribunals. Although it has been generally admitted that Congress may constitutionally vest in the federal courts jurisdiction of all crimes and offences of national concern, yet it has been held equally clear, that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States.(*z*) In several of the States it has been held, and certainly in accordance with the decisions of the Supreme Court of the United States, that although the State courts may exercise jurisdiction in cases authorized by the laws of the States, and not prohibited by the exclusive jurisdiction of the federal courts,(*a*) yet it cannot be considered obligatory upon the State judicatories to exercise such jurisdiction.(*b*) Where the State, it was urged, originally possessed a power which had not been exclusively ceded to Congress, or the exercise of which had not been prohibited to the States, the States might continue to exercise the power, until it came, practically, in collision with the exercise of some congressional power; when that happens, the State authority would be so far controlled, but it would still be good in those respects in which it did not contravene the provisions of the paramount law. Under no circumstances, however, it was said, could Congress confer jurisdiction on State courts in criminal or penal cases, arising under the laws of the United States.(*c*)

§ 185. In New York it was decided, in an action for a penalty for breach of the excise law, that Congress could not invest the State courts with a jurisdiction which they did not enjoy concurrently before the adoption of the Constitution, and that a pecuniary penalty for a violation of an act of Congress being a punishment for an offence created under the Constitution was not cognizable by them.(*d*) Similar views have been taken in New Hampshire and Indiana.(*e*)

Lately in New York it was held that perjury in a proceeding for naturalization in a State court is an offence against the general government, and is

(*x*) Act of March 3, 1815. (*y*) Act of Feb. 28, 1839, sect. 3.

(*z*) Huston *v.* Moore, 5 Wheat. 27.

(*a*) Calder *v.* Bull, 3 Dall. 386; Sturges *v.* Crowninshield, 4 Wheat. 193.

(*b*) Prigg *v.* Com. 16 Peters, 630. For information on this head see 12 Niles' Register, 255, 376; Washington Union, 22d March, 1847; National Intell. 23d Dec. 1813; 10 Bost. Law Rep. 378.

(*c*) Livingston *v.* Van Ingen, 9 Johns. 576; Blanchard *v.* Russell, 13 Mass. 16; Moore *v.* Huston, 3 S. & R. 179; Cohens *v.* Virginia, 6 Wheat. 396.

(*d*) U. S. *v.* Lathrop, 17 Johns. 4.

(*e*) State *v.* Pike, 15 N. H. 83; State *v.* Adams, 4 Black. 146.

punishable by proceeding in the courts of the United States, and not in the State courts.(ee)

§ 186. In a case which occurred in Ohio, on an information for selling distilled liquors without a license, contrary to the act of Congress,(f) it was held by all the judges, that the United States could not prosecute in the State courts. In a previous case, on a similar question, the court had been equally divided.(g)

§ 187. In Virginia, it has been decided that the courts of that State have no jurisdiction of stealing packages from the mail, that being an offence created by act of Congress,(h) and the same view was taken in an action brought to recover a penalty for a breach of the revenue laws, notwithstanding such penalty being expressly made recoverable in the State courts.(i)

§ 188. In Kentucky,(j) in an action to recover a penalty under an act of Congress, for a refusal to make return to the marshal of a list of the defendant's family, it was held that, as no tribunal of the State had an inherent or concurrent jurisdiction in such cases, the jurisdiction of the courts of the federal government must necessarily be exclusive, and that the State courts could take no cognizance.

§ 189. In Connecticut,(k) upon an action brought to recover damages under an act of Congress for the government and regulation of seamen in the merchant service, against the mate, for a desertion, the court felt themselves bound by the case of Martin *v.* Hunter's lessee,(l) and declared that Congress could not vest any portion of the judicial power of the United States except in a court ordained and established by itself, and that no part of the criminal jurisdiction of the United States could, consistently with the Constitution, be delegated to State tribunals. On a writ of error to the Superior Court of the same State, from a decision of a County Court, awarding a penalty for a violation of an act relating to the post-office department,(m) the case was reviewd and confirmed.(n)

(ee) People *v.* Sweetman, 3 Parker C. R. (N. Y.) 358.
(f) Since repealed. Act of 23d Dec. 1817, chap. 1.
(g) U. S. *v.* Campbell, 6 Hall's L. J. 113.
(h) Com. *v.* Freely, Virg. Cases, vol. i. 321.
(i) Serg. Cons. Law, 280.
(j) Hawley *v.* Sharp, 1 Dana, 442.
(k) Ely *v.* Peck. 7 Conn. 240.
(l) 1 Wheat. 304.
(m) Act of March 3, 1825.
(n) Ibid. The opinion of Daggett, J., in the last cited case, presents the arguments on which it rests in a clear light. The third article of the Constitution of the United States, he said, declares that the judicial power shall extend to all cases of law or equity arising under the Constitution, the laws of the United States, or treaties made, or which shall be made, under their authority. (Osborne *v.* Bank U. States, 9 Wheat. 818.) It is difficult to image a more complete grant of power. In what courts is this power to be vested? This question is definitively answered by the first section of the 3d article. The judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. And the State courts, says Judge Marshall, in 4 Cranch, 97, "are not in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court." They are not *inferior* courts, because they emanate from distinct authority, and are the creatures of a distinct government. Should it be said, that it is a matter of convenience to sustain jurisdiction in cases of this nature, that courts and magistrates are not appointed by the United States, to hear and determine these apparently trivial offences; nor has Congress ordained and established such inferior courts as could, with propriety, take cognizance of these offences; an easy reply

§ 190. In Missouri, it has been even said that the power to punish counterfeiting current coin was, notwithstanding the statute, vested exclusively in Congress, that the States had no concurrent legislation on the subject, and that a statute of a State providing for the cognizance and punishment of such crimes was void.(*o*) Such, however, so far as concerns the jurisdiction of the offence of coining, is in contravention of the accepted opinions.(*p*)

§ 191. In Pennsylvania, however, a contrary doctrine has obtained. On a writ of error to the Supreme Court, in an action brought in a Court of Common Pleas, to recover a penalty for distilling without a license, under the act of Congress of 19th April, 1816, the Supreme Court sustained the jurisdiction of the State courts, saying: "On the matter of jurisdiction, it is sufficient to observe, this court has often sustained actions on penal acts of Congress for the penalty, where the penalty is made recoverable in the State courts; and although convenience is no justification for the usurpation of power, yet as the court does not see how this conflicts with the Constitution of the United States, the inconvenience may be considered, and it would be an intolerable inconvenience and grievance, in an action for a petty penalty, to drag a man from the most remote corner of the State, to the seat of the federal judiciary."(*q*) In another case it was argued, that it does not always follow that the States have relinquished their own powers, because they have granted similar powers to the United States. They retain their powers, it is said, unless they are expressly deprived of them, or they have vested such powers in Congress as are in their own nature incompatible with the exercise of the same power by themselves. A difference, however, was observed in the two cases; where the prohibition is *express*, all power of the States ceased immediately on the adoption of the Constitution; but where the authority of the States is taken away by implication, they may continue to act until the United States exercise their power, because, until such exercise, there can be no incompatibility.(*r*) Such seems, also, the case in New Jersey.(*s*)

§ 192. In Vermont, an almost similar opinion has been held.(*t*) Even if Congress do possess the power and right to give exclusive jurisdiction over the offences of "counterfeiting, or possessing with intent to utter, and passing counterfeit bills of the United States," to the courts of the United

can be made. The Congress have the power. Let them occupy with their courts the whole judicial ground. If, from any motives (and we are not at liberty to inquire at all on the subject) they omit to ordain and establish inferior courts, or to vest judicial power in courts already established; they cannot justify a court in *Connecticut* in exercising judicial power of the *United States*, never vested in them by the Constitution, nor in obeying a law not made in pursuance of the Constitution. There is a broad distinction between suits on bonds given to the *United States* for seamen's wages, &c. &c., where the courts of the United States have a common law jurisdiction, and actions for penalties for the violation of the penal laws of the United States. These distinctions are well sustained in the United States *v.* Lathrop, 17 Johns. 4.

(*o*) Mattesin *v.* State, 3 Missouri Rep. 421; see State *v.* Shoemaker, 7 Ib. 177. As to coining, see generally, post, § 1500.

(*p*) Post, § 1500. See Rump. *v.* Com. 30 Penns. st. Rep. 475.

(*q*) Buckwater *v.* U. S. 11 S. & R. 196.

(*r*) Moore *v.* Houston, 2 S. & R. 196.

(*s*) U. S. *v.* Smith, 1 Southard, 33.

(*t*) State *v.* Randall, 2 Aikens, 89.

States, it was held that until they shall have done so, the jurisdiction remains in the State conrts, by force of the laws of the several States, as fully as if Congress had no power to legislate on the subject. Such is also the view in Massachusetts.(*u*)

§ 193. In South Carolina, the courts at one time went the extreme length of saying, that every offence against the laws of the United States, is an offence against the laws of South Carolina, and that she has a right to punish all violations of her law; unless the exclusive power to punish it has been delegated by the Constitution of the United States to the judiciary established by it.(*v*) Such, however, seems now no longer the law in that State.(*w*)

§ 194. From the foregoing decisions in the different States, the conclusion is that there is a great preponderance of authority against the concurrent

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(*u*) Com. *v.* Fuller, 8 Metc. 313.

(*v*) State *v.* Wills, 2 Hill, S. C. 687. The question arose as an appeal from the decision of a Circuit Court in South Carolina, to the Court of Appeals, on an indictment for opening a letter, contrary to the provisions of the act of Congress regulating the Post Office Department, conferring jurisdiction in such cases on the State courts. "The government of the United States," said O'Neal, J., "in all its constitutional powers, is the government of each and all the States, and by the Constitution, 2d section, 6th article, they have made the Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States the supreme law of the land. This constitutional legislation of the United States is the command of South Carolina, as well as of the United States; the officers and people of the former are bound by it, and more especially the judges, for the Constitution declares that they shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding. An offence against the laws of the United States is an offence against the laws of South Carolina; and she has a right to punish it, upon the confessed and acknowledged principle of the common law, that she has a right to punish all violations of her law; unless the exclusive power to punish it has been delegated by the Constitution of the United States to the judiciary created by it. The 1st section of the 3d article of the Constitution declares, 'that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.' This does not mean that the supreme and subordinate courts of the Union should *alone* have the power of deciding those cases to which their authority is to extend, but that the United States should exercise the judicial powers with which they are to be invested, through one supreme, and a certain number of inferior tribunals, to be instituted by them; 82d No. Fed. To decide the question of jurisdiction, it is therefore necessary to inquire whether the power conferred on the United States courts of hearing and determining the class of cases of which this is one, be exclusive or not. The 2d section of the third article provides, 'that the judicial power shall extend to all cases in *law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.*' Do the terms, 'the judicial power shall *extend to all cases,*' necessarily imply exclusion? I think they do not. In the 82d No. of the Federalist, Mr. Hamilton says: 'I mean not, therefore, to contend that the United States in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient: but I hold that the *State courts* would be divested of no part of their primitive jurisdiction, further than may relate to appeal, and I am even of opinion that in every case in which they were not expressly included by the future act of the national legislature, *they will of course take cognizance of the causes to which these acts may give birth.*' 3 Ham. Works, 265. I concur fully in this view, and particularly in the latter part; for it seems to me undeniable that every violation of the law of the United States is, when committed in South Carolina, by a person subject to her jurisdiction, a violation of the law of South Carolina, for which she has the common law power of punishing the offender, unless she, through Congress, has made the federal judiciary her agent for that purpose."

(*w*) State *v.* McBride, Rice, 400.

jurisdiction of the federal and State courts, in criminal cases, so far as concerns the right of the latter to administer the laws of the former. Where the States possessed jurisdiction in any class of cases, ceded to the general government, before the cession, and Congress, by act, vests a concurrent jurisdiction in the State courts, it seems generally admitted that the State courts will take cognizance. But where there has been such cession, and Congress omits to vest an express concurrent jurisdiction, in the State courts, or where some new act is passed on subjects over which the State courts never before exercised jurisdiction, giving them a concurrent power, the conflicting decisions are almost as numerous as the States themselves, and while the courts of New York, Ohio, Virginia, New Hampshire, Indiana, Kentucky, Connecticut, and Missouri, deny the authority of Congress to make State courts the depositories of the criminal jurisdiction of the United States, Pennsylvania and Vermont yield a qualified assent. How far indictments will lie in State courts for treason against the United States, and for counterfeiting the coin of the United States, will be considered under other heads.(*x*)

2d. JURISDICTION AS TO HABEAS CORPUS.

§ 195. The only acts of Congress which have been passed in relation to the *habeas corpus*, are the act of Sept. 24, 1789, sec. 14, giving to all the courts of the United States the right to issue the writ of *habeas corpus* when necessary for the exercise of their respective judicatories, and agreeably to the principles and usages of law, and to any one of the justices of the Supreme Court, or District Court, for the purpose of inquiry into the cause of commitment: providing, however, that the writ shall in no case extend to prisoners unless they are in custody under or by color of the authority of the United States, or are committed for trial by some court of the same, or are necessary to be brought to court to testify. The act of 29th August, 1842, sec. 1, extends the above power to any foreigners who may be confined by the United States or any State, and who may declare that they acted under authority from a foreign state; and provides an appeal from the decision of such justice or judge to the circuit, and from thence to the Supreme Court of the United States. Neither of these acts forbids the employment in any case of the *habeas corpus* by the State courts, and the consequence has been, that in almost all the States the courts have held that so far as the cause of commitment is concerned they are at liberty to investigate; but whether they will look beyond the warrant of commitment when made by any other than a judge of the courts of the United States, and inquire into the fact, is, it is said, a matter of sound discretion, to be regulated by the circumstances of the case.(*y*) In the case of Charles Lockington,(*z*) a British subject arrested by the marshal, in 1813, under the act of July 6, 1798, respecting alien enemies, it was held by the Supreme Court of Pennsylvania, upon an

(*x*) As to treason, post, § 2766. As to coining, post, § 1501.
(*y*) Ex parte, Pool et al., Serg. Cons. L. 286, 287. (*z*) 5 Hall's L. J. 92, 313.

application for a *habeas corpus*, that the authority of the State judges in cases of *habeas corpus* emanates from the States, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, it was said, not that the United States has not given them jurisdiction, but that Congress possesses, and has executed the power of taking away that jurisdiction which the States have vested in their own judges. A prisoner of war, however, it was held, is not entitled to the same privileges; he is subject to the laws of war, and his interests were never in any manner blended with those of the people of this country.(*a*) In Maryland, an act of assembly makes it the duty of the judges of the State to issue a *habeas corpus*, and inquire into the cause of commitment of any party upon complaint of illegal detention.(*b*) In South Carolina, in the case of a soldier in the army asking his discharge, on the ground of fraud in his enlistment, no objection was made to the issuing of the writ on constitutional grounds; and it appearing that his complaint was well founded, he was released from his engagement.(*c*) In Massachusetts, a minor who had enlisted was discharged without hesitation.(*d*) In New York, a special statute provides that a *habeas corpus* may issue in all cases, unless the party be detained by process from a court or judge of the United States having exclusive jurisdiction of the case.(*e*)

§ 196. In a case in the U. S. Circuit Court for Illinois, upon a *habeas corpus*, where the party had been arrested by the sheriff of Sangamon County upon a warrant by the Governor of Illinois, on a requisition by the Governor of Missouri, demanding him as a fugitive from justice, the court held that the courts of the United States have jurisdiction in the premises, and may order a person so arrested to be discharged; but whether the State courts have jurisdiction, or whether it is competent for either courts to inquire into facts behind the writ on *habeas corpus*, was doubted.(*f*)

§ 197. Until the act of 29th August, 1842, no appeal could be taken from an inferior to a superior court on the decision of a *habeas corpus*, and that act only provides one in a specific case; in all other cases of *habeas corpus* arising under the laws of the United States, no appeal lies to the Supreme Court, although the power of Congress to pass such an act is admitted.(*g*)

3d. Criminal jurisdiction of the senate.

§ 198. The criminal jurisdiction of the federal government is administered through the agency of various tribunals, of which two are constituted expressly by the Constitution, and the residue under the authority at the same time given to Congress to ordain and establish inferior courts.(*h*) The Senate

(*a*) See also the cases of Com. *v.* Halloway, 5 Binn. 512; ex parte Elizabeth Sergeant, 8 Hall's L. J. 206.

(*b*) Hall's L. J. 486, case of Ephraim Merritt.

(*c*) 5 Hall's L. J. 497. But see case of Rhodes, Serg. Cons. L. 238.

(*d*) Com. *v.* Chandler, 11 Mass. 83; Com. *v.* Cushing, 11 Mass. 68; Com. *v.* Harrison, 11 Mass. 63.

(*e*) New York R. S. vol. ii. 563, sect. 22. (*f*) Ex parte Joe Smith, 6 Law Rep. 57.

(*g*) Case of Lockington, 4 Hall's L. J. 96. (*h*) Art. 3, sect. 1 Const. U. S.

s constituted by the Constitution the sole tribunal for the trial of impeachments. It is provided that when the President of the United States is tried, the chief justice shall preside, and that no person shall be convicted without the concurrence of two-thirds of the members present.(*i*)

§ 199. 4th. CRIMINAL JURISDICTION OF THE SUPREME COURT.

§ 200. (*a.*) *Original.*—The original jurisdiction of the Supreme Court is very limited, and it has been decided that Congress has no power to extend it.(*j*) Indeed, it can scarcely be said to possess any original jurisdiction at all in criminal cases. By referring to the provisions of the Constitution, it will be seen that the only cases in which original jurisdiction may be exercised, are those affecting ambassadors, or other public ministers or consuls, and those in which a State shall be a party. Of course no case can be supposed in which criminal proceedings can be entertained against a sovereign State; and Congress, by several acts, has shown that the person of a foreign minister and his domestics are not to be made amenable to any judicial process whatsoever.(*k*) The only practical original criminal jurisdiction which the Supreme Court can be said to possess, therefore, is that inherent in all courts to punish for contempts offered to its dignity by fine and imprisonment.(*l*)

§ 201. (*b.*) *Appellate from Circuit Court.*—Under the Constitution the Supreme Court can exercise appellate jurisdiction only where it is expressly given by some act of Congress,(*m*) and no act of Congress having been passed to that effect, it cannot revise the judgments of the Circuit Courts by writ of error in any case where a party has been convicted of a public offence.(*n*) When any question, however, occurs before a Circuit Court upon which the opinions of the judges are opposed, the point upon which the disagreement happens, may, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court at their next session, to be held thereafter; and shall by the said court be finally decided, and the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and there entered on record, and shall have effect according to the nature of such judgment and order; but it is provided that nothing shall be held to prevent the cause from proceeding, if, in the opinion of the court, further proceedings may be had without prejudice to the merits; and imprisonment is not allowed, nor can punishment in any case be inflicted, where the judges of the court are divided in opinion upon the question touching such sentence.(o) This is the only act which Congress has ever

(*i*) Art. 1, sect. 3, Const. U. S. (*j*) Marbury *v.* Madison, 1 Cranch, 137.

(*k*) Act 30th April, 1790, sects. 25, 26, 27.

(*l*) U. S. *v.* Hudson & Goodwin, 7 Cranch, 32.

(*m*) U. S. *v.* Moore, 3 Cranch, 170; Wilson *v.* Mason, 1 Cranch, 91; Wiscart *v.* Dauchy, 3 Dall. 321.

(*n*) Ex parte Kearney, 7 Wheat. 38.

(*o*) Act 29th April, 1802, sect. 5, 6; see Act March 2d, 1793.

passed, giving to the Supreme Court a revisionary power over the Circuit Court in criminal cases; and it has been held that Congress intended to provide for a division of opinion on single points only, and not to enable a Circuit Conrt to transfer an entire cause into the Snpreme Conrt before final judgment. A constrnction authorizing such transfer wonld, it was said, counteract the policy which forbids writs of error or appeals until the judgment or decree be final.(*p*) The Supreme Conrt will not consider any other than the single question on which the judges differ.(*q*)

§ 202. (*c.*) *Appellate from District Court.*—The Supreme Conrt has no jurisdiction of a case brought originally in the District Court, and removed by a writ of error to the Circuit Court, though there be an alleged difference of opinion between the jndges of the Circuit Court, since the district jndge cannot sit in the Circuit Court on a writ of error from his own decision.(*r*) Nor is a division of opinion on a motion for a new trial such a difference as is to be certified to the Supreme Court, as there is nothing in the reason for the certificate which would apply to such a case.(*s*) To give the Supreme Conrt jurisdiction, the point certified must be upon a matter arising at the trial of the cause, and not upon any subsequent or collateral proceeding.(*t*)

§ 203. (*d.*) *Appellate from Circuit Court for the District of Columbia.*—As regards the Circuit Court for the District of Colnmbia, no power or review appears vested in the Snpreme Court in any shape over criminal cases, it having been decided that under the act concerning the District of Columbia, the appellate jurisdiction granted to the Supreme Court is confined to civil cases; that no appeal or writ of error lies in a criminal case from the judgment of the Circnit Court of that district;(*u*) and that the Supreme Court has no jurisdiction of causes brought before it npon a certificate of division of opinion of the judges of the Circuit Court for the District of Columbia.(*v*)

§ 204. (*e.*) *Appellate from the Territorial Courts.*—From the acts passed in relation to the territorial courts, it seems that no power of review in criminal cases, either by writ of error, appeal, or certificate, is delegated to the Supreme Court.(*w*) Over the State conrts, however, owing to the great number of cases in which they necessarily exercise a concnrrent jurisdiction with the federal courts, Congress has seen fit to give a supervisory power on a final judgment in law or eqnity in a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an anthority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute

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(*p*) U. S. *v.* Bailey, 9 Peters, 257; Harris *v.* Elliott, 10 Peters, 25; Adams *v.* Jones, 12 Peters, 207; U. S. *v.* Turk, 12 Peters, 238.

(*q*) Ogle *v.* Lee, 2 Cranch, 33.

(*r*) U. S. *v.* Lancaster, 5 Wheat. 434.

(*s*) U. S. *v.* Daniel, 6 Wheat. 542.

(*t*) Devereaux *v.* Marr, 12 Wheat. 212; B. U. S. *v.* Green et al., 6 Peters, 26.

(*u*) U. S. *v.* Moore, 3 Cranch, 159; ex parte Watkins, 7 Peters, 201.

(*v*) Ross. *v.* Triplett, 3 Wheat. 600.

(*w*) Acts 20th April, 1836; June 12, 1838.

of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity, or where is drawn in question the construction of any clause in the Constitution, or of a treaty or statute of a commission held under the United States, and the decision is against the right, title, privilege, or exemption, especially set up or claimed by either party, under such clause of the Constitution, treaty, statute, or commission. The procedure, it is provided, will be upon writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court, rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, the writ having the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court; and the proceeding upon the reversal being also the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. No other error, however, shall be assigned or regarded as a ground of reversal in any such case, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity, or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute.(*x*) It has been held that the object of this act was to give to the Supreme Court the power of rendering uniform the construction of the laws of the United States, and the decision upon rights and titles claimed under these law;(*y*) and that the right to issue such writ extends to criminal as well as civil cases.(*z*)

§ 205. (*f.*) *Appellate from the highest State Courts.*—The appellate jurisdiction from the highest State courts by writ of error, under this act, was exercised by the Supreme Court in a variety of cases, without question, until the year 1815;(*a*) when the Court of Appeals in Virginia decided, in a case which had occurred under a treaty,(*b*) that the appellate power of the Supreme Court of the United States did not extend to that court. Upon this point the case was again taken to the Supreme Court of the United States, and it was there held, that the whole judicial power must be at all times vested either in an original or appellate form in some courts created under the authority of the United States. The grant of the judicial power, it was ruled, was absolute, and it was imperative upon Congress to provide for the appellate jurisdiction of the federal courts, in all the cases in which judicial power was exclusively granted by the Constitution, and not given by way of original jurisdiction to the Supreme Court: that the appellate power of the United States does extend to cases pending in the State courts; and that the 25th section of the judiciary act, which authorizes the exercise of this juris-

(*x*) Act 24th Sept. 1789, sect. 25.

(*y*) Matthews *v.* Zane, 4 Cranch, 382.

(*z*) U. S. *v.* Moore, 3 Cranch, 159; Martin *v.* Hunter's lessee, 1 Wheat. 348; Cohens *v.* Virginia, 6 Wheat. 387; Worcester *v.* The State of Georgia, 6 Peters, 515.

(*a*) Serg. Const. L. 65.

(*b*) Fairfax *v.* Hunter, 7 Cranch, 608.

diction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution.(*c*) In a late case,(*d*) the question of jurisdiction was again raised, and decided in the same manner, the court saying, "All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion we find this tribunal invested with appellate jurisdiction in *all* cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. The Constitution, in direct terms, gives an appellate jurisdiction to the Supreme Court, in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of the appeal, not the tribunal from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor."(*e*) The decision, however, in such case, must be a final one; and a judgment, reversing that of an inferior court and awarding a *venire facias de novo*, is not a final judgment.(*f*) But the Supreme Court has no appellate jurisdiction, unless the decision in the State court be against the right or title set up by the party under the Constitution or statute of the United States, and the right depended thereon; or unless the decision be in favor of a State law, when its validity was questioned as repugnant to the Constitution of the United States, and the right of the party depending upon the State law.(*g*)

§ 206. If a cause has been remanded from the Supreme Court to a State court, and the State court refuse to carry into effect the mandate of the Supreme Court; the Supreme Court will proceed to a final decision of the cause, and itself award execution thereon.(*h*)

§ 207. Congress, as has been said, has vested in the Supreme Court, together with the other courts of the United States and the judges thereof, authority to issue the writ of habeas corpus, for the purpose of inquiry into the cause of commitment of prisoners in jail under or by color of the authority of the United States;(*i*) and under this act it has been decided, that although the Supreme Court has authority to issue the writ where a person is in jail under the warrant or order of any other court of the United States,(*j*) yet this power does not extend to a commitment for a contempt by a court of competent jurisdiction. Such commitment has the character of an execu-

(*c*) Martin *v.* Hunter's lessee, 1 Wheat. 531.
(*d*) Cohens *v.* The State of Virginia, 6 Wheat. 264.
(*e*) Ibid. 6 Wheat. 419; see Worcester *v.* State of Georgia, 6 Peters, 515, and Prigg et al. *v.* Com. of Pennsylvania, 16 Peters, 538.
(*f*) Houston *v.* Moore, 3 Wheat. 433.
(*g*) Williams *v.* Norris, 12 Wheat. 117; Montgomery *v.* Hernandez, Ibid. 129; Gordon *v.* Caldcleugh, 3 Cranch, 278; Fulton *v.* McAfee, 16 Peters, 149; McClung *v.* Silliman, 6 Wheat. 598. Post, § 520.
(*h*) Martin *v.* Hunter, 1 Wheat. 304.
(*i*) Act 24th Sept. 1789, sect. 14.
(*j*) Bollman *v.* Swartwout, 4 Cranch, 75.

tion, and as the Supreme Court cannot directly revise a judgment of the Circuit Court in a criminal case, there is no reason to suppose that it was intended to vest it with the authority to do it indirectly.(*k*) The authority to issue a mandamus is also given to the Supreme Court in cases warranted by the principle and usages of law, to any courts appointed or persons holding office under the authority of the United States.(*l*) So much of this act has been held unconstitutional, as authorizes the court to issue the mandamus to public officers, Congress having no power to give the court appellate jurisdiction where the Constitution has said it shall be original, nor original where the Constitution has declared that it shall be appellate;(*m*) but a mandamus to an inferior court of the United States is clearly an exercise of appellate jurisdiction and within the power of the Supreme Court.(*n*) Whether the Supreme Court has also the power to issue a mandamus to State tribunals is an unsettled question, which the court declined deciding in Cohens *v.* Virginia.(*o*)

5th. CRIMINAL JURISDICTION OF CIRCUIT AND DISTRICT COURTS.

§ 208. Formerly, the Circuit Court had almost exclusive cognizance of all crimes cognizable under the authority of the United States,(*p*) the District Court possessing a concurrent jurisdiction only over cases where whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, was the punishment.(*q*) By a late act, however, the jurisdiction of the latter court has been extended, concurrently with the Circuit Court, to all crimes and offences against the United States, the punishment of which is not capital.(*r*) The exclusive jurisdiction of the Circuit Court is, therefore, confined to those offences against the United States, not vested concurrently by act of Congress in the courts of the several States, and which may be punished capitally. In such cases, however, its jurisdiction is final, unless the judges disagree on a point(*s*) which may be certified to the Supreme Court.(*t*)

§ 209. The jurisdiction of the Circuit Court in criminal cases is confied to offences committed within the district for which these courts respectively sit, where they are committed on land.(*u*) Where concurrent jurisdiction over offences is given to the courts of the United States and State courts, the act of Congress giving exclusive jurisdiction to the United States courts, of all crimes and offences, cognizable under the authority of the United States, is so far repealed;(*v*) and where jurisdiction is concurrent, the sentence of either court, whether of acquittal or conviction, may be pleaded in a bar to a prosecution in the other, for the same offence.(*w*) Authority has been

(*k*) Ex parte Kearney, 7 Wheat. 38.
(*l*) Act 24th Sept. 1789, sect. 13.
(*m*) Marbury *v.* Madison, 1 Cranch, 137; Cohens *v.* Virginia, 6 Wheat. 400.
(*n*) Ex parte Crane et al., 5 Peters, 190.
(*o*) 6 Wheat. 264.
(*p*) Act Sept. 24th, 1792, sect. 11.
(*q*) Act 24th Sept. 1789, sect. 9.
(*r*) Act 23d August, 1842, sect. 3.
(*s*) U. S. *v.* Moore, 3 Cranch, 171.
(*t*) Act 29th April, 1802, sect. 6.
(*u*) U. S. *v.* Wm. Wood, Serg. Const. L. 129.
(*v*) Hustin *v.* Moore, 5 Wheat. 29.
(*w*) Ibid. People *v.* Lynch, 11 Johns. 549.

given to the Circuit Courts to hold special sessions for the trial of criminal cases, at their discretion, or at the discretion of the Supreme Court.(*x*) This provision, however, does not seem to apply to capital cases,(*y*) and it is doubtful whether indictments for treason, found at a regular Circuit Court, can be transferred to a special court, as no power appears to be given to remit to a special, the business depending before a stated Circuit Court.(*z*) The Circuit Court has jurisdiction over crimes committed within any place situated in the district in which it sits which has been ceded to the United States, with the consent of the legislature of the State, for the purpose of erecting forts, dock-yards, and other necessary works.(*a*) It has not authority to issue a mandamus to an officer of the United States,(*b*) but where such writ is necessary to sustain its appellate jurisdiction, it may undoubtedly be employed; as, for instance, if the court below refuse to proceed to judgment.(*c*) The judges of the Circuit Court, in common with all other United States judges, have power to issue the writ of habeas corpus to any one in prison, under the authority of the United States, but they have no such authority where the party is in prison under State authority.(*d*) There appears to be no reviewing power in the Circuit Court over the criminal decisions of the District, or any other court of the United States; the only acts specifying its appellate jurisdiction being confined, either by their terms, or by construction, to civil causes.(*e*)

6th. Criminal jurisdiction of territorial courts.

§ 210. By the acts constituting the territorial courts of the United States, the District Courts of such territories possess the same jurisdiction in criminal causes arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States. Writs of error and appeals from the final decisions of the said courts in such cases, shall be

(*x*) Act 24th Sept. 1789, sect. 5; act 2d March, 1793, sect. 3.

(*y*) Serg. Cons. Law, 131.

(*z*) U. S. *v.* Hamilton, 3 Dall. 17.

(*a*) U. S. *v.* Cornell, 2 Mason, 95.

(*b*) McIntyre *v.* Wood, 7 Cranch, 504; McClung *v.* Silliman, 6 Wheat. 368; Postmaster Gen. *v.* Stockton et al. 12 Peters, 524.

(*c*) Serg. Const. L. 128; Smith *v.* Jackson, 1 Paine, 453; see ante, p. 52.

(*d*) Ex parte Cabrera, 1 Wash. C. C. Rep. 232; U. S. *v.* French, 1 Gal. 1.

(*e*) Act 24th Sept. 1789, sec. 22; Act 3d March, 1803; U. S. *v.* Winson, 1 Gal. 5; U. S. *v.* McClellan, 1 Gal. 227; Wiscart et al. *v.* Dauchy, 3 Dall. 321, 328. It has never been settled by any decision of the Supreme Court, whether the original jurisdiction given in the Constitution to that court, in the case of consuls, was intended to be exclusive. The tenor of Marbury *v.* Madison, 1 Cranch, 137, would imply that it was; but this case has been since much qualified in Cohens *v.* Virginia, 6 Wheat.; and in the case of the United States *v.* Ortega, 11 Wheat. 467, the decision of the question was avoided. In the United States *v.* Ravera, 2 Dall. 297, it was decided that Congress possessed the power to vest concurrent jurisdiction in other courts, of cases over which, by the Constitution, original jurisdiction was given to the Supreme Court. In the State courts the decisions conflict. In Pennsylvania, Com. *v.* Kosloff, 5 S. & R. 545, it has been held that, although a consul is not protected by the law of nations, still he must be tried, for any crime which he may commit, in the courts of the United States; while in South Carolina, it has been held that he is not exempted by the laws of the Union from liability to the criminal laws of the State in which he resides. State *v.* De la Font, 2 Nott and McCord, 217.

made to the Supreme Court of the territory, in the same manner as in other cases. In criminal cases, their decision appears final, as nothing in these acts provides for such cases being taken to the Supreme Court of the United States.(*f*)

CHAPTER V.

FORM OF INDICTMENT.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION, § 211.
II. STATUTES OF AMENDMENT, § 215.
III. CAPTION AND COMMENCEMENT, § 219.
IV. NAME AND ADDITION OF DEFENDANT, AND NAME OF PROSECUTORS AND THIRD PARTIES, § 233.
V. TIME, PLACE, AND VENUE, § 261.
VI. STATEMENT OF THE OFFENCE, § 285.
VII. WRITTEN INSTRUMENTS, § 305.
VIII. WORDS SPOKEN, § 351.
IX. PERSONAL CHATTELS, § 353.
X. OFFENCES CREATED BY STATUTE, § 364.
XI. DUPLICITY, § 381.
XII. REPUGNANCY, § 396.
XIII. TECHNICAL AVERMENTS, § 398.
XIV. CLERICAL ERRORS, § 405.
XV. CONCLUSION OF INDICTMENTS, § 410.
XVI. JOINDER OF OFFENCES, § 414.
XVII. JOINDER OF DEFENDANTS, § 429.
XVIII. LIMITATION OF PROSECUTIONS, § 436.

I. INDICTMENT AS DISTINGUISHED FROM INFORMATION.

§ 211. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."(*a*)

§ 212. "The first clause," in the language of the late Mr. Justice Story, in commenting on this article, "requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime charged against him. This is regularly true, at the common law, of all offences above the grade of common misdemeanor. A grand jury, it is well known, are selected in a manner pre-

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(*f*) Acts 3d March, 1805; 24th Sept. 1789, sect. 10; 2d March, 1793, sect. 2; 20th April, 1836; 12th June, 1838.
(*a*) Const. U. S. Amend., art. 5.

scribed by law, and duly sworn to make inquiry, and present all offences committed against the authority of the State government, within the body of the county for which they are impanelled. In the national courts, they are sworn to inquire and present all offences committed against the authority of the national government within the State or district for which they are impanelled, or elsewhere, within the jurisdiction of the national government. A presentment, properly speaking, is an accusation made *ex mero motu* by a grand jury, of an offence, upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offence preferred to, and presented upon oath, as true, by a grand jury at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment, before the party accused can be put to answer to it."(*b*)

§ 213. "There is another mode of prosecution, which exists by the common law in regard to misdemeanors; though these are ordinarily presented upon indictments found by a grand jury. This mode is by information, usually at the suit of the government or its officers. An information generally differs in nothing from an indictment, in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury. This process is rarely recurred to in America; and it has never yet been formally put in operation by any positive authority of Congress, under the national government in mere cases of misdemeanor, though common enough in civil prosecutions for penalties and forfeitures."(*c*) In Pennsylvania, there is a constitutional provision against proceeding by information in any case where an indictment lies;(*d*) and the same restriction exists in several of the other States.(*e*) In New York,(*f*) and in Virginia,(*g*) the limitation is confined to cases of infamous crime. In New Hampshire, it obtains in all cases where the punishment is death or confinement at hard labor.(*h*) In Vermont, a distinction of the same character is made.(*i*) In the latter state, in fact, it has been decided by the Supreme Court, that the provision in the federal Constitution, given at the head of this chapter, applies only to cases in the United States courts.(*j*) In Massachusetts, it has been declared to be a general rule, that all public misdemeanors which may be prosecuted by indictment, may be prosecuted by information on behalf of the commonwealth, unless the prosecution be restrained by the statute to indictment.(*k*)

§ 214. It is not intended, in this place, to consider the cases in which an information under the English system will be granted. The question is fully

(*b*) Story on the Constitution, [illegible] (*c*) Ibid. 653.
(*d*) Const., art. 9, sect. 10.
(*e*) State *v.* Mitchell, 1 Bay, 267; Clearly *v.* Desselin, I McCord, 35.
(*f*) Const., art. 7, sect. 7. (*g*) Davis' C. Law, 422.
(*h*) Rev. Stat. N. Hamp. 457. (*i*) Rev. Stat. Ver. chap. cii.
(*j*) State *v.* Keyes, 8 Vermont, 57.
(*k*) Com. *v.* Waterborough, 5 Mass. 257, 259.

discussed in the English books;(*l*) but as the cases on the subject in this country are extremely imperfect, and as the power is strictly guarded by statute, it will be unnecessary here to enter upon the examination. An information, it is said, resembles not only an indictment, in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must show the forfeiture, and its appropriation, or at least the proportion given him by the statute.(*m*) So far as the structure of an information is concerned, the same rules apply as obtain in cases of indictment.

II. Statutes of amendment.

§ 215. It will be observed that no inconsiderable portion of the difficulties in the way of the criminal pleader, at common law, have been removed in England, by the 7 Geo. IV. c. 64, sects. 20, 21, and in several of the States by statutes containing similar provisions.

§ 216. By the English statute:—

"No judgment upon any indictment or information, for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versa;* nor for that any person or persons mentioned in the indictment or information is, or are, designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence;" and (sect. 21), "that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute."(*n*)

(*l*) 1 Ch. C. L. 841; Archbold's C. P., by Jervis, 66; Burns' Justice, 20th ed., by Ch. Bears, title Information.

(*m*) Com. *v.* Messenger, 4 Mass. 462, 465; Com. *v.* Cheney, 6 Mass. 347; Hill *v.* Davis, 4 Mass. 137; Brummer *v.* Long Wharf, 5 Pick. 131; Evans *v.* Com., 3 Metc. 453; Welde *v.* Com., 2 Metc. 408.

(*n*) This enactment, remarks Mr. Archbold, applies only to felonies and misdemeanors, whether prosecuted by indictment or information, and does not extend to informations in the crown office, other than for misdemeanors, or to coroners' inquisitions; and these objections, in cases to which t[illegible] applies, will no longer be available either in arrest of judgment or on a writ of error. By pleading over, therefore, all these objections are waived; but they are, it would seem, still equally fatal if taken by demurrer. If the defendant succeed upon demurrer, the judgment is not stayed or reversed, but, on the contrary, is given in his favor; and the words, "whether after verdict or outlawry, or by confession, default, or *otherwise*," do not extend the meaning of the clause beyond those cases in which the application is to stay or reverse the judgment.—*Archbold's C. P.*, by Jervis, 77. Post, § 369.

§ 217. In Massachusetts, it is declared,

"No indictment shall be quashed, or deemed invalid, nor shall the judgment or proceedings thereon be arrested or affected, by reason of the omission or misstatement of the title, occupation, estate, or degree of the defendant, or of the name of the city, town, county, or place of his residence; nor by reason of the omission of the words, 'force and arms,' or of the words 'against the peace,' nor by reason of omitting to charge any offence to have been committed, contrary to the form of the statute, or statutes; provided that such omission or misstatement do not tend to the prejudice of the defendant." (Rev. Stat. Mass. chap. 130, 14.)

§ 218. In New York:—

No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be affected: 1. By reason of having omitted the addition of the defendant's title, occupation, estate or degree; or by reason of the misstatement of any such matter, or of the town or county of his residence, where the defendant shall not be misled or prejudiced by such misstatement; or, 2. By the omission of the words "with force and arms," or any words of similar import; or, 3. By reason of omitting to charge any offence to have been committed contrary to a statute, or contrary to several statutes, notwithstanding such offence may have been created, or the punishment thereof may have been declared, by any statute; or, 4. By reason of any other defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant.(*o*) (2 Rev. Stat. N. Y. part iv. ch. ii. title 4, sec. 51.)

In Pennsylvania:—

Indictments may be amended.—It shall be lawful for any court of criminal jurisdiction, if such court shall see fit so to do, to cause the indictment for any offence whatever, when any variance or variances shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof in the indictment whereon the trial is pending, to be forthwith amended in such particular or particulars, by some officer of the court, and after such amendment the trial shall proceed in the same manner, in all respects, as if no such variance or variances had appeared. (Rev. Act of 1860, p. 434.)

Immaterial variances between indictment and proof amendable.—If, on the trial of any indictment for felony or misdemeanor, there shall appear to be any variance between the statement of such indictment and the evidence offered in proof thereof, in the name of any place mentioned or described in any such indictment, or in the name or description of any person or persons or body politic or corporation therein stated, or alleged to be the owner or owners of any property, real or personal, which

(*o*) In the People *v.* Treadway (3 Barbour, 473), this statute is thus commented on by Gridley, J.: "The question presented for our decision, is whether this statute of jeofails was intended to relieve the criminal pleader from setting forth in the indictment, the facts requisite to confer jurisdiction on the officer who administers an oath —an averment which would seem to be essential, as a matter of substance, to the very existence of the crime of p[illegible]—and without which (in analogous cases) in civil suits, a pleading would [illegible] he[illegible]sufficient. I confess that if this were a new question, I should hold with the counsel for the prisoner, that such a construction of the act went far beyond the intent of its framers, and was not warranted by any sound rule of interpretation. But we are constrained to say that the question is no longer an open one. It has been directly decided in the case of The People *v.* Phelps (5 Wend. 10); and the principle again reiterated and declared to have been settled in the former case, in The People *v.* Warner" (Ibid. 271).

shall form the subject of any offence charged therein, or the name or description of any person or persons, body politic or corporate therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offence, or in the Christian name or surname, or both Christian and surname, or other description whatsoever of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before whom the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence upon such merits, to order such indictment to be amended, according to the proof, by some officer of the court, both in that part of the indictment wherein said variance occurs, and in every other part of the indictment in which it may become necessary to amend; and after such amendment, the trial shall proceed in the same manner, in all respects, and with the same consequences, as if no variance had occurred. And every verdict and judgment which shall be given after making such amendment, shall be of the same force and effect, in all respects, as if the indictment had originally been in the same form in which it was after such indictment was made.(*oo*) —Ibid.

(*oo*) In reference to these sections (11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22) the revisers say:—

"These sections are all new, and are certainly not the least important in the proposed amendments of our penal system. The history of criminal administration abounds with instances in which the guilty have escaped, by reason of the apparently unreasonable nicety required in indictments. Lord Hale, one of the best, and most humane of English judges, long since remarked, that such niceties were 'grown to be a blemish and an inconvenience in the law, and the administration thereof; that more offenders escaped by the easy ear given to exceptions to indictments, than by the manifestations of their innocence, and that the grossest crimes had gone unpunished, by reason of these unseemly niceties.' The reason for recognizing these subtilities by the common law, no doubt arose from the humanity of the judges, who, in administering a system in which the punishment of death followed almost every conviction of felony, were naturally disposed in favor of life, to hold the crown to the strictest rules. Since, however, the reform of the penal laws, and the just apportionment of punishment to crimes according to their intrinsic atrocity and danger, the reason which led to the adoption of these technical niceties has ceased, and with the cessation of the reason, the technicalities themselves should be expunged from our system. The eleventh section of this act proposes what the commissioners believe will be an effective remedy to this reproach of the common law, without depriving the accused of any proper privilege. It leaves him, at the outset of his trial, to determine whether he will question the relevancy of his accusation, or take issue on the merits of the charge. If he elects the latter, and is condemned, there seems neither moral nor legal fitness in permitting him to urge formal exceptions, which, if suggested at an early period, would have been promptly corrected. The twelfth and thirteenth sections are intended to meet cases of frequent occurrence, in which, although an indictment is strictly formal, yet owing to some accidental slip in its preparation, it is found on the trial that the proofs do not entirely tally with the description of the instrument set forth in the indictment, or in the names of persons or places described therein. By the law as it now stands, where written instruments enter into the gist of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, &c., they are required to be set out in words and figures. The omission of a figure in an indictment for forgery is [illegible] In the case of the Commonwealth *v.* Gillespie, 7 Sergeant and Rawle, 469, [illegible]ke in spelling the name of 'Burrall,' which in the indictment was spelled '[illegible]ll,' was adjudged fatal after verdict. So a variance between the names of the persons aggrieved, and places described in the indictment, and the proofs thereof on trial, will entitle the defendant to an acquittal, on the ground of the want of agreement between the allegata and the probata. The proposed sections authorize the courts to amend such verbal errors, if objected to; and thus terminate a class of technical niceties, which are a reproach to the rational administration of justice. The fourteenth and fifteenth sections avoid

III. Caption and commencement.

§ 219. The caption is no part of the indictment;(*p*) its office is to state the style of the court, the time and place of its meeting, the time and place where

(*p*) State *v.* Gary, 36 N. H. 359; State *v.* Thibeau, 30 Vt. 100.

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the existing necessity of setting forth, in indictments, the names of numerous individuals, owners of property feloniously or fraudulently taken, or maliciously injured or destroyed. It will serve to reduce the voluminousness of such indictments, and can do no possible injury to the defendant, who cannot be interested in the fact, whether one person is, or one hundred persons are the owners of property in regard to which he is charged with having committed a felony or misdemeanor. The sixteenth section refers to public property, and rests on the same principle as the fourteenth and fifteenth sections. The seventeenth and eighteenth sections will enable the criminal pleader to simplify hereafter the forms of indictments in forgery, and facilitate him in averring instruments necessary to be recited in any other indictment. The twelfth and thirteenth sections contemplate the amendment of indictments, framed according to the existing law, where an accidental error occurs between the instrument and names described, and those offered in proof. These sections strike at the root of the evil sought to be eradicated, by giving the pleader the option to prepare his indictment in such a way as to avoid, altogether, such difficulties; which can be done with ordinary care and caution. The nineteenth section contemplates avoiding the necessity of specifically describing the parties intended to be defrauded, and the embarrassing the proofs, in any case, with a question not really material to the issue. In forgeries, uttering and passing forged money, and in cheating by false pretences (the crimes contemplated by the section), the gist of the offence is, that the act charged was committed with an intent to defraud. An indictment containing that averment, should be sufficient, without requiring the pleader to go into the description of who was the party intended to be defrauded; a mistake in whom would acquit the accused, although the jury should be convinced that he had forged or uttered false money, or had been guilty of cheating by false pretences, with intent to defraud. The twentieth section, providing for indictments for murder and manslaughter, from the nature and consequences of these offences, requires that a somewhat detailed explanation of the reasons which have led to their introduction should be given. By the common law, in an indictment for murder, it is essentially necessary to set forth, particularly the manner of the killing, and the means by which it was effected. If a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a different species of death, as by shooting, starving, or strangling. A few cases will serve to illustrate how far this principle has been carried. In Rex *v.* Kelly, 1 Moody's Crown Cases Reserved, 113, decided in 1825, the indictment charged that the prisoner struck the deceased with a piece of brick, and it appeared probable that the prisoner had not struck with the brick, but that he struck with his fist, and that the deceased fell from the blow upon a piece of brick, and that the fall on the brick was the cause of the death. It was unanimously held by the twelve judges of England, on a case reserved, that the cause of the death had not been truly stated, and the prisoner was discharged. So in Rex *v.* Martin, 5 Carrington and Payne's Reports, 128, where the indictment charged the wound to have been inflicted by a blow with a hammer, held in the prisoner's hand, and it appeared that the injury might have been occasioned by a fall against the lock or key of a door, it was held, that if the injury was occasioned by a fall against the lock or key of a door, produced by the act of the defendant, the indictment was not sufficient. In Rex *v.* Hughes, 5 Carrington and Payne, 126, decided in 1832, the prisoner was indicted for an attempt to murder, by shooting the injured party with a pistol loaded *with a leaden bullet.* On the trial, no evidence was produced to actually prove that the pistol was loaded with a leaden bullet, none having been found either in the wound, or in the room where the wound was inflicted. The surgeon, examined in the case, testified that the wadding, if rammed tight, might have produced the effect without any ball. In this state of the evidence, the court ruled, that the indictment was not sufficiently proved, and the defendant was acquitted. It is true, that the courts have drawn a distinction, which rendered their rulings in indictments for homicide, as to the manner and cause of the death, more reconcilable with reason, to wit: That where the instrument laid in the indictment, and the instrument proved, are of the same nature and character, there is

the indictment was found, and the jurors by whom it was found; and these particulars it must set forth with reasonable certainty.(*pp*) It is said, also, that it must show that the *venire facias* was returned, and from whence the jury came, or it will be fatal on demurrer.(*q*)

§ 220. In England, the caption in general does not appear until the return to a writ of *certiorari*, or a writ of error, yet, in case of high treason, the defendant is entitled to a copy of it in the first instance, after the finding of the indictment, in order that he may be acquainted with the names of the jurors by whom it was presented.(*r*) It forms no part of the indictment,(*t*) and therefore it was no ground for arresting judgment, that the indictment does not show, in its caption, that it was taken in the State; for, it is said, while it stood on the records of the court below, it appeared to be an indictment of that court, and, when sent to the Supreme Court, the caption of the record, of which it is a part, officially certified, renders it sufficiently certain.(*u*) If wholly omitted, in the court below, it is said, the indictment may, nevertheless, be sufficient, as the minute of the clerk, upon the bill, at the time of the presentment, and the general records of the term, will supply any defect in such preface.(*v*) In North Carolina, it was held that a caption to an indictment is only necessary where the court acts under a special commission.(*w*)

§ 221. The following is the English form of a caption to an indictment in a Court of Quarter Sessions.(*x*)—"Westmoreland: At the General Quarter Sessions of the Peace, holden at Appleby in and for the county aforesaid, the —— day of ——, in the —— year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, before A. B. and C. D., Esquires, and other their associates, justices of our said Lady the Queen, assigned to keep the peace of

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no variance, as if the wound is charged to have been inflicted with a dagger or knife, proof is sufficient which establishes the wound to have been inflicted with a sword, spear, or the like. So, if the indictment allege a death by one kind of poison, proof of death by another kind of poison will support it. The section under consideration proposes to go one step in advance of this doctrine, by declaring that it shall hereafter be sufficient, in an indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; without going into the details of the cause and manner of the death, which the cases cited show only tends to create unnecessary difficulties on the trial, and often results in the complete defeat of justice. The twenty-first and twenty-second sections are intended to simplify indictments for perjury and subornation of perjury, which are now extremely voluminous and technical. These characteristics of indictments for these crimes, are so familiar to all criminal lawyers, as to render it unnecessary to enter into any details on the subject. The sections recommended for adoption will remedy these evils, and place indictments for these crimes on a rational footing."

(*pp*) McClure *v.* State, 1 Yerg. Tenn. R. 260, per White, J.; U. S. *v.* Thompson, 6 McLean, 56; State *v.* Conly, 39 Maine (4 Heath), 78; English *v.* State, 4 Texas, 125; Reeves *v.* State, 20 Ala. 33.

(*q*) State *v.* Hunter, Peck's Tenn. R. 166; see State *v.* Fields, Ibid. 140; State *v.* Williams, 2 McCord, 301.

(*r*) 1 East, P. C. 113; Fost. 2; Ch. C. L. 327.

(*t*) People *v.* Jewett, 3 Wendell, 319; Reeves *v.* State, 20 Ala. 33.

(*u*) State *v.* Brickell, 1 Hawks. N. C. R. 354; 1 Saunders, 250 d, n. 1.

(*v*) State *v.* Gilbert, 13 Vermont R. 647; State *v.* Smith, 2 Harrington, 532.

(*w*) State *v.* Wasden, N. C. Term R. 270.

(*x*) Jervis' Archbold, 24.

our said Lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of" [the grand jurors, naming them,] "good and lawful men of the county aforesaid, sworn and charged to inquire for our said Lady the Queen, and for the body of the county aforesaid, it is presented," that J. S., late of Appleby, in the county aforesaid, laborer, &c., so continuing the indictment.(*y*)

§ 222. When the indictment is returned from an inferior court in obedience to a writ of *certiorari*, the statement of the previous proceedings sent with it, is termed the *schedule*, and from this instrument the caption is extracted.(*z*) When taken from the schedule it is entered upon the record, and prefixed to the indictment, of which, however, it forms no part, but is only the preamble which makes the whole more full and explicit.(*a*) When there has been a removal by *certiorari*, its principal object is to show that the inferior court had jurisdiction, and, therefore, a certainty in that respect is particularly requisite. Care must be taken duly to set it forth, for if there be no caption, or one that is defective, the error, in England, may be taken advantage of on arrest.(*b*)

§ 223. A formal statement in the indictment that it was found by the authority of the State, is not necessary if it appear, from the record, that the prosecution was in the name of the State.(*c*) The caption must set forth the court where the indictment was found, as a "General Session of the Peace," "the Court of Oyer and Terminer, &c., for New York County," &c., so that it may appear to have jurisdiction.(*d*) Next to the statement of the court, follows the name of the *place* and *county* where it was holden, and which must always be inserted;(*e*) and though it may be enough, after naming a place, to refer to "the county aforesaid," yet, unless there be such express reference to the county in the margin, or it be repeated in the body of the caption, it will be insufficient.(*f*) This is necessary in order to show that the place is within the limits of the jurisdiction; and, therefore, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike invalid, though amendable;(*g*) as if it state it to be taken only at the town without adding "*the county aforesaid*," the omis-

(*y*) 2 Hale, 166; 3 Burn's Justice, 29th edition, by Chitty and Bears; R. *v.* Fearnly, 1 Leach, 425; and see Forms, 4 Went. 41, 105, 132, 150, 174, 222; 6 Went. 1, 353, 357; 2 Stra. 865; R. *v.* Warre, 1 Str. 698; R. *v.* Hall, 1 T. R. 320; 2 Hawk. C. 25.

(*z*) 1 Saund. 309.

(*a*) 2 Hale, 165; Bac. Ab. Indictment, J.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

(*b*) 2 Sessions Cases, 316; 1 Ch. C. L. 327.

(*c*) Greeson *v.* State, 5 Howard's Miss. R. 33.

(*d*) 2 Hale, 165; 2 Hawk. c. 25, s. 16, 17, 118, 119, 120; Burn's Justice, 29th ed. by Chitty and Bears, Indict. ix.; Dean *v.* State, Martin and Yerger, 127; State *v.* Lisle, 5 Halstead, 348.

(*e*) Dyer, 69, A.; Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bacon Ab. Indictment, i.

(*f*) Ante, 327, 328; 2 Hale, 180; 3 P. Wms. 439; 1 Saund. 308, N.; Cro. Eliz. 137, 606, 738.

(*g*) Cro. Jac. 276; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i.

sion will vitiate.(*h*) But though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment.(*i*) The omission of North Carolina, in an indictment found in a court in that State, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment.(*j*) An indictment in the same State, containing in its caption a statement of the term in these words: "Fall Term, 1822," and, in the body of the indictment, charging the time of the offence in these words: "On the first day of August in the present year," was held good; and it was said that there was no necessity for stating any time in the caption of an indictment found in the county or Supreme Courts.(*k*)

An indictment with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," on a certain day, sufficiently shows that it was found at a court held in this commonwealth.(*a*) In Massachusetts, an indictment which purports by its caption to have been found at a Court of Common Pleas for the county of Hampshire, and in the body of which "the jurors of said commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire.(*b*) And where an indictment commenced: "State of Maine, Cumberland, ss. At the Supreme Court begun and holden at Portland, within the county of Cumberland," it was held that this was sufficient to show that the court at which the indictment was found was holden for that county in the State of Maine.(*c*)

§ 224. An indictment was entitled in the margin, "The State of Alabama, Butler County," and in the body of the indictment, it was recited that "the grand jurors, &c., of the county of *Buter*, upon their oaths present," &c. The name of the county was not again repeated, nor was any other county named. The offence was charged to have been committed in "the county aforesaid." It was held that the indictment was not defective, as the courts are bound to know the names of all the counties in the State; and there being no such county as *Buter*, the words "in the county aforesaid," must refer to the county stated in margin of the indictment.(*l*)

§ 225. In England it has been held that the indictment must, in all cases, be shown to have been taken *upon oath*, and if this allegation be omitted, the caption cannot be supported.(*m*)

"Oaths" for "oath" is no variance.(*n*)

An indictment purporting to be presented by the grand jurors "upon their

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(*h*) Cro. Eliz. 137, 606, 738, 751; 2 Hale, 166; 2 Hawk. c. 25, s. 128; Bac. Ab. Indictment, i.; Williams, J., Indictment, iv.; U. S. *v.* Wood, 2 Wheeler's C. C. 336.

(*i*) Seeft *v.* Com. 8 Leigh, 721.

(*j*) State *v.* Lane, 4 Iredell, 113.

(*k*) State *v.* Haddock, 2 Hawks, 461.

(*a*) Com. *v.* Fisher, 7 Gray, Mass. 492.

(*b*) Commonwealth *v.* Edwards, 4 Gray (Mass.) 1.

(*c*) State *v.* Conly, 39 Maine (4 Heath), 78.

(*l*) Reeves *v.* State, 20 Ala. 33.

(*m*) 2 Keb. 676; 1 Keb. 329; 1 Sid. 140; 3 Mod. 202; 2 Hale, 167; 2 Hawk. c. 25, sec. 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

(*n*) State *v.* Dayton, 3 Zabr. (N. J.) 33.

oath and affirmation," need not state the reasons why any of the jurors affirmed instead of being sworn.(*nn*)

§ 226. It must appear on the face of the record, that the bill was found by at least twelve jurors, or it will be insufficient.(*o*) They must be described, also, as "good and lawful men,"(*p*) but this does not seem to be absolutely essential, especially when the indictment is found in a superior court, because all men shall be so regarded until the contrary appear.(*q*) The caption then must state that they are "*of the county aforesaid*," or other vill or precinct for which the court had jurisdiction to inquire; and if these words are omitted the whole will be vicious.(*r*) The caption by implication, at least, must show that the grand jury were of the county where the indictment was taken.(*s*) Where the commencement of the indictment was: "The State of Mississippi, Wilkinson County, ss. The Circuit Court of Wilkinson County, October Term, 1835, thereof, in the year of our Lord, 1835. The grand jurors of the State of Mississippi, impanelled and sworn, in and for the county of Wilkinson, and State of Mississippi, upon, &c.," it was held that the record presented a sufficient allegation that the grand jurors were of the State of Mississippi, and of the county of Wilkinson.(*t*) The caption of an indictment declaring that it was found by "the grand jurors of the State of Wisconsin, to wit, twelve good and lawful men," the statute of the State requiring that there shall be not more than twenty-three, nor less than sixteen persons sworn on any grand jury, is bad, and the indictment, of which it is part, will not support a conviction.(*tt*)

§ 227. The commencement of an indictment in these words, "The grand jurors for the people of the State of Vermont, upon their oath, present, &c.," is sufficient, on motion, in arrest of judgment.(*u*)

§ 228. Where it appeared by the record, that a foreman was appointed, and the indictment was returned, signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by the authority of the grand jury.(*v*) It is not necessary, in New Jersey, to aver the specific qualifications of the grand jurors, if they be described as good and lawful men;(*w*) nor that the grand jurors were summoned and reckoned as such.(*x*) It was

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(*nn*) Com. *v.* Brady, 7 Gray, Mass. 320.

(*o*) Cro. Eliz. 654; 2 Hale, 167; 2 Hawk. c. 25, s. 16, 126; 1 Saund. 248, n. 1; 4 East, 175, 176; Andr. 230; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

(*p*) 2 Hale, 167; Cro. Eliz. 751; 1 Keb. 629; Cro. Jac. 635.

(*q*) 2 Keb. 366; 2 Hawk. c. 25, s. 16, 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

(*r*) Tipton *v.* State, Peck's R. 8; Cornell *v.* State, Martin and Yerger, 147; Cro. Eliz. 677; 2 Keb. 160; 2 Hale, 167; 2 Hawk. c. 25, s. 16, 126; Bac. Ab. Indictment, i.; Burn, J., Indictment, ix.; Williams, J., Indictment, iv.

(*s*) Tipton *v.* State; Peck's Tenn. R. 38; per Haywood and Beck, J. J., contra, White, J.

(*t*) Woodsides *v.* State, 2 How. Miss. R. 655.

(*tt*) Fitzgerald *v.* State, 4 Wis. 395.

(*u*) State *v.* Nixon, 18 Vr. (3 Washb.) 70.

(*v*) Greeson *v.* State, 5 How. Miss. R. 33. See post, § 497.

(*w*) State *v.* Price, 6 Halstead, 203.

(*x*) State *v.* Jones, 4 Halstead, 457.

formerly usual to insert the names of twelve grand jurors, at the least, in the caption; and Lord Hale says that this is necessary: though as has just been seen it is now thought enough to aver that twelve united (*y*) In fact, it having lately been objected upon error, that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment; and in a later case(*z*) the chief justice agreed that the insertion of the names is not necessary.(*a*) And a variance in the names of the grand jurors is not fatal.(*b*)

§ 229. When an indictment purports to be on the affirmation of some of the grand jurors, it is said, in New Jersey, that it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or it will be fatally defective;(*c*) but such is not the usual practice; the indictment going no further, in most States, than to aver the fact of its being made on the oaths and affirmations of the grand jurors.

§ 230. If the caption omit to state the grand jury were sworn, it will be presumed they were sworn; at least the recital in the record that "the grand jury were elected, impanelled, sworn, and charged," will be sufficient.(*d*)

§ 231. In New York, it was ruled that an indictment taken at the sessions must, in the caption, state that the grand jury were, then and there, sworn and charged; the omission of the words "then and there" will be fatal on motion in arrest of judgment;(*e*) but the contrary was held in Mississippi, where it was said that, if it appear from the record, that the grand jurors were sworn, it will be presumed that they were then and there sworn.(*f*)

§ 232. Defects in the caption of the indictment, as not naming the judges, the jurors, and the county, which would be fatal if the indictments were removed into a superior court, may be supplied in the court in which it is taken by reference to other records there.(*g*) And in New Jersey, it is said that it may be amended in the Supreme Court, on proper evidence of the facts; or the *certiorari* may be returned to the court below, and the amendment made there.(*h*) Such also is the practice in South Carolina.(*i*)

It must appear in each count of an indictment that it was found by the jurors on their oaths,(*j*) and a want of such allegation in a subsequent count will not be aided by such allegations in a former count, where there is no reference to such former count for the finding of that fact.(*k*)

(*y*) R. *v.* Aylett, 6 Ad. & Ell. 247; 2 Hale, 167.
(*z*) R. *v.* Marsh, 6 Ad. & Ell. 236.
(*a*) R. *v.* Aylett, 6 Ad. & Ell. 247; Archbold, by Jervis, 24.
(*b*) State *v.* Norton, 3 Zabr. 33; State *v.* Dayton, Ibid. 49.
(*c*) State *v.* Harris, 2 Halstead, 361.
(*d*) McClure *v.* State, 1 Yerger, 260, per Catron, J.
(*e*) People *v.* Guernsey, 3 Johnson, 265.
(*f*) Woodsides *v.* State, 2 How. Miss. R. 655.
(*g*) U. S. *v.* Thompson, 6 McLean, 156; English *v.* State, 4 Texas, 125; Pennsylvania *v.* Bell, Add. 173; Com. *v.* Bechtell, 1 Am. L. J. 414.
(*h*) State *v.* Jones, 4 Halstead, 457; State *v.* Norton, 3 Zabr. 33.
(*i*) State *v.* Williams, 2 McCord, 301; Vandyke *v.* Dare, 1 Bailey, 65. See post, § 497.
(*j*) Clark *v.* State, 1 Carter (Ind.), 253.
(*k*) State *v.* McAllister, 26 Maine (13 Shep.), 374.

IV. NAME AND ADDITION OF DEFENDANT, AND NAME OF PROSECUTOR AND THIRD PARTIES.

1st. WHEN DEFENDANT IS A CORPORATION, § 233.
2d. HOW OFTEN THE DEFENDANT'S NAME MUST BE REPEATED, AND HOW FAR A SUBSEQUENT FULL NAME CURES A FORMER OMISSION, § 234.
3d. WHAT IS A MISNOMER, § 236.
4th. ALIAS DICTUS, § 237.
5th. DEFENDANT'S MIDDLE NAMES, § 238.
6th. ABBREVIATIONS AND INITIALS, § 239.
7th. WHERE DEFENDANT'S NAME IS UNKNOWN, § 242.
8th. ADDITION AND MYSTERY, § 243.
9th. JUNIOR AND SENIOR, § 249.
10th. DESCRIPTION OF PARTIES INJURED AND THIRD PARTIES, § 250.
11th. GENERAL SUMMARY OF PRACTICE.

1st. WHEN DEFENDANT IS A CORPORATION.

§ 233. The indictment must be certain as to the name of the person indicted.(*l*) The inhabitants of a parish, however, in England may be indicted for not repairing a highway, or the inhabitants of a county, for not repairing a bridge, without naming any of them.(*m*) So in Pennsylvania, it was determined, that where an act of assembly directed "the president, managers, and company," of a certain turnpike-road to remove a gate on the road, that an indictment would not lie against the president and managers, *individually*, for not removing the gate.(*n*) In Maine, however, it is said, that where an offence is committed by virtue of corporate authority, the individuals concerned in its commission, in their personal capacity, and not as a corporation, must be indicted;(*o*) and, in Virginia, it has been determined, still more broadly, that a corporation cannot be impleaded *criminaliter* by its artificial name at common law.(*p*) In England, it is clear that a corporation aggregate may be indicted by its corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute.(*q*)

2d. HOW OFTEN THE DEFENDANT'S NAME MUST BE REPEATED, AND HOW FAR A SUBSEQUENT FULL NAME CURES A FORMER OMISSION.

§ 234. In an indictment the name of the defendant should be repeated to every distinct allegation; but it will suffice to mention it once as the nominative case in one continuing sentence.

An indictment against "Edward Toney Joseph Scott," laborers, intended for Edward Toney and Joseph Scott, is bad.(*qq*)

(*l*) Bac. Ab. Misdo. B. Indict. s. 2; 2 Hale, 175; Cro. C. C. 34; Chitty's C. L. 167. Post, § 595, &c., as to what is variance in this respect.
(*m*) 2 Roll. Ab. 79; Archbold, C. P. 25. See ante, § 85, &c.
(*n*) Com. *v.* Demuth, 12 Serg. & Rawle, 389.
(*o*) State *v.* Great Works, 20 Maine R. 41.
(*p*) Com. *v.* Swift Run Gap Turnpike Co., 2 Virg. C. 362. See ante, § 85, &c.
(*q*) R. *v.* Birm. & Glou. Railway Co., 3 Ad. & El. 223.
(*qq*) State *v.* Toney, 13 Texas, 74.

§ 235. If the surname of the defendant be omitted in the presenting portion of an indictment, the defect is fatal, though the full name be mentioned in subsequent allegations referring to the name as their antecedent; as where the grand jurors present that "Hawkins" did falsely, &c., pretend that he, the said "Hawkins Hand," had a large amount of money, &c. And the defendant may plead in abatement that his name is not "Hawkins," but "Hawkins Hand."(*r*)

3d. What is a misnomer.

§ 236. A plea in abatement, in the language of Mr. Chitty, has always been allowed when the Christian name of the defendant is mistaken,(*s*) but it seems formerly to have been supposed that an error in the surname was not thus pleadable.(*t*) But it is now the settled law that a mistake in the latter is equally fatal with one in the former.(*u*) As will be seen, however, if the sound of the name is not affected by the mis-spellings, the error will not be material.(*v*) If two names are, in original derivation, the same, and are taken promiscuously in common use, though they differ in sound, yet there is no variance.(*w*)

4th. Alias dictus.

§ 237. It has been holden, that a defendant cannot be described with an *alias dictus* of the Christian name,(*x*) but a man may be described by a second surname, if laid under an alias.(*y*) The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*,(*z*) thus, "Richard Wilson, otherwise called Richard Layer." Kennedy vs The People 39 N.Y. 245--59

5th. Defendant's middle names.

§ 238. In New York, it has been determined that the law never recognized more than one Christian name, and, therefore, when the middle names

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(*r*) State *v.* Hand, 1 Eng. (Ark.), 165.

(*s*) Hale, 176, 237, 238, ; 2 Hawk. c. 25, s. 68; Bac. Ab. Ind. G. 2, Misn. B.; Burn, J., Indict.; Gilb. C. P. 217. Post, § 536.

(*t*) 2 Hale, 176; 2 Hawk. c. 25, s. 69; Burn, J., Indict.; Williams, J., Misn.; Bac. Ab. Misn. B.; Com. *v.* Denman, Brightly R. 441.

(*u*) 10 East, 83; Kel. 11, 12.

(*v*) 10 East, 84; 16 East, 110; 2 Hawk. c. 27, s. 81. Post, 258, 597.

(*w*) 2 Rol. Ab. 135; Bac. Ab. Misn., where the instances of this principle are stated at large.

(*x*) 1 Ld. Raym., 562; Willes, 554; Burn, J., Indict.; 3 East, 111. This doctrine, it is said, is not well founded; for, admitting that a person cannot have two Christian names at the same time, yet he may be *called* by two such names, which is sufficient to support a declaration or indictment, baptism being immaterial, R. T. H. 26; 6 Mod. 116; 1 Camp. 479.

(*y*) 1 Leach, 420; 1 Hen. 7, 82; Bro. Misn. 47.

(*z*) Bro. Misn. 37.

of the defendant were omitted, the omission was right.[a] And the same view is taken in Ohio, with the qualification that if a middle name is nevertheless set out, it must be proved as laid.[b] In California the last point has been differently held.[bb] It was held a misnomer, however, in Massachusetts, when T. H. P. was indicted by the name of T. P.[c]

6th. Abbreviations and initials.

§ 239. Where surnames, with a prefix to them, are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient.[d]

§ 240. Where a man is in the habit of using initials for his Christian name, and he is so indicted, and the fact whether he was so known is put in issue, and he is convicted, the court will not interfere on that ground.[e]

§ 241. If a man, by his own conduct, renders it doubtful what his real name is, he is answerable for the consequences.[f]

7th. When defendant's name is unknown.

§ 242. Where the name of the prisoner is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison;[g] but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, would be insufficient.[h] The practice is to indict the defendant by a specific name, such as John No-name, and if he pleads in abatement, to amend the bill by inserting the real name which he then discloses, by which he is bound.

A known party cannot be indicted as unknown.[hh]

8th. Addition and mystery.

§ 243. Stat. I. Henry V. c. 5, in force in most of the United States, specifies the following additions: "Estate, or degree, or mystery;" and also the addition of the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant."[i] The construction given to the statute, in England, has been, that the words, "estate or degree," have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men.[j] The defendant should be described according to his present degree, and not as "*nuper armiger*," &c.,

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[a] Roozevelt *v.* Gardiner, 2 Cowen, 463; People *v.* Cook, 14 Barb. 259; State *v.* Manning, 14 Texas, 402.

[b] Price *v.* State, 19 Ohio, 423; State *v.* Hughes, 1 Swan (Tenn.), 266.

[bb] People *v.* Lockwood, 6 Cal. 205.

[c] Com. *v.* Perkins, 1 Pick. 388.

[d] State *v.* Kean, 10 N. Hamp. 347.

[e] City Coun. *v.* King, 4 McCord, 487.

[f] Ibid.; Newton *v.* Maxwell, 2 Crompt. & Jer. 215.

[g] State *v.* Angell, 7 Iredell, 27.

[h] R. *v.* ——, R. &. R. 489.

[hh] Geiger *v.* State, 5 Iowa (Clarke), 484.

[i] See, as to Pennsylvania, Roberts' Dig. 2d ed. 374.

[j] 2 Inst. 666.

which is insufficient.[k] It is wrong to describe a man as possessed of any dignity which he holds in any nation, except England,[l] though it was anciently said, that an Irish bishop might be indicted by the addition of his diocese.[m] A nobleman may be described by his dignity obtained by creation, as earl;[n] by his name of dignity, as garter;[o] an inferior person by his reputed degree of gentleman, if so reputed, though only a yeoman in legal understanding;[p] but if he be not so reputed the mistake will be fatal.[q] The omission of the addition is fatal.[r] But in Indiana, a description of a defendant in an indictment, by the addition of his degree, or mystery, and place of residence, is not necessary.[s]

§ 244. Mystery means the defendant's trade or occupation; such as merchant, mercer, tailor, schoolmaster, husbandman, laborer, or the like.[t] Where a man has two trades, he may be named of either;[u] but if a man who is a "gentleman" in England be a tradesman, he should be named by the addition of gentleman;[v] in all other cases he may be indicted by his addition of degree or mystery, at the option of his prosecutor.[w] The additions in common use in the United States, are yeoman, laborer, and gentleman; and there are few cases in which the defendant, on being indicted as such, has pleaded in abatement. In Virginia, however, where the common law distinctions have been carried out with a nicety which approaches to the English practice, it has been held that the difference between the addition of laborer and yeoman is sufficient to abate the indictment.[x]

In an indictment against a slave it is not necessary to state the name of his or her owner.[xx]

§ 245. Though, when there is no name at all, or no addition, the correct course is to quash, yet, when there is a misnomer, the proper, and indeed the only method of meeting the error, is by plea in abatement.[y] A plea in abatement, however, that James Baker, the prosecutor, is a husbandman, and not a laborer, being demurred to, was adjudged bad.[z] The additions of degree or mystery usually given, in the English books, are, to peers, peeresses, knights, esquires, clergymen, and gentlemen, the addition to which they are of right entitled; to other men, the addition of yeoman or laborer;[a]

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[k] 2 Inst. 670; 9 E. 4, 2; 22 E. 4, 13; 21 H. 6, 3.

[l] 2 Leach, 547; 2 Salk. 451; 2 Hawk. c. 23, s. 109.

[m] Year Book, 21 Hen. vi. 3, 4; 2 Hawk. c. 23, s. 109; Bac. Ab. Misn. B. 2.

[n] 2 Inst. 666; Com. Dig. Indict. G. 1.

[o] 2 Hawk. c. 26, s. 69; Cro. Eliz. 542; Bac. Ab. Indict. G. 2.

[p] 2 Inst. 668; Com. Dig. Indict. G. 1.

[q] Id. ibid.

[r] State *v.* Hughes, 2 Harris & McHen. 479; Com. *v.* Sims, 2 Virg. Cases, 374.

[s] State *v.* McDowell, 6 Blackf. 49.

[t] 2 Hawk. c. 33, s. 111.

[u] 2 Inst. 658.

[v] Ibid. 669.

[w] See Mason *v.* Bushel, 8 Mod. 51, 52; Howpoole *v.* Harrison, 1 Str. 556; Smith *v.* Mason, 2 Str. 816, 2 Ld. Raym. 1541.

[x] Com. *v.* Sims, 2 Virg. Cases, 374.

[xx] Frances *v.* State, 6 Florida, 306.

[y] Com. *v.* Cherry, 2 Virg. Cas. 20; Com. *v.* Lewis, 1 Metcalf, 151; Smith *v.* Bowker, 1 Mass. 76; State *v.* Bishop, 15 Maine, 122; Lynes *v.* State, 5 Port. 236; Com. *v.* Lewis, 1 Met. 151; Com. *v.* Demain, Brightly R. 441; State *v.* Nelson, 29 Maine (16 Shep.), 329. Post, § 518, 536.

[z] Haught *v.* Com. 2 Virg. Cases, 3.

[a] 8 Mod. 51, 52; 1 Str. 556; 2 Str. 816; 2 Ld. Raym. 1541.

or to tradesmen, &c., the addition of their mystery; to widows, the addition of widows; to single women, the addition of spinster or single woman; to married women, usually thus: "Jane, the wife of John Wilson, late of the parish of C., in the county of B., laborer," though "matron" is not fatal.[b] Laborer,[c] or yeoman,[d] is not a good addition for a woman. Servant is not a good addition in any case.[e]

§ 246. Any addition calculated to cast contempt or ridicule on the defendant is bad; and it has been held, in Maine, that the addition "lottery *vender*," when the defendant was, in fact, a lottery *broker*, is bad on abatement.[f]

§ 247. Where, in an indictment against a woman, she is described as A. B., "wife of C. D.," these latter words are mere additions, or *descriptio personæ*, and need not be proved on trial.[g]

§ 248. The defendant must be described as of the town, *or* hamlet, *or* place *and* county, of which he was, or is, or in which he is or was conversant.[h] In Massachusetts, Rhode Island, Pennsylvania, Louisiana, and, in fact, in most of the States, the forms in common use give the addition of place, as "late of the said county," or "of the county of ——." In the city of New York, the practice is to charge "late of the —— ward, in the city of New York."

9th. JUNIOR AND SENIOR.

§ 249. Where a father and son have the same name, and are both indicted, the English rule was to distinguish them by naming one as the elder, the other as the younger;[i] though such seems no longer requisite.[j] In New York, Massachusetts, and Maine, however, it has been said that *junior* is no part of the name.[k] But in New Hampshire, it was held that when L. W. and L. W., Junior, being father and son, lived in the same town, and the indictment averred certain acts to be done by L. W., evidence was not admissible to show that they were done by L. W., *Junior*, it being presumed L. W. in the indictment meant L. W., *Senior*.[l] In New York, in an early case, it was said that if a man be known by the addition of "*junior*" to his name, an indictment against him, without that addition, is not conclusive that he was the person indicted.[m]

10th. DESCRIPTION OF PARTIES INJURED AND THIRD PARTIES.

§ 250. The statnte of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other indivi-

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[b] State *v.* Nelson, 29 Maine (16 Shep.), 329.

[c] R. *v.* Franklin, 2 Ld. Raym. 1179.

[d] 2 Inst. 668.

[e] R. *v.* Checkets, 6 M. & S. 88.

[f] State *v.* Bishop, 15 Maine, 122.

[g] Com. *v.* Lewis, 1 Metc. 151.

[h] Arch. C. P. 27.

[i] 1 Bulst. 183; 2 Hawk. c. 25, s. 70; Salk. 7.

[j] Hodgson's case, 1 Lewin C. C. 236; Peace's case, 3 Barn. & Ald. 579.

[k] People *v.* Cook, 14 Barb. 259; Com. *v.* Perkins, 1 Pick. 388; State *v.* Grant, 22 Maine, 171; see Cort *v.* Stackweather, 8 Conn. 280.

[l] State *v.* Vittum, 9 New Hamp. 519; *contra*, R. *v.* Peace, 3 Barn. & Ald. 579.

[m] Jackson ex dem. Pell *v.* Provost, 2 Caines, 165.

duals whom it may be necessary to name;[n] and therefore no addition is in such case necessary, unless more than two persons are referred to whose names are similar.[o] It is enough to state a party injured, or any person except the defendant, whose name necessarily occurs in the bill, by their Christian and surname, as, for instance, "on John Slycer did make an assault," or "the goods of John Nokes did steal." The name thus given must be the name by which the person is generally known.[p]

§ 251. Where third persons cannot be described by name, it is enough to charge them as a "certain person or persons to the jurors aforesaid unknown,"[q] which is correct, if the party is at the time of the indictment unknown, though he became known afterwards.[r] Thus an indictment for harboring thieves unknown is sufficient, from the necessity of the case, and the fair presumption which exists that their names cannot be ascertained.[s] So, upon the same ground, if the dead body of a person murdered be found, and it is impossible to discover who he was, an indictment for having killed some one unknown would be good. Nothing is more common when the owner of stolen property is unknown, than to charge him as such.[t] Such

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[n] 2 Leach, 861; 2 Hale, 182; Burn, J., Indictment; Bac. Ab. Indictment, G. 2; R. *v.* Graham, 2 Leach, 547; R. *v.* Ogilvie, 2 C. & P. 230; Com. *v.* Varney, 10 Cush. (Mass.) 402; though see R. *v.* Daley (1 Mood. C. C. 303), 4 C. & P. 578.

[o] Id. ibid.

[p] R. *v.* Norton, Rus. & Ry. 510; R. *v.* Berriman, 5 Car. & Payne, 601; R. *v.* Williams, 7 Car. & Payne, 298; State *v.* Haddock, 2 Haywood, 162.

[q] 2 Hawk. c. 25, s. 71; 2 East, P. C. 651, 781; Cro. C. C. 36; Plowd. 85 b.; Dyer, 97, 286; 2 Hale, 181; State *v.* Irwin, 5 Blackf. 343; Willis *v.* People, 1 Scam. 399; Goodrich *v.* People, 3 Parker, C. R. 622.

[r] Com. *v.* Hendrie, 2 Gray, 503.

[s] Id. Stra. 186, 497.

[t] 2 East, P. C. 651, 781; 1 Ch. C. L. 212; 1 Hale, 181; 2 B. & Ald. 580. To support the description of "unknown," remarks Mr. Sergeant Talfourd, it must appear that the name could not well have been supposed to have been known to the grand jury; Reg. *v.* Stroud, C. & K. 187. "Unknown" was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old, unbaptized, had been called by its mother, Mary Ann; R. *v.* Smith, 1 Mood. C. C. 295; S. C. 6 C. & P. 151. A bastard which had never acquired a name, is sufficiently identified by showing the name of its parent thus: "a certain illegitimate male child then lately born of the body of A. B. (the mother);" R. *v.* Mary and Jane Hogg, 2 M. & Rob. 380; see R. *v.* Hicks, 2 ib. 302, where an indictment for child-murder was held bad for not stating the name of the child, or accounting for its omission. A bastard must not be described by his mother's name till he has acquired it by reputation; R. *v.* Clark, R. & R. 358; Wakefield *v.* Mackey, 1 Phill. R. 133, contra. A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder; Reg. *v.* Crans, 8 C. & P. 765; but where a bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment, styling it "Eliza *Waters*," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of Waters by reputation; R. *v.* Ellen Waters, 1 Mood. C. C. 457; 2 C. & K. 862. (N. B. No baptismal register, or copy of it, was produced at either trial. *Semb.* "Eliza" would have sufficed; see R. *v.* Stroud, C. & K. 187, and cases collected; Williams *v.* Bryant, 5 M. & W. 447.) In the previous case of R. *v.* Frances Clark, R. & R. 358, an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened *George Lakeman*, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held him improperly laid *Clark*, and as nothing but the name identified him in it, the convic-

cases, however, are exceptions to the general rule, that wherever the name of the party injured exists, it is absolutely necessary to insert it.[u] In an indictment for larceny, though the goods may be laid to be the property of persons unknown, if that is actually the case, yet if the owner be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one, in which the mistake is corrected.[v]

It would seem that the allegation that co-defendants are "unknown," is material, and may be traversed under the plea of not guilty.[w] An indictment will be bad against an accessary, stating the principal to be unknown, contrary to the truth, and the judge will direct an acquittal.[x] By the same rule it has been holden, that an indictment for stealing a certain piece of cloth of A. B., without saying of the goods and chattels of A. B., is bad, because it does not sufficiently appear to whom the articles in question belonged.[y] And it was anciently decided, that where a man is indicted for murdering another, the name of the party killed ought to be disclosed by the inquest; but this could only mean where the name was capable of dis-

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tion was held bad; see also R. *v.* Sheen, 2 C. & P. 634. However, in R. *v.* Bliss, 8 C. & P. 773, an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, &c., did make an assault," &c., was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." *Semble:* it would have sufficed to state him "as a certain male child, &c., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B.;" see 2 C. & P. 635, n; see also R. *v.* Sheen, 2 C. & P. 634. Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name; R. *v.* Norton, R. & R. 509; R. *v.* Berriman, 5 C. & P. 601; Anon., 6 C. & P. 408. So where an indictment charged the name of the person slain as Marie Gardiner, *alias* Maria Bull, and the proof showed her real name to be Maria Frances Bull, though she was generally known by the name in the indictment, it was held sufficient; State *v.* Gardiner, Wright's R. 392. If a false description be added to the name, as if a female feloniously married by a man whose wife is still alive, be described as a "widow," when she is known to be a single woman, the error will be fatal, though no description of her was requisite; R. *v.* Deeley, 1 Mood. C. C. R. 303; 4 C. & P. 579 (A. D. 1831). Where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed; Singleton *v.* Johnson, 9 M. & W. 67. But this was held immaterial, when it is sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz., the daughter of another Elizabeth Edwards; R. *v.* Peace, 3 B. & Ald. 519; see ante, p. 7. A variance in the name or identity of the party laid as injured, will entitle the prisoner to acquittal; Dickinson's Q. S., 6th ed. 213. See also, generally, on this head, 2 Hale's Pleas of the Crown, edited by Stokes and Ingersoll, n. 1, to which work the practitioner is referred as being at the same time the most satisfactory edition of Hale extant, and as containing a series of notes of much learning and accuracy. See 1 Denn. C. C. 361.

[u] 3 Camp. 264, 265; 2 Hawk. c. 25, s. 71; Burn, J., Indictment; Cro. C. C. 36; Sum. 95; Plowd. 85; Keilw. 25; Dyer, 99; Dalt. C. J. 131; 9 H. 6, 45; see Buck *v.* State, 1 Ohio St. R. 61.

[v] 2 East, P. C. 561, 781; 3 Camp. 265, note; 1 Hale, 512; 2 Hawk. c. 25, s. 71; 2 Leach, 578; R. *v.* Robinson, 1 Holt, 595.

[w] Barkman *v.* State, 8 Eng. (13 Arkans.) 703; Cameron *v.* State, Ibid. 712; Reed *v.* State, 16 Ark. 499. See post, § 429.

[x] 3 Camp. 264, 265; 2 East, P. C. 781.

[y] Cro. Eliz. 490; 2 Hawk. c. 25, s. 71; Bac. Ab. Indictment, G. 5.

covery.[z] It will be enough, however, to defeat the bill, that the same grand jury found another bill specifying the "person unknown" as "J. L."[a]

§ 252. Where the defendant was indicted for the murder of her bastard child, whose name was to the jurors unknown, and it appeared that the child had not been baptized, but that the mother had said she would like to have it called Mary Ann, and little Mary, the indictment was held good.[b] An indictment for the murder of "a certain Wyandott Indian, whose name is unknown to the grand jury," is valid, and sufficiently descriptive of the deceased, without an allegation that the words "Wyandott Indian" mean a human being.[bb]

§ 253. If the allegation in which the misnomer appears is immaterial, it may be rejected as surplusage.[c]

§ 254. A mere statement of the Christian name, without any addition to ascertain the precise individual, is bad, because uncertain.[d] But if there is enough to explain who the party was it will be sufficient. Thus an indictment for an assault on John, parish priest of D., is sufficiently certain, and if the defendant, after verdict of not guilty, be indicted again, with the addition of the prosecutor's surname, he may plead his former acquittal;[e] and an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she had always acted and was known, was held good, though her real name was Selima Victoire.[f] So an indictment for forgery of a draft addressed to Messrs. Drummond and Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the name of Mr. Drummond's partners, was held sufficient.[g]

§ 255. Initials, it seems, are a sufficient designation of the Christian name;[h] and at all events cannot be excepted to after verdict.[i]

§ 256. A variance, however, or an omission in the name of the person aggrieved, is much more serious than a mistake in the name or addition of the defendant, as the latter can only be taken advantage of by plea in abatement, while the former will be ground for arresting the judgment, when the error appears on the record, or for acquittal, when a variance arises on the trial.[j]

§ 257. A description of a person in legal proceedings by the name acquired by reputation has been held sufficiently certain. Thus where, in a case of homicide, an indictment charges the name of the person slain as Marie Gardiner, *alias* Maria Bull, and the proof shows her real name to have been Maria Frances Bull, though generally known by the name in the indict-

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[z] 2 Hawk. c. 25, s. 71; Staunf. 181, b. c. 18; State *v.* Haddock, 2 Heywood, 162; R. *v.* Willis, 1 Car. & Kir. 722.

[a] R. *v.* Bush, R. & R. 372; see 1 Denn. C. C. 361.

[b] R. *v.* Smith, 1 Mood. C. C. 402.

[bb] Reed *v.* State, 16 Ark. 499.

[c] Com. *v.* Hunt, 4 Pick. 252; U. S. *v.* Howard, 3 Sumner, 12.

[d] 2 Hawk. c. 25, s. 71; Bac. Ab. Indictment, G. 2; but see Starkie, 171, 172; 6 St. Tr. 805; Moor. 466.

[e] Dyer, 285 a, Keilw. 25; 2 Hawk. c. 25, s. 72; Bac. Ab. Indictment, G. 2.

[f] 2 Leach, 861.

[g] 1 Leach, 248; 2 East, P. C. 990.

[h] State *v.* Anderson, 3 Rich. 172.

[i] Smith *v.* State, 8 Ham. 294.

[j] 1 East, P. C. 514; 2 Leach, 774; 1 Ch. C. L. 217; Haworth *v.* State, Peck's Tenn. Rep. 89.

ment, it is sufficient.[k] In another case, an indictment for the murder of a bastard child, which described the prisoner as a single woman, stated that she, being big with a male child, did bring forth the said child alive, and that she afterwards, to wit, on the day and year aforesaid, with force and arms, at, &c. It was held, by the judges, that the child was sufficiently described, although the indictment neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name.[l]

§ 258. Where it appears that the party injured is misnamed, or that the owner of the goods or house, &c., is not the person named as such in the indictment, the variance is fatal, and the defendant must be acquitted.[m] But should the name proved be *idem sonans* with that stated in the indictment, and different in spelling only, the variance will be immaterial.[n] Thus, Segrave for Seagrave;[o] Benedetto for Beniditto;[p] Whyneard for Winyard, pronounced Winnyard;[q] Petris and Petries, the pronunciation being the same;[r] "Hutson" for "Hudson,"[s] form no variance. But it has been decided that M'Cann and M'Carn,[t] Shakespear and Shakepear,[u] Tabart and Tarbart,[v] Shutliff and Shirtliff,[w] are not the same in sound. In a case in Pennsylvania, it was even held that Burrall was a fatal variance from Burrill.[x] In South Carolina, on an indictment for trading with "a certain slave of W. G., named Authron," a trading with *Autrum* or *Autrim* was proved, and it was held that the variance was immaterial.[y]

What is *idem sonans* is for the jury.[z]

11th. General summary of practice.

§ 259. It may therefore be stated in brief:—

1st. A *variance* in defendant's name or addition can only be taken advantage of by plea in abatement.

2d. A *blank* in either name or addition can be taken advantage of by plea in abatement, though the proper course is by motion to quash.[a]

3d. No abatement will be awarded in this country to "yeoman" for a man, or "matron," or "wife of C. D.," or "single woman," to a woman.

4th. Any variance in *sound* in the name of material third parties is fatal at common law, it being the duty of the court to order an acquittal, though such acquittal is no bar to a second and correct indictment.[b]

§ 260. Certainty to a common intent, is all that is required in charging

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[k] State *v.* Gardiner, Wright's Ohio R. 392.
[l] R. *v.* Willis, 1 Car. & K. 722.
[m] 2 East, P. C. 651, 781.
[n] State *v.* Bean, 19 Vt. 530; see post, § 597. See, for a strong case of this, State *v.* France, 1 Overton, 434; and see fully as to variance in this respect, post, § 597.
[o] Williams *v.* Ogle, 2 Str. 889.
[p] Ahithol *v.* Beniditto, 2 Taunt. 401.
[q] R. *v.* Foster, R. & R. 412.
[r] Petrie *v.* Woodward, 3 Caines, 219; see State *v.* Upton, 1 Devereux, 513.
[s] State *v.* Hutson, 15 Miss. 512.
[t] R. *v.* Tannett, R. & R. 351.
[u] R. *v.* Shakespear, 2 East, 83.
[v] Bingham *v.* Dickie, 5 Taunt. 814.
[w] 1 Chit. C. L. 216; 3 Chit. Burn. 341.
[x] Com. *v.* Gillespie, 7 Serg. & R. 469.
[y] State *v.* Scurry, 3 Rich. 68.
[z] R. *v.* Davis, 2 Den. C. C. 231.
[a] Ante, § 245; post, § 537.
[b] Post, § 597.

misdemeanors; the same certainty of averment not being required as in charging felonies.[c]

V. Time, place, and venue.

1st. Time must be averred, but not generally material, § 261.
2d. What precision is necessary in its statement, § 264.
3d. Initials and numerals, § 265.
4th. Double and obscure dates, § 266.
5th. Historical epochs, § 269.
6th. Hour, § 270.
7th. Record dates, § 271.
8th. "Then and there," § 272.
9th. Repugnant, future, or impossible dates, § 273.
10th. Cases where date is material, § 275.
11th. Venue, § 277.

1st. Time must be averred, not generally material.

§ 261. Time and place must be attached to every material fact averred,[cc] but the time of committing an offence (except where the time enters into the nature of the offence), may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted.[d]

§ 262. If a day certain be laid before the finding, other insensible dates may be rejected as surplusage.[e]

§ 263. The statement of the day of the month, in an indictment for committing an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and, hence, if the indictment charge the offence to have been committed on Sunday, though it names the day of the month which does not fall on Sunday, it is good.[f]

2d. What precision is necessary in its statement.

§ 264. It is requisite with some exceptions, to name both the day and year. The month without the year is insufficient.[g] If the date be laid in blank, so that it does not appear if the offence was barred by limitation or not, the judgment will be arrested.[h] But in Pennsylvania it has been determined that where the commencement of the indictment was "December

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[c] Martin v. State, 6 Humph. 204.

[cc] State v. Beckwith, 1 Stewart, 318; 1 Chit. on Pleading, 4th ed. Index, tit. Time; R. v. Holland, 5 T. R. 607; R. v. Aylett, 1 T. R. 69; Stand. 95 a; R. v. Haynes, 4 M. & S. 24; State v. Baker, 4 Redding, 52; State v. Walker, 14 Mis. 398; Roberts v. State, 19 Ala. 526; State v. Hanson, 39 Maine (4 Heath), 337; People v. Littlefield, 5 Cal. 355.

[d] Shelton v. State, 1 Stew. & Por. 208; M'Dade v. State, 20 Ala. 30; Stark. C. P. 58; People v. Van Santvoord, 9 Cowen, 660; State v. Magrath, 19 Mo. 678; Com. v. Dillane, 1 Gray, 483; Cook v. State 11 Georg. 53; Wingard v. State, 13 Georgia, 396; U. S. v. Bowman, 2 Wash. C. C. R. 328. Post, § 599.

[e] State v. Woodman, 3 Hawks, 384; Cook v. State, 11 Georg. 53.

[f] State v. Eskridge, 1 Swan (Tenn.), 413.

[g] Com. Dig. Ind. s. 2.

[h] State v. Beckwith, 1 Stewart, 318; State v. Roach, 2 Haywood, 552; Tam. v. State, 3 Missouri, 45.

Session, 1818," and the offence was charged to have been committed on the twelfth day of August, in *the year aforesaid*, the time was sufficiently expressed.[i] And it was said in another case, that it was not fatal to aver the "first March," instead of the first day of March.[j] An indictment, not containing the year, but referring to the caption (which does contain the year), in this manner, "in the year of our Lord aforesaid," was held to be bad, as the caption was no part of the indictment.[k]

3d. Initials and numerals.

§ 265. It has been said that the omission of the phrase, "the year of our Lord," is fatal,[l] though it is ruled that A. D., in initials, will be sufficient;[m] and the better opinion is that both may be dispensed with.[n] The dates may be given in Arabic figures.[o]

In Massachusetts, a complaint, which charges, in words at length, the time of the commission of an offence, is not affected by the addition, in figures, of the date when the complaint is made.[oo]

4th. Double and obscure dates.

§ 266. To aver that the defendant, on divers days, committed an offence, is bad, and so where two distinct days are averred,[p] but it is sufficient to state that on a day specified, as well as on certain other days, he kept a gaming house, a tippling house, or a common nuisance, the allegation "certain other days" being rejected as surplusage.[q]

An allegation that the offence therein charged was committed on a certain specified "day of September *now passed*," is not stated with sufficient certainty.[r]

An indictment which charges the defendant with being a common seller of

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[i] Jacobs *v.* Com. 5 Serg. & Rawle, 315; though see Com. *v.* Hutton, 5. Gray (Mass.) 482.

[j] Simmons *v.* Com. 1 Rawle, 142.

[k] State *v.* Hopkins, 7 Blackf. 494.

[l] Whitesides *v.* People, 1 Breese, R. 41; though see State *v.* Haddock, 2 Hawks 461; State *v.* Dickens, 1 Haywood, 406.

[m] State *v.* Hodgedom, 3 Ver. 481; State *v.* Reed, 35 Maine (5 Red.) 489.

[n] State *v.* Gilbert, 13 Ver. 647; Hall *v.* State, 3 Kelly, 18; Engleman *v.* State, 2 Carter (Ind.) 91.

[o] State *v.* Smith, Peck, 165; State *v.* Dickens, 1 Haywood, 406; State *v.* Haddock, 2 Hawks. 461; State *v.* Lane, 4 Iredell, 113; State *v.* Reed, 35 Maine (5 Redf.) 489; Lazier *v.* Com. 10 Grattan, 708; Cady *v.* Com. Ibid. 776; State *v.* Egan, 10 La. R. 699; State *v.* Seamons, 1 Iowa R. 418; Kelly *v.* State, 3 Sm. & Mars. 518; State *v.* Hodgedom, 3 Vermont R. 481; State *v.* Raiford, 7 Port. 101; Com. *v.* Adams, 1 Gray, 481; though see contra, State *v.* Voshall, 4 Indiana, 590; Finch *v.* State, 6 Blackf. 533; Berrian *v.* State, 2 Zabriskie, 9, though see Ibid. 679. In New Jersey this is corrected by statute. Johnson *v.* State, 2 Dutch. (N. J.) 313.

[oo] Comth. *v.* Keefe, 7 Gray, 332.

[p] State *v.* Brown, 2 Murphy, 224; State *v.* Walker, 2 Murphy, 229; State *v.* Hayes, 24 Miss. (3 Jones), 358, corrected by statute, 1852, p. 368; Hampton *v.* State, 8 Ind. 336; State *v.* Hendricks, C. & N. 369; 1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk. c. 25, s. 82; Cro. C. C. 36; 4 Mod. 101.

[q] State *v.* May, 4 Devereaux, 328; People *v.* Adams, 17 Wendell, 475; 10 Mod. 338; Starkie's C. P. 60; U. S. *v.* La Costa, 2 Mason, 129; Cook *v.* State, 11 Georg. 53.

[r] Com. *v.* Griffin, 3 Cush. 523.

spirituous and intoxicating liquors from a day named "to the day of the finding presentment and filing of this indictment," is fatally indefinite.[rr]

When an indictment stated that the offence was committed on or about the 30th day of December, it was held that the words "on or about" were mere surplusage. They could have made no difference in the proof required, and could in no way have prejudiced the defendant's rights.[s]

§ 267. As a general rule it is incorrect to lay the offence between two days specified, in indictments and information;[ss] and, therefore, an indictment for battery setting forth that the defendant beat so many of the king's subjects between two specified days, is insufficient.[t]

§ 268. In alleging a mere neglect or non-performance, it is unnecessary to specify either time or place.[u]

5th. Historical epochs.

§ 269. In England it is the practice to specify the year of the king's reign but it is enough if the time be ascertained by any other means; and, therefore, in the case of the regicides, no year of any reign was laid for the king's murder, but the compassing of his death was laid in January, in the twenty-fourth year of Charles the First, and the murder was laid on the thirtieth day of the same month of January.[v] So where the time was stated, in the caption of the indictment, and the offence laid to have been committed on the day after Pentecost, the time was held to be sufficiently expressed.[w] And upon the same ground, it seems to follow that an indictment laying the time on the *utas* of Easter, which will be taken for the eighth day after the feast, or on the 10th day of March last, if it can be ascertained by the style of the sessions before which the indictment was taken, is valid.[x]

6th. Hour.

§ 270. In no case is it necessary to state the hour at which the act was done, unless rendered so by the statute upon which the indictment is framed.[y] In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night,*" without mentioning the hour, seems to be sufficient.[z] In an indictment upon stat. 9 G. 4, c. 69, for unlawfully en-

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[rr] Commonwealth *v.* Adams, 4 Gray (Mass.) 57.

[s] Hampton *v.* State, 8 Ind. 336. And see Hardebeck *v.* State, 10 Ind. 459.

[ss] 1 Ld. Raym. 581; 10 Mod. 249; 2 Hawk. c. 25, s. 82; Cro. C. C. 36; Burn, J., Indict.; Williams, J., Indict. iv.

[t] 4 Mod. 101; 2 Hawk. c. 25, s. 82; Burn, J., Indict.; Williams, J., Indict. iv.; 1 Chitty's C. L. 216.

[u] 2 Hawk. c. 25, s. 79; Starkie's C. P. 61; but see Archbold's C. P. 34.

[v] Kel. 10, 11; 2 Hawk. c. 25, s. 80; Burn, J., Indictment; Williams, J., Indict. iv.

[w] Com. Dig. Indict. G. 2; 2 Hawk. c. 25, s. 78; Bac. Ab. Indict. 94.

[x] 2 Hawk. c. 26, s. 78; Bac. Ab. Indict. G. 4; Burn, J., Indict.; Williams, J., Indictment, iv.

[y] 2 Hawk. c. 25, s. 76; and see Combe *v.* Pitt, 3 Burr. 1434; R. *v.* Clarke, 1 Bulst. 204; March pl. 127; 2 Inst. 318.

[z] But see State *v.* G. S. 1 Tyler, 295; 1 Hale, 549; R. *v.* Waddington, 2 East, P. C. 513; 2 Hawk. c. 25, s. 76, 77, and see post, § 600, 1612.

tering, or being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night.[a] In Vermont, however, it has been held that in an indictment for burglary, the hour should be stated.[b]

7th. Record dates.

§ 271. When, as in case of perjury, the time of the alleged false oath enters into the essence of the offence, and is to be shown by the records of the court where the oath was taken, a variance in the day is fatal;[c] thus, if the perjury is averred to have been committed at the Circuit Court on the 19th of May, and the record shows the court to have been holden on the 20th day of May, the indictment is bad.[d]

8th. "Then and there."

§ 272. When the time has been once named with certainty, it is afterwards sufficient to refer to it by the words *then and there*, which have the same effect as if the day and year were actually repeated.[e] It is said, however, that the mere conjunction *and* without adding *then and there*, will, in many cases be insufficient. Thus, in an indictment for robbery, the allegation of time must be attached to the stroke or the robbery, and not merely to the assault;[f] and in a case of murder, it is not sufficient to allege, that the defendant on a certain day made an assault and struck the party killed, but the words *then and there* must be introduced before the averment of the stroke.[g] The word "immediately" is too uncertain an allegation when time constitutes part of the offence; and, therefore, where, on an indictment for a highway robbery, the special verdict found the forcible assault, and then in a distinct sentence that the prisoners "then and there *immediately*" took up the prosecutor's money, this was held to be insufficient to fix the prisoners with the offence of robbery, because the word "immediately" has great latitude, and is not of any determinate signification, and is frequently used to import "as soon as it conveniently could be done.[h] If, however, the words "then and there" precede every material allegation, it is sufficient, though these words may not precede the conclusions drawn from the facts.[i]

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[a] R. *v.* Davis, 10 B. & C. 89; Archbold's C. P. 35.

[b] State *v.* G. S. 1 Tyler's R. 295.

[c] Post, § 599. Gray *v.* Bennett, 1 T. R. 656; Freeman *v.* Jacob, 4 Cambp. 209; Pope *v.* Foster, 4 T. R. 590; Woodford *v.* Ashley, 11 East, 508; Restall *v.* Stratton, 1 H. Bl. 49.

[d] U. S. *v.* M'Neal, 1 Gallison, 387; U. S. *v.* Bowman, 2 Wash. C. C. R. 328.

[e] 2 Hale, 178; 2 Stra. 901; Keil. 100; 2 Hawk. c. 25. s. 78, c. 23, s. 88; Bac. Ab. Indict. G. 4; Williams, J., Indict. iv.; Comyns, 480; Stout *v.* Com. 11 Serg. & R. 177; State *v.* Cotton, 4 Foster, 143; State *v.* Bailey, 21 Mo. 484; State *v.* Williams, 4 Indiana, 235.

[f] Id. Ibid.; 2 Hale, 178; 2 Hawk. c. 23, s. 88; Cro. Eliz. 739.

[g] 2 Hale, 173; Dyer, 69; 2 Hawk. c. 23, s. 88; Cro. C. C. 35. Post, § 1052–71.

[h] R. T. H. 114, 115; Comyns, 480; Chitty's C. L. 221, per contra, State *v.* Cherry, 2 Murphy, 7.

[i] State *v* Johnson, 1 Walker, Miss. R. 392; 1 Leach, 529; Dougl. 212.

The word *being* (*existens*) will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offence; and, therefore, an indictment for a forcible entry, on land *being* the prosecutor's freehold, without saying "then being," was held insufficient.[j]

If the indictment allege that the defendant feloniously and of malice aforethought, made an assault, and with a certain sword, &c., *then and there* struck, the previous omission will not be material, for the word *feloniously and of malice aforethought*, previously connected with the assault, are by the words *then and there* adequately applied to the murder.[k] So in an indictment for breaking a house with intent to ravish, "then and there" is not necessary to the intent.[kk]

An indictment which avers that the defendant, at a time and place named, feloniously assaulted A. B., and being then and there armed with a dangerous weapon, did actually strike him on his head with said weapon, is sufficient, without repeating the words "then and there" before the words "did actually strike."[l]

In North Carolina, it has been held that an indictment may contain enough to induce the court to proceed to judgment, if the time and place of making the assault be set forth, though they be not repeated as to the final blow.[ll]

If, however, two times have been previously mentioned, and afterwards a part only is laid "then and there," the indictment is defective, because it is uncertain to which it refers.[m]

9th. Repugnant, future, or impossible dates.

§ 273. If the fact be stated, as to the time or place, with repugnancy, or uncertainty, the indictment will be bad.[n] An indictment charging the offence to have been committed in November, 1801, and in the twenty-fifth year of American Independence, was held defective, and the judgment arrested, because the offence was charged to have been committed in two different years.[o] In a case in Mississippi, where the crime was alleged to have been committed in the year of our Lord 1030, the allegation, in an opinion of some quaintness, was held to be bad, as contradicting one of the known laws of nature. "A third objection," it was said, "not embraced by the special assignment of errors, but which is properly presented under the general assignment, merits the consideration of the court. The objection is, that the indictment does not show any crime to have been committed against the State of Mississippi, and that the assumption of the truth of the allegations contained therein is inconsistent with a known law of nature. The crime charged

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[j] Bac. Ab. Indict. G. 1; Cro. Jac. 639; 2 Ld. Raym. 1467, 1468; 2 Rol. Rep. 225; Com. Dig. Indict. G. 2.

[k] 4 Co. 41, b.; Dyer, 69, a; 1 East. P. C. 346; 1 Ch. C. L. 221. Post, § 1072.

[kk] Com. *v.* Doharty, 10 Cush. (Mass.) 52.

[l] Commonwealth *v.* Bugbee, 4 Gray (Mass.) 206.

[ll] State *v.* Cherry, 3 Murphy, 7. See Jackson *v.* People, 18 Ill. 264.

[m] Storris *v.* State, 3 Missouri R. 45; State *v.* Jackson, 3 Maine (4 Heath.) 291.

[n] Jane (a slave) *v.* State, 3 Missouri R. 45; post, § 1072.

[o] State *v.* Hendricks, Cons. N. C. R. 369.

against the prisoner is alleged to have been committed the 30th day of September, A. D. one thousand and thirty-three; whether it is a mistake which occurred in the indictment, or was made by the transcribing clerk, I think now cannot be inquired into. The record in this respect, appears not to be imperfect, and a presumption cannot be entertained which contradicts it. An allegation in an indictment, which substantially contradicts a known law of nature, regulating the duration of human life, is clearly defective, and cannot constitute the legitimate foundation of a judgment of a court. All knowledge of the laws of nature which govern the material world, is primarily derived from experience, and our belief in their permanency rests upon the same foundation. An allegation which presupposes the life of the accused to have endured for upwards of eight hundred years, as it contradicts the experience of the whole world, must be considered as impossible."[p]

§ 274. An indictment alleging the offence to have been committed on an impossible day,[q] or a day subsequent to the finding of the bill,[r] is defective. An indictment may be found for a crime committed after the term commenced to which it is returned.[rr]

10th. Cases where date is material.

§ 275. The remaining exceptions to the rule, as classified by Mr. Archbold,[s] are as follow: 1. The dates of bills of exchange, and other written instruments, must be truly stated when necessarily set out.[t] 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated. 4. If the precise day of a fact be a necessary ingredient in the offence, it must be truly stated.[u] 5. If the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the parish must be truly stated. 6. Where a place named is part of a description of a written instrument, or is to be proved by matter of record, it must be truly stated. 7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated: and the slightest variance in these several respects, between the indictment and evidence, will, in felonies, be fatal, and the defendant must be acquitted. 8. Where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited.[v] 9. To these may be added cases where the date is essential under the statute of limitations.[w]

§ 276. In an indictment for murder, as will be noticed more fully here-

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[p] Serpentine v. State, 1 How. Miss. R. 260.

[q] People v. Mather, 4 Ward. 229.

[r] Penns. v. McKee, Add. 36; Jacobs. v. Com. 5 S. & R. 316; State v. Munger, 15 Vt. 291.

[rr] Allen v. State, 5 Wis. 329.

[s] Archbold's C. P. 370.

[t] Post, § 599.

[u] See R. v. Trehearne, 1 Mood. C. C. 298.

[v] See R. v. Brown, M. & M. 163; State v. McGrath, 19 Mis. (4 Bennett) 678.

[w] See post, § 458, &c.

after,[x] the death should be laid on a day within a year and a day from the time at which the stroke is alleged to have been given.

The evidence on the subject of time is discussed under a future head.[y]

11th. Venue.

§ 277. In England, it is necessary, for reasons now no longer operative, to lay, besides the county, some particular place or parish, which is not so extensive but that all who live within its limits may be reasonably presumed to have a knowledge of the transaction to be made the subject of inquiry.[z] Thus it may be laid in a town,[a] a ward,[b] a parish,[c] a hamlet,[d] burgh,[e] manor,[f] castle,[g] forest,[h] or any place known out of a town.[i] And formerly, if the sheriff returned that there was no such ville, or parish, the practice was to award the venire from the body of the county.[j] So also a visne may come from the neighborhood of a city, without specifying any more particular division.[k] But London, on account of its size and population, has always been an exception to this last rule, and it is always necessary to lay the offence either in some ward or parish within its limits.[l] The general practice in the United States, is to lay the offence to be committed in the county where it took place, and in many cases, when the county is within the jurisdiction of the court, such a description has been held sufficient.[m] The rule, however, admits of occasional variation. In Massachusetts, it has been laid down, that not only the town must be averred, but also the county, where an offence is committed, if, from the terms of the location of the town, or district, by the act of incorporation, the court cannot conclude that the whole town, district, or unincorporated place, lies in one county.[n] It seems that an indictment for a capital offence, in all cases, should lay both the county and town.[o] In Maine, it is enough if the place be indicated, even if no town be named, and hence it was held, that where an indictment alleged the offence to have been committed "on the Penobscot River, between the two towns of E. and H., or within the limits aforesaid, or either of them, and within the said county of Penobscot," it was held that the description of the place was sufficiently certain.[p]

The venue must correspond with the jurisdiction of the court.[q] Where

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[x] See post, § 941, 1073.
[y] Post, § 599, 600.
[z] 2 Hawk. c. 22, sect. 92, post, § 601–3.
[a] 2 Hawk. c. 23, sect. 92.
[b] Id. Ibid.; Yelv. 159; 1 Sid. 178; Cro. Jac. 222.
[c] 2 Hawk. c. 23, sect. 92; 6 Co. 14; 1 Burr. 337.
[d] 2 Hawk. c. 23, sect. 92; 6 Co. 14.
[e] 2 Hawk. c. 23, sect. 92; Cro. Eliz. 886.
[f] Co. Lit. 125; 1 Sid. 326; 2 Hawk. c. 23, sect. 92.
[g] 2 Rol. Ab. 612, 613, 614; Co. Lit. 125; 2 Hawk. c. 23, sect. 92.
[h] Co. Lit. 125; 2 Rol. Abr. 618; 2 Hawk. c. 23, sect. 92; Cro. Eliz. 200.
[i] 2 Hawk. c. 23, sect. 92; 2 Ins. 319; 1 Sid. 326.
[j] Cro. Eliz. 200.
[k] 2 Hawk. c. 23, sect. 92; 2 Roll. Abr. 622, 623; Cro. Jac. 307, 308; 2 Hale, 260; Cro. Eliz. 490.
[l] 2 Hawk. c. 23, sect. 92; Cro. Jac. 150, 308; 1 Burr. 333; 2 Leach, 900.
[m] People v. Lafuente, 6 Cal. 202; see post, § 601–3.
[n] Com. v. Springfield, 7 Mass. 9.
[o] Ibid. 13.
[p] State v. Roberts, 26 Maine (13 Shep.), 374.
[q] People v. Barrett, 1 Johnson R., 66; State v. G. S., 1 Tyler, 295; State v. Jones, 4 Halsted, 357.

an offence is committed within the county of A., and, after the commission of the offence, the county is divided, and the part of the county in which the offence was committed is erected a new county called B., the latter county has jurisdiction over the offence.[r] In such case, however, the indictment properly charges its perpetration in the former county while the trial is in the latter.[rr]

§ 278. In New York it was ruled, where an offence is committed within that State by means of an innocent agent, the employer is guilty as a principal, though he did not act in that State, and was, at the time the offence was committed, in another State. In such case the courts of New York have jurisdiction of the offence, and if the offender comes within the limits of the State, they have also jurisdiction of his person, and he may be arrested and brought to trial. When an offence is committed within the State, whether the offender be at the time in the State, or be without the State, and perpetrates the crime by means of an innocent agent, it is no answer to an indictment that the offender owes allegiance to *another* State or sovereignty.[s] As a general rule, however, it seems that an indictment does not hold good for an offence committed out of the jurisdiction.[t]

§ 279. The offence must be charged in the body of the bill, to have been committed within the district over which the court has jurisdiction;[u] where there are distinct judicial districts in the county, it is not sufficient that the caption names the district. Therefore, where the offence in a District Court in North Carolina, was laid to have been committed in Beaufort County, without adding in the district of Newbern, judgment was arrested.[v] An indictment charging that the act was done in the county of Rusk, without saying in the State of Texas, is good.[a] Where the county of Cumberland was named in the margin of an indictment, and in the body of the indictment the material facts were alleged to have taken place "in said county of Cumberland," it was held that the venue sufficiently appeared to be within the jurisdiction of the court, and that the court was authorized to try the indictment in that county.[b] A complaint, made "in behalf of the Commonwealth," alleging an offence in a particular city and county (corresponding in name to a city and county of the Commonwealth), against a statute the title and date of which are stated, and rightly describing a statute passed by the legislature of the Commonwealth, sufficiently shows that the offence was committed within the Commonwealth, without any caption, or venue in the margin.[c]

§ 280. In the city of New York, the practice is to charge the ward as part of the venue—thus, "in the first ward of the city of New York;" in New

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[r] State *v.* Jones, 4 Halsted, 357; Searey *v.* State, 4 Texas, 450.
[rr] Jordan *v.* State, 22 Geo. 545.
[s] Adams *v.* The People, 1 Comstock, 173; see S. C. 3 Denio, 190; and see also Com. *v.* Gillespie, 7 S. & R. 469; R. *v.* Garrett, 22 Eng. Law & Eq. 607; see ante, § 154.
[t] Manley *v.* People, 3 Selden (N. Y.), 295.
[u] State *v.* Cotton, 4 Foster (N. H.), 143.
[v] State *v.* Adams, Murphy, 30.
[a] State *v.* Jordan, 12 Texas, 205.
[b] State *v.* Anley, 39 Maine (4 Heath), 78.
[c] Commonwealth *v.* Quin, 5 Gray (Mass.), 478.

Orleans to name the parish. If, however, the offence is shown to be within the jurisdiction of the court, the particular place need not be proved.[w]

§ 281. But where the place is stated by way of local description and not a venue merely, a variance is fatal;[x] thus where, in an indictment for arson, the tenement was averred to be in the sixth ward, whereas it was in the fifth, the indictment was held bad.[y] The same particularity is required in cases of stealing in a dwelling-house, of burglary, and of forcible entry and detainer, and the like, where the situation of the premises is specially laid, in which case the prescription must be strictly proved.[z]

§ 282. It is sufficient to lay the venue in an indictment "in the county aforesaid," a county being named in the commencement, for which the grand jurors were sworn.[a] It is otherwise when two counties are named.[aa] An indictment for burning a barn situate at a certain place, which was within the jurisdiction of the court, and alleged to be "within the curtilage of the dwelling-house of A.," need not also aver that the dwelling-house was at that place.[c] In an indictment for wounding, the time and place of the assault and stroke were formally laid, but no venue was alleged as to the wounding, the result of the stroke. It was held, that the venue was sufficiently laid.[cc]

§ 283. In North Carolina, by an act of assembly, passed in 1842, a part of the county of Burke and a part of the county of Rutherford, were constituted a new county by the name of M'Dowell; and by a supplemental act, jurisdiction of all criminal offences committed in that part of M'Dowell taken from Burke was given to the Superior Court of Burke. It was held, that an indictment for a criminal offence, alleging it to have been committed in Burke County, could not be supported by evidence showing the offence to have been committed in M'Dowell, after the establishment of the latter county.[b] On the other hand, it is not error to describe a county within which the offence was committed, by the name belonging to it at the time of trial, even though it went by another name at the time when the act was committed.[c]

§ 284. In Pennsylvania, it is said that in an indictment for adultery, it is not necessary to mention the township in which the defendant resided, when the offence was committed, because the court may ascertain the place of the defendant's residence otherwise than by the verdict of the jury.[d]

In larceny the venue may be laid in any county in which the thief was possessed of the stolen goods.[e] Where an indictment omits to lay a venue

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[w] 2 Hale, 179, 244, 245; 4 Bla. Com. 306; 2 Hawk. c. 25, sect. 84, c. 46, sect. 181, 182; 1 East, P. C. 125; Holt, 534; Heikes *v.* Com. 2 Casey, 513.

[x] State *v.* Cotton, 4 Foster (N. H.), 143. Post, § 602.

[y] People v. Slater, 5 Hill, N. Y. R. 401.

[z] R. *v.* Redley, Rus. & R. 515; Archbold's C. P. 38.

[a] State *v.* Ames, 10 Mis. 743; Com. *v.* Edwards, 4 Gray (Mass.), 1.

[aa] State *v.* McCracken, 20 Mo. (5 Bennett), 411.

[c] Commonwealth *v.* Barney, 10 Cush. (Mass.) 480.

[cc] State *v.* Freeman, 21 Mis. (6 Bennett), 481; State *v.* Bailey, 21 Mis. (6 Bennett), 484.

[b] State *v.* Fish, 4 Iredell, 219.

[c] McElroy *v.* State, 8 Eng. (13 Ark.) 708.

[d] Duncan *v.* Com. 4 Ser. & Raw. 449.

[e] Post, § 1815.

of the offence charged, it is a fatal defect, on motion to quash, or in arrest of judgment.[ee]

The subject of evidence as to venue is further considered in a subsequent chapter.[f]

VI. Statement of the offence.

1st. Offence must be made judicially to appear, § 285.
2d. Statement must be technically exact, § 287.
3d. Not enough to charge a conclusion of law, § 288.
4th. Common barrator and common cheat, § 289.
5th. Matters unknown, § 290.
6th. Bill of particulars, § 291.
7th. Surplusage need not be stated, § 291.
8th. Alternate or disjunctive statements, § 294.
9th. Knowledge and intent, § 297.
10th. Inducement and aggravation, § 298.
11th. Objects for which particularity is required, § 299.
(*a*) Identification, § 300.
(*b*) Protection, § 301.
(*c*) Indulgence, § 302.
(*d*) Preparation, § 303.
(*e*) Sentence, § 304.

1st. Offence must be made judicially to appear.

§ 285. It is a general rule that the special matter of the whole fact should be set forth in the indictment, with such certainty, that the offence may judicially appear to the court.[g] Thus, in indictments for murder or manslaughter,

[ee] Learcy *v.* State, 4 Texas, 450.

[f] Post, § 601-5.

[g] The doctrine of this branch of pleading is thus stated by Judge Kane: "The law secures to every man who is brought to trial on a charge of crime, that the acts which constitute his alleged guilt, shall be set forth with reasonable certainty in the indictment which he is called upon to plead to. This is his personal right—indispensable, to enable him to traverse the facts, if he believes them to be untruly charged—to deny their asserted legal bearing, if in his judgment they do not establish the crime imputed to him—or to admit at once the facts and the conclusion from them, if he be conscious of guilt. It is important to his protection also, in case he should be a second time charged for the same offence, that there should be no uncertainty as to that for which he was tried before. And besides all this, which may be supposed to regard the accused alone, it is necessary for the proper action and justification of the court, that it should clearly appear from facts patent on the record, that a specific, legally defined crime has been committed, for which sentence is to be awarded according to the laws that apply to it.

"There are exceptions, or rather limits, to the application of this principle; but they all refer themselves to the peculiar character of the offence charged. Thus, an indictment against a 'common barrator,' or for 'keeping a common gaming-house,' or a 'house of ill-fame,' is good without a specification of acts; for the essence of the offence in these cases is habitual character. So, also, where the charge is not the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation, or motion of the party towards its perpetration; the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record. Such are certain cases of conspiracy, and those of attempt or solicitation, to commit a known crime; where the mental purpose may not have matured into effective action, or has had reference to criminal action by a third party—a class of exceptions this last, which vindicates much of the judicial action under this statute.

"But these are only exceptions; the principle is as broad as the common law. It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from facts that are not themselves disclosed on the record.

it is indispensably necessary to state that the death ensued in consequence of the act of the prisoner.[h] So, in the case of perjury, it is necessary to set out the oath as an oath taken in a judicial proceeding, and before a proper person, in order to see whether it was an oath which the court had jurisdiction to administer.[i] And in the prosecution of a constable for not serving, it is requisite to set out the mode of his election, because if he was not legally elected to the office, he cannot be guilty of a crime in refusing to execute his duties. When circumstances are constituent parts of the offence, they must be set out, but where the crime exists without them, they may be alleged in aggravation, but are not absolutely requisite.[j] And it is a general rule that, where the act is not, in itself, necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists.[k] The omission of any fact or circumstance necessary to constitute the offence will be fatal; as, in an indictment for obstructing an officer in the execution of process, without showing that he was an officer of the court out of which the process issued, and the nature of the official duty and of the process;[l] for contemptuous or disrespectful words to a magistrate, without showing that the magistrate was in the execution of his duty, at the time;[m] against a public officer for non-performance of a duty, without showing that he was such an officer as was bound by law to perform that particular duty;[n] for obtaining money under false pretences, without showing whose money it was;[o] *quod exoneravit tormentum, &c., dans vulnus mortale*, without saying *percussit*;[p] that he feloniously did lead away a horse, &c., without saying "take;"[q] in all these and the like cases, the indictment is

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You may not charge treason, murder, or piracy, in round general phrases. You must set out the act which constitutes it in the particular case.

"Following out the principle, it has always been held that where various acts have been enumerated in the statute, as included in the same category of crime, and to be punished alike, it is not enough to charge the violation of such a statute in disjunctive or alternative terms. That is to say, you may not charge its violation to have been in this or that or another particular, leaving the defendant uncertain which or how many of the enumerated particulars he is to answer to. He is entitled to precise notice of the accusation against him.

"All these are long recognized rules of the criminal law, framed for the protection of innocence, and not unfrequently essential to its safety. The court has no right to disregard them, if it would; on the contrary, it is called upon by the highest duty that man can owe his fellow, to see to it that they lose none of that efficiency for good which is due to the uniformity and certainty of their application. The defendants have asserted of record, that in their case these rules of pleading have not been conformed to, that they have not had such notice of the offence charged against them as the law requires, and that there is not now within the judicial knowledge of the court that precise and specific assurance of their guilt, which can warrant us in pronouncing sentence upon this verdict. If it be so, they are not too late in bringing the fact to our notice; U. S. *v.* Almeida, cited Wh. Prec. 1061–2, n. See to same effect, People *v.* Taylor, 3 Denio, 91; Briggs *v.* People, 8 Barbour, 547; State *v.* Philbrick, 1 Red. 401; Kit. *v.* State, 1 Humph. 167."

h State *v.* Wimberly, 3 M'Cord, 190.

i Cro. Eliz. 137; Cowp. 683.

j Cowp. 683; 5 Mod. 196.

k 2 Hawk. c. 25, s. 57; Bac. Indictment, G. 1; Cowp. 683.

l R. *v.* Osmer, 5 East, 304; see R. *v.* Everett, 8 B. & C. 114; State *v.* Burt, 25 Vt. (2 Deane) 373; McQuoid *v.* People, 3 Gilman, 76; Cantrill *v.* People, ibid. 376.

m R. *v.* Lease, Andr. 260.

n 5 T. R. 623.

o R. *v.* Norton, 8 C. & P. 196.

p R. *v.* Long, 5 Co. 122 b.

q 2 Hale, 184.

bad, and the defect may be taken advantage of in the manner above mentioned.[r] In New York, where an attorney of the Court of Common Pleas was charged with extortion, and the indictment averred that on ——— he obtained a judgment in favor of one J. R. *v.* A. C., and that he did extort and receive from the said A. C. $11 over and above the fees usually paid for such service, and due in the suit aforesaid, &c., it was held that the indictment was not sufficiently precise, it not specifying how much he received on his own account, and how much on that of the officers and members of the court.[s]

§ 286. Where an indictment alleges sufficient facts to constitute a misdemeanor, and also alleges other facts which go to constitute a felony, but omits one fact essential to make up the felony, the indictment is, notwithstanding, good for the misdemeanor.[t]

2d. Statement must be technically exact.

§ 287. The description of the offence must be technically exact, thus, an indictment, charging the defendant with forging a receipt against a book account, is too indefinite. The term is not known to the law; and in common parlance, may mean money, goods, labor, or whatever may be brought into account. Had the charge been forging an acquittance for goods, the evidence of forging the paper, described in the indictment, would, it was said by the court, have been proper for the jury. The paper described was, "Sept. 3, 1816. Received of James Dalton, his book account, in full, John Logan."[u] So in an indictment for fornication and bastardy, it is held, that the sex of the child must be stated.[v]

3d. Not enough to charge a conclusion of law.

§ 288. As the indictment must contain a specific description of the offence, it is insufficient to charge the defendant generally with having spoken false and scandalous words of the mayor of a certain city.[w] So it is bad to accuse him of being a common defamer, vexer or oppressor, of many men,[x] or with being a common disturber of the peace, and having stirred up divers quarrels,[y] or with being a common forestaller,[z] a common thief,[a] or with being a common evil doer,[b] a common champertor,[c] or with being a common con-

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[r] See R. *v.* Cheers, 7 D. & R. 461; 4 B. & C. 902; 1 B. & Adol. 861.
[s] People *v.* Rust, 1 Caines' R. 133.
[t] Lohman *v.* People, 1 Comst. 379; see ante, § 2, 10; post, § 520.
[u] State *v.* Dalton, 2 Murphey, 379.
[v] Com. *v.* Pintard, 1 Browne, 59; Simmons *v.* Com. 1 Rawle, 142.
[w] 1 Roll. Rep. 79; 2 Roll. Ab. 79; 2 Stra. 699; 2 Hawk. c. 25, s. 59; Com. Dig. Indictment, G. 3; Bac. Ab. Indictment, G. 1.
[x] 2 Roll. Ab. 79; 1 Mod. 71; 2 Stra. 848; 2 Stra. 1246, 1247; 2 Hale, 182; 2 Hawk. c. 25, s. 59; Com. Dig. Indict. G. 3; Bac. Ab. Indict. G. 1.
[y] Id. Ibid.
[z] Moor, 302; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.
[a] Id. ibid.; 2 Roll. Ab. 79; 2 Hale, 182; Cro. C. C. 37.
[b] 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.
[c] 2 Hale, 182; 2 Hawk. c. 25, s. 59; Bac. Ab. Indict. G. 1.

spirator, or any other such general and indistinct accusation.[d] It is on the same reasoning that an indictment for obtaining money by false pretences, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply.[e] And in cases of indictments for forgery and threatening letters, as will be seen hereafter, the law requires an exact copy of the instrument to be inserted in the indictment, in order that the court may see that it is the subject of forgery, or threat,[f] within the meaning of the statutes. An indictment, on the same principle, charging a man with being a common cheat, or a common slanderer or brawler, is bad, and is not helped by an averment, that by divers false pretences and false tokens he deceived and defrauded divers good citizens of the said State.[g] So, in Pennsylvania, a count in an indictment charging that the defendant sold a lottery ticket and tickets, in a lottery not authorized by the laws of the commonwealth, is bad, not being sufficiently certain.[h]

4th. "Common barrator and common cheat."

§ 289. There are, however, several marked exceptions to the rule requiring the offence, in each case, to be specifically set forth. Thus, an indictment charging one with being a "common barrator;"[i] or, "a common scold;"[j] or, with keeping a "house of ill-fame;" or a "disorderly house;"[k] or "a common gaming-house;" is good.[l] So an indictment for betting at Faro Bank, need not set out the particular nature of the game, nor the name of the person with whom the bet was made.[m]

In Pennsylvania, by the Revised Act of 1860:—

"If any person shall be proved and adjudged a common barrator, vexing others with unjust and vexatious suits, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court."[mm]

5th. Matters unknown.

§ 290. If a particular fact which is matter of description and not vital to

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[d] Id. Ibid. [e] 2 M. & S. 379; see post, § 2158. [f] 2 Leach, 661; see post, § 305.
[g] 1 Chipman, 129; U. S. v. Royall, 3 Cranch, C. C. R. 618.
[h] Com. v. Gillespie, 7 Serg. & R. 469.
[i] Com. v. Davis, 11 Pick. 432; 6 Tenn. R. 752; 6 Mod. 311; 2 Hale, 182; 1 Russell, 185; 1 Ch. C. L. 230. Post, § 2377.
[j] Com. v. Pray, 13 Pick. 362; James v. Com. 12 Serg. & Rawle, 220; 6 Mod. 311; 2 Stra. 1246; 2 Keb. 409; 9 Cowen, 587; 1 Russell, 302; U. S. v. Royall, 3 Cranch, C. C. R. 618.
[k] State v. Patterson, 7 Iredell, 70.
[l] Com. v. Pray, 13 Pick. 359; 1 Term. R. 754; 1 Russell, 301.
[m] State v. Ames, 1 Missouri, 372.
[mm] Rev. Act, 1860, Tit. ii.

the accusation cannot be ascertained, the indictment will be good if it state that such fact is unknown to the grand jury.[n]

6th. BILL OF PARTICULARS.

§ 291. Whether a bill of particulars or specification of facts shall be required, is exclusively within the discretion of the presiding judge.[o] In many cases of general charges (*e. g.* conspiracy, where the indictment merely avers a general conspiracy to cheat), such a specification on the part of the prosecution will be required.[p]

7th. SURPLUSAGE NEED NOT BE STATED.

§ 292. It is not necessary to charge in the indictment anything more than is requisite to make out the offence.[q] There are even instances when, by intendment of law, what might otherwise be a variance, is made good. Thus, when in an indictment for extortion, or obtaining goods on false pretence where the money is paid by an agent, the indictment is right in alleging it to have been paid by the principal.[r] In a class of cases, also quite numerous in this country, viz: assaults, or attempts to commit offences in themselves indictable, the same particularity is not necessary as is required in indictments for the commission of the offence itself. Thus it may be laid down generally, that in an indictment for soliciting or inciting to the commission of a crime,[s] or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or incitation, or of the aid or assistance, provided circumstances enough be given to show the offence was really committed. An indictment, for an assault with an intent to steal from the pocket, without stating the goods or money intended to be stolen, is good,[t] nor is it necessary to aver that the prosecutor had anything in his pocket to be stolen.[u] So in an indictment for an assault, with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent.[v] So in an indictment for breaking and entering a dwelling-house, with intent to commit a rape, it need not be alleged that the defendant "then and there" intended to commit the rape, nor need the offence of rape be fully and technically set forth.[vv] The means of effecting the criminal intent, or the circumstances evincive of

[n] People *v.* Taylor, 3 Denio, 9; post, § 311.

[o] Com. *v.* Giles, 1 Gray R. 466; see Wh. Prec. 615, n for form.

[p] R. *v.* Kendrick, 5 Ad. & El. 49; R. *v.* Hamilton, 7 C. & P. 448.

[q] State *v.* Ballard, 2 Murphey, 186, see post, § 622.

[r] Com. *v.* Bagley, 7 Pick. 279; Com. *v.* Call, 21 Pick. 515.

[s] R. *v.* Higgins, 2 East, 5; though see R. *v.* Marsh, 1 Den. C. C. 505. See post, § 1281.

[t] Com. *v.* Rogers, 5 Serg. & Rawle, 463. Post, § 1281.

[u] Com. *v.* McDonald, 5 Cush. 365; see Com. *v.* Doherty, 10 Cush. (Mass.) 52.

[v] State *v.* Dent, 3 Gill. & John. 8; but see State *v.* Johnston, 11 Texas, 22; State *v.* Jordon, 19 Mis. (4 Bennett) 213; Trexler *v.* State (19 Alab.) 21; State *v.* Chandler, 24 Mis. (3 Jones) 371.

[vv] Commonwealth *v.* Doherty, 10 Cush. (Mass.) 52.

the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment,[w] though when an *attempt* is averred, it is necessary that some act constituting such attempt (*e. g.*, an assault) should be laid.[x]

§ 293. In New York, in an indictment under the statute[y] for attempting to commit an offence, the particular manner in which the attempt was made is immaterial, and need not be alleged.[z] In a subsequent chapter, however, it will be seen that the weight of authority now clearly is, that the indictment must show on its face facts which would make an "attempt" in point of law, or, at least, should so individuate the offence as to secure the offender from a second conviction.[a]

In an indictment for resisting a deputy sheriff in the discharge of his duty, it is unnecessary to set forth the specific acts of resistance complained of.[b]

8th. Alternative or disjunctive statements.

§ 294. The offence, in every case, must be stated in such a way as not to leave it uncertain what is really intended to be relied on to support the accusation. Thus, if the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered, *or* caused to be murdered, forged, *or* caused to be forged,[c] burn, *or* cause to be burned,[cc] sold spirituous *or* intoxicating liquors;[d] *levavit* vel *levari causavit*,[e] conveyed, *or* caused to be conveyed, &c.[f] it is bad for uncertainty; and the same, if it charge him in two different characters, in the disjunctive, as *quod* A. *existens servus* sive *deputatus*, took, &c.[g] So, an indictment which may apply to either of two definite offences, and does not specify which, is bad.[h] On the other hand, in Vermont it was held not to be a fatal objection, that the indictment charged the defendant with the larceny of a horse, described as being either of a "brown or bay color."[i] In Pennsylvania, indictments averring certain trees cut down not to be the property of the defendants, "or either of them,"[j] and laying a nuisance to be in the "highway *or* road," &c., were held good;[k] in several late precedents in Massachusetts, the expression "as an inn holder *or* victualler," formally occur.[l] And in the U. S. Circuit

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[w] State *v.* Dent, 3 Gill. & John. 8.

[x] Randolph *v.* Com. 6 Serg. & R. 398; Clark's case, 6 Grat. 675.

[y] 2 R. S. 698, sect. 3.

[z] People *v.* Bush, 4 Hill's N. Y. R. 132. As to precision necessary in indictments for attempts, &c., see post, § 2698, n. &c.

[a] See post, § 2698.

[b] State *v.* Copp, 15 N. H. 212.

[c] 2 Hawk, c. 35, s. 58; R. *v.* Stocker, 1 Salk. 342, 371.

[cc] People *v.* Hood, 6 Cal. 236.

[d] Com. *v.* Grey, 2 Gray, 501.

[e] R. *v.* Stoughton, 2 Str. 900.

[f] R. *v.* Flint, Hardw. 370. See R. *v.* Morley, 1 Y. & J. 22; State *v.* Gary, 36 N. H. 359.

[g] Smith *v.* Mall, 2 Ro. Rep. 263.

[h] R. *v.* Marshall, 1 Mood. C. C. 158.

[i] State *v.* Gilbert, 13 Vermont, R. 647.

[j] Moyer *v.* Com. 7 Barr, 439.

[k] R. *v.* Arnold, 3 Yeates, 417; and see State *v.* Ellis, 4 Mis. 474.

[l] Com. *v.* Churchill, 2 Metcalf, 119, 125; Com. *v.* Thayer, 5 Metcalf, 246. The paragraph, also, "did cause to be published, &c., in a certain paper or publication," seems to have escaped the vigilance of counsel who were concerned in the great case of People *v.* Crosswell, 3 Johnson's Cases, 338.

Court for Michigan, it was held that "cutting *or* causing to be cut" was not fatal.[m]

§ 295. Where a statute on which an indictment is founded, enumerates the offences, or the intent necessary to constitute such offences disjunctively, the indictment must charge them conjunctively; as where the statute against unlawful shooting in Virginia, &c., affixes a penalty when the act is done with intent to maim, disfigure, disable, or kill (in the disjunctive), the indictment should charge the intent conjunctively.[n] So in England, under statutes describing the offences disjunctively, it was held fatal to say that the defendant forged, or caused to be forged, an instrument,[o] or that he carried and conveyed, or caused to be carried and conveyed, two persons having the smallpox, so as to burden a certain parish.[p] The proper course is to charge the offences where they are not repugnant, conjunctively.[q]

§ 296. But when a statute in one clause makes several distinct and substantive offences indictable, neither of which, as in the clause "counterfeit, or cause to be counterfeited," is included in the other, it is necessary to specify particularly the actual offence committed. Thus, where the language of the statute was, "any person who shall presume to keep a tippling-house, or sell rum, brandy, whiskey, taffia, or other spirituous liquors, &c., shall be liable," &c.; and the indictment charged the defendant with selling the particular liquors without a license, it was held that the indictment was deficient in not defining the offence with sufficient precision.[r]

9th. Knowledge and intent.

§ 297. Where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary.[s] It is otherwise where guilty knowledge is a substantive ingredient of the offence.[t] Thus in an indictment for selling an obscene book, a scienter is necessary.[u] On the other hand it has not been held necessary in an indictment for adultery.[v]

Under statutes the distinction has been taken that where the guilty knowledge is part of the definition of the offence, it must be averred, but not otherwise.[w]

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[m] U. S. *v.* Potter, 6 McLean, C. C. R. 186. See also State *v.* Ellis, 4 Mis. 474; post, § 368.

[n] Angel *v.* Com. 2 Virg. C. 231; James *v.* State, 1 McMullen, 236; State *v.* Price, 6 Halsted, 203.

[o] 1 Burr. 399; 1 Salk. 342, 371; 8 Mod. 32; 5 Mod. 137.

[p] 1 Sess. Cases, 307.

[q] State *v.* Price, 6 Halsted, 203; Angel *v.* Com. 2 Virg. Cases, 231; Jones *v.* State, 1 McMullen, 236; see post, § 390.

[r] State *v.* Raiford, 7 Porter, 101; R. *v.* Middlehurst, 1 Burr. 400.

[s] Com. *v.* Elwell, 2 Metc. 190; Com. *v.* Stout, 7 B. Monr. 277.

[t] Post, § 2159. Com. *v.* Blumenthal, Wh. Prec. 528, n.

[u] Com. *v.* McGarrigall, cited 1 Bennett & Heard Lead. Cas. 551. See also State *v.* Brown, 2 Speers, 129; Com. *v.* Kirby, 2 Cush. 577; State *v.* Carpenter, 20 Vermont, 9.

[v] Com. *v.* Elwell, 2 Metc. 190.

[w] R. *v.* Jukes, 8 Term R., 536; R. *v.* Myddleton, 6 Term R. 739; 1 Starkie C. P. 196; State *v.* Stimson, 4 Zabr. 478. See U. S. *v.* Schuler, 6 M'Lean, 28; as to scienter in Poisoning, see post, § 1066.

Where a particular intent is necessary to constitute an offence, it must be averred.[x]

In Pennsylvania :—

Intent to defraud particular persons.—It shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any 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; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove any intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.[xx]

10th. Inducement and aggravation.

§ 298. Matters of inducement or aggravation, as a general rule, do not require so much certainty as the statement of the gist of the offence.[y] So where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods" has been holden sufficient.[z]

11th. Objects for which particularity is required.

§ 299. The degree of particularity necessary in setting out the offence can be best determined by examining the objects for which such particularity is required. These objects are ranked by an eminent criminal pleader as follows :—[a]

§ 300 (*a.*) In order to identify the charge, lest the grand jury should find a bill for one offence and the defendant be put upon his trial, in chief, for another, without any authority.[b]

§ 301. (*b.*) That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds: the offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same offence.[c]

§ 302. (*c.*) To warrant the court in granting or refusing any particular

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[x] People *v.* Lehman, 2 Barbour, S. C. 216; Gabe *v.* State, 1 Eng. (Ark.) 519; Norman *v.* State, 24 Mis. 54; State *v.* Card, 34 N. H. 510.

[xx] Rev. Act, 1860—pamph. p. 435.

[y] R. *v.* Wright, 1 Vent. 170; Com. Dig. Indict. G. 5. As to evidence of surplusage, of this kind, see post, § 624-5.

[z] R. *v.* ——, 1 Chit. Rep. 698; R. *v.* Eccles, 1 Leach, 274; King *v.* Gill, 2 Barn. & Ald. 204; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Collins, 3 Serg. & Rawle, 220; Com. *v.* Mifflin, 2 Watr. & Serg. 461.

[a] 1 Starkie's C. P. 73. See also post, § 622, &c.

[b] Staunf. 181. [c] Ibid.

right or indulgence, which the defendant claims as incident to the nature of the case.[d]

§ 303. (*d.*) To enable the defendant to prepare for his defence[e] in particular cases, and to plead in all,[f] or, if he prefer it, to submit to the court by demurrer whether the facts alleged (supposing them to be true), so support the conclusion in law, as to render it necessary for him to make any answer to the charge.[g]

§ 304. (*e.*) Finally and chiefly, to enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction, of the particular crime, and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender.[h]

As to what constitutes surplusage, will be considered fully hereafter.[i]

VII. Written instruments.

1st. Where the instrument, as in forgery and libel, must be set out in full, § 305.
- (*a*) In such case literal exactness is necessary, § 306.
- (*b*) "Tenor," "purport," and "substance," § 307.
- (*c*) What variance is fatal, § 309.
- (*d*) Quotation marks, § 310.
- (*e*) Lost, destroyed, obscene, or suppressed writings, § 311.
- (*f*) When any part may be omitted, § 312.
- (*g*) Where the instrument is in a foreign language, or is on its face insensible, § 313.

2d. Where the instrument, as in larceny, &c., may be described merely by general designation, § 314.
- (*a*) U. S. courts, § 315.
- (*b*) Massachusetts, § 319.
- (*c*) Connecticut, § 320.
- (*d*) New York, § 321.
- (*e*) Pennsylvania, § 325.
- (*f*) New Jersey, § 331.
- (*g*) Maryland, § 332.
- (*h*) North Carolina, § 333.
- (*i*) Georgia, § 335.
- (*j*) Alabama, § 336.
- (*k*) Mississippi, § 337.
- (*l*) Missouri, § 338.
- (*m*) Tennessee, § 339.
- (*n*) Ohio, § 349.

3d. What general legal designation will suffice, § 341.
- (*a*) "Purporting to be," § 342.
- (*b*) "Receipt," § 343.

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[d] Ibid.

[e] R. *v.* Holland, 5 T. R. 623; Fost. 194; Com. *v.* M'Atee, 8 Dana's Ky. R. 29. See to same effect, People *v.* Taylor, 3 Denio, 91. "That certainty and precision in an indictment, is required, which will enable the defendant to judge whether the facts and circumstances stated constitute an indictable offence; that he may know the nature of the offence, against which he is to prepare his defence; that he may plead a conviction or acquittal, in bar of another indictment; and that there may be no doubt as to the nature of the judgment to be given in case of conviction." Biggs *v.* The People, 8 Barbour, 547, Edmonds, P. J.

[f] 3 Inst. 41.

[g] Cowper, 672.

[h] Cowper, 672; 5 T. R. 623; 1 Starkie, C. P. 73.

[i] Post, § 622.

(c) "Bill of Exchange," § 344.
(d) "Promissory Note," § 345.
(e) "Bank Note," § 346.
(f) "Money," § 347.
(g) "Goods and chattels," § 348.
(h) "Warrant, order, or request the payment of money," § 349.
(i) "Piece of paper," § 349.

§ 305. 1st. WHERE THE INSTRUMENT, AS IN FORGERY AND LIBEL, MUST BE SET OUT IN FULL.

§ 306. (*a.*) *In such case literal exactness is necessary.*—Where written instruments enter into the gist of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, &c., they should be set out in words and figures.[j] Thus, the omission of a figure in an indictment for forgery is fatal.[k] In such cases, however, it is not necessary to insert the vignettes, devices, letters, or figures in the margin, as they make no part of the instrument.[l] But it has been held fatal to omit the name of the State in the upper margin of a copy of a bank note, when such name is not repeated on the body.[m]

§ 307. (*b.*) "*Tenor,*" "*purport,*" *and* "*substance.*"—When it is necessary to set forth an instrument, or writing, remarks Mr. Chitty,[n] it may be preceded by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following," for though the setting forth the instrument by the tenor which imports an accurate copy,[o] has been considered to be most technical, yet it has been holden that "as follows," is equivalent to the words "according to the tenor following," or "in the words and figures following," and that if, under such an allegation, the prosecutor fails in proving the instrument verbatim, as laid, the variance will be fatal;[p] and where the indictment, by these or similar averments, fails to claim to set out a copy of the instrument in words and figures, it will be invalid.[q]

Purport, it is said, means the substance of an instrument as it appears on the face of it to every eye that reads it, and is insufficient when literal exactness is required; tenor, means an exact copy of it.[r] But if the instrument

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[j] State *v.* Stephens, Wright's Ohio R. 73; R. *v.* Mason, 2 East, 180; 2 East, P. C. 976; R. *v.* Paul, 1 Leach, 77; R. *v.* Hart, 1 Leach, 145; Com. *v.* Gillespie, 7 Serg. & Rawle, 469; Com. *v.* Stow. 1 Mass. 54; Com. *v.* Bailey, 1 Mass. 62; State *v.* Farrand, 3 Halsted, 333; State *v.* Gustin, 2 Southard R. 749; State *v.* Twitty, 2 Hawks. 248; Com. *v.* Sweney, 10 S. & R. 173; Com. *v.* Wright, 1 Cush. 46; Com. *v.* Tarbox, Ib. 66; post, § 606–8, 1468, &c., 2601, &c.

[k] State *v.* Street, Tay, 158; and see State *v.* Bradley, 1 Hay. 403; State *v.* Coffey, N. C. Term. R. 272; U. S. *v.* Harman, 1 Baldwin, 292; U. S. *v.* Britton, 2 Mason, 462.

[l] People *v.* Franklin, 3 Johnson's C. 299; Com. *v.* Searle, 2 Binney, 232; State *v.* Carr, 5 N. Hamp. 367; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stephens, Ibid. 264; Com. *v.* Taylor, 5 Cush. 605; Buckland *v.* Com. 8 Leigh, 732.

[m] Com. *v.* Wilson, 2 Gray, 70.

[n] 1 Ch. C. L. 234; 2 Leach, 661; 6 East, 418–426.

[o] 2 Leach, 660, 661; 3 Salk. 225; Holt, 347–350, 425; 11 Mod. 96, 97; Douglass, 193, 194.

[p] 1 Leach, 78; 2 Leach, 660, 661; 2 East, P. C. 976; 2 Bla. Rep. 787.

[q] 2 Leach, 597, 660, 661; Dana *v.* State, 2 Ohio St. Rep. 91. Post, § 2601–2–3.

[r] 2 Leach, 661; Com. *v.* Wright, 1 Cush. 46; State *v.* Bonney, 34 Maine, 383.

does not "purport" to be what the indictment avers—*i. e.*, if its meaning is not accurately stated—the variance is fatal.[s]

The words "in manner and form following, that is to say," do not profess to give more than the substance, and are usual in an indictment for perjury;[t] but the word "aforesaid," binds the party to an exact recital.[u] "According to the purport and effect, and in substance," are bad.[v] And so is "substance and effect."[w]

§ 308. The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not sufficient indication that the paper is set out in the very words.[ww]

In forgery, as will be seen hereafter, the indictment may run, that the prisoner forged a paper writing to the tenor and effect following, &c.[x] An exact copy[y] of the instrument, in words and figures,[z] must then be set forth to enable the court to see whether the false making of it is in law considered as forgery;[a] and the same rule applies to indictments for threatening letters.[b]

§ 309. (*c.*) *What variance is fatal.*—A mere variance of a letter will not be fatal, even when the tenor is set out, provided the meaning be not altered by changing the word misspelt into another of a different meaning;[c] thus, in an indictment for forging a bill of exchange, the tenor was "value received," and the bill as produced in evidence, was "value received"—the question being reserved, it was held that the variance was not material, because it did not change one word into another, so as to alter the meaning.[d] On the same principle, where, in an indictment for perjury, it was assigned for perjury that the defendant swore he "understood and believed," instead of "understood," the mistake was held to be immaterial.[e] So "promise," for "promised," was held not a fatal variance.[f]

The subject of clerical errors in the setting forth of writings, and that of variance in the setting out of records, are considered under future heads.[g]

Where an indictment alleged that a forged certificate was signed by Bowling Starke, but the instrument was signed B. Starke, and the signer's true name was Bolling Starke, the variance was held fatal.[h]

The subject of variance between the indictment and the evidence in this respect is more fully considered under a future head.[i]

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[s] Dougl. 300; State *v.* Molier, 1 Devereux, 263; State *v.* Carter, Conf. N. C. R. 210; State *v.* Wimberly, 3 McCord, 190.

[t] 1 Leach, 192; Dougl. 193, 194.

[u] Id. Ibid. Doug. 97.

[v] Com. *v.* Wright, 1 Cush. 46; State *v.* Brownlow, 7 Humph. 63; Dana *v.* State, 2 Ohio St. R. 91.

[w] Com. *v.* Sweney, 10 Serg. & R. 173.

[ww] Com. *v.* Tarbox, 1 Cush. 66.

[x] 2 Leach, 660, 661, Postea, § 1467.

[y] 2 Leach, 624; 2 East, P. C. 928, 977.

[z] 1 Leach, 78, 145; 2 East, P. C. 976.

[a] 2 Leach, 624, 657, 661; 2 East, P. C. 975.

[b] 2 East, P. C. 976; 1 Marsh. 522; 6 East, 418.

[c] R. *v.* Drake, Salk. 660; U. S. *v.* Hinman, Baldwin, 292; State *v.* Bean, 19 Vt. 530 State *v.* Weaver, 13 Iredell, 491. Post, § 606.

[d] 1 Leach, 145.

[e] 1 Leach, 133; Dougl. 193, 194.

[f] Com. *v.* Parmenter, 5 Pick. 279.

[g] Post, § 405-6-7-9, 606, &c.

[h] Com. *v.* Kearns, 1 Virg. Cases, 109; State *v.* Waters, Const. Ct. R. 169.

[i] Post, § 606-7-8.

Where the setting out of the instrument in an indictment can give no information in the court, it is unnecessary to set it.[j]

§ 310. (*d.*) *Quotation marks.*—Quotation marks by themselves are not sufficient.[k]

§ 311. (*e.*) *Lost, destroyed, obscene, or suppressed writings.*—Where the instrument on which the indictment rests is in the defendant's possession, or is lost or destroyed, it is sufficient to aver such special facts as an excuse for the non-setting out of the instrument, and then to proceed, either by stating its substance, or by describing it as an instrument which "the said inquest cannot set forth by reason," &c., of its loss, destruction, or detention, as the case may be.[m] It was at first doubted whether any proceedings would lie when the instrument on which the indictment was based, was in the hands of the defendant; it being clear that the courts would not compel him to surrender it; and such an objection was raised in King *v.* Watson,[n] where an information was asked against a corporation for a libel, the libellous writing being in the hands of the defendant, and not within the control of the prosecution. The case did not proceed to trial, but it was strongly intimated by Buller, J., that if it should, and the defendant refused to deliver the libellous paper, after notice, it would be enough for the prosecution to prove the substance. And it has since been held, in prosecutions for forgery, that if the prosecutor, a reasonable time before the commencement of the assizes, gives the prisoner notice to produce the alleged forged writing, he is entitled, on non-production, to give secondary evidence of its contents.[o] In Maine, Massachusetts, Vermont, New York, New Jersey, and Virginia, as well as in the United States Courts, it has been laid down that, in such cases, it is proper and necessary for the prosecution to aver specially in the indictment the loss of the instrument in question, or a possession and non-production by the defendant.[p] Thus, where the indictment excused the want of a particular description, by averring, that the bond was with the defendant, it was held that this was sufficient.[q] Although it was said, in another case, the note is described as made on the —— day of May, and the proof is, that the forged note was dated on a particular day, a conviction will be sustained, notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment.[r] It has been ruled, however, that upon a rule to show cause, the court will not order an attorney of the court to deliver to the State Attorney, for the inspection of the grand jury, promissory notes suggested to have been forged, which had been delivered

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[j] R. *v.* Coulson, 1 Eng. R. 550; S. C. 1 Temple & Men. C. C. 332; 4 Cox, C. C. 227.

[k] Com. *v.* Wright, 1 Cush. 66.

[m] Post, § 608.

[n] 2 T. R. 200.

[o] Rex. *v.* Haworth, 4 Car. & Payne, 254; Rex *v.* Hunter, 4 Car. & Payne, 128; see post, § 608–9.

[p] State *v.* Bonney, 34 Maine, 223; Sedgwick, J., 8 Mass. 110; People *v.* Bagley, 16 Wend. 53; Pendleton *v.* Com. 4 Leigh, 694; State *v.* Parker, 1 Chipman's Ver. R. 298; State *v.* Potts, 4 Halsted, 393; U. S. *v.* Britton, 2 Mason, 468; Bucher *v.* Jarrett, 3 Bos. & Pul. 143; Howe *v.* Hall, 14 East, 275.

[q] People *v.* Kingsley, 3 Cowen, 522.

[r] People *v.* Badgley, 16 Wend. 53.

to the attorney in the common course of business by his client suspected of committing the forgery.[s]

On the same ground, if the grand jury declare of an indecent libel, "that the same would be offensive to the court here, and improper to be placed on the records thereof:" the non-setting forth of the libel will be thereby sufficiently excused.[t] Thus in an indictment for publishing an obscene book or picture, it is not necessary that the libel should be set out at large,[u] but in such case it is necessary specifically to aver the reason of the omission.[v]

§ 312. (*f.*) *When any part may be omitted.*—Wherever the whole instrument is included in the offence, the whole of it must be set out in the indictment. But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus: "8th March, 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written, it was holden sufficient.[w] In all other cases, where part only of a written instrument is included in the offence, that part alone is necessary to be set out. Thus, in cases where portions of publications are libellous and others not, it is only necessary to state those parts containing the libels; and if the libellous passages be in different parts of the publication, distinct from each other, they may be introduced thus: "In a certain part of which said libel there were and are contained the false, scandalous, malicious, and defamatory words and matter following, that is to say," &c. "And in a certain other part of which said libel there were and are contained," &c.[x]

Where the indictment is for forging a note or bill, the indorsement, though forged, need not be set out.[y]

§ 313. (*g.*) *When the instrument is in a foreign language, or is on its face insensible.*—An instrument in a foreign language must be translated and explained by averments.[z] And so where initials appear without an averment of what they mean;[a] and where there is no averment of who the officer was whose name is copied in a forged instrument, there being no averment of what the instrument purports to be.[b]

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[s] State *v.* Squires, 1 Tyler's Ver. R. 147.

[t] Com. *v.* Holmes, 17 Mass. 336.

[u] Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 Serg. & Rawle, 91; People *v.* Girardin, 1 Mann. (Mich.) 90; State *v.* Brown, 1 Williams (Vt.), 619. For form, see Whar. Prec. 952, 968.

[v] Com. *v.* Tarbox, 1 Cush. 66.

[w] R. *v.* Testick, 1 East, 181, n.

[x] See Tarbart *v.* Tipper, 1 Camp. 350.

[y] Com. *v.* Ward, 2 Mass. 397; Com. *v.* Perkins, 7 Gratt. 654; Simmons *v.* State, 7 Hammond, 116; Com. *v.* Adams, 7 Metc. 50.

[z] R. *v.* Goldstein, R. & R. 473.

[a] R. *v.* Barton, 1 Moody, C. C. 141; R. *v.* Inder, 2 C. & K. 635.

[b] R. *v.* Wilcox, R. & R. C. C. 50.

§ 314. 2d. WHERE THE INSTRUMENT, AS IN LARCENY, &C., MAY BE DESCRIBED MERELY BY GENERAL DESIGNATION.

In each of the United States, as well as in the federal government, statutes exist making the larceny of bank notes, bonds, and other writings, for the payment of money, highly penal. It will not be consistent with the limits of this work to insert here statutes so numerous and so uniform ; but it is apprehended that a brief sketch of the adjudications under them, so far as the present head is concerned, will be of importance to the practitioner.

§ 315. (*a.*) *United States Courts.*—Money, and bank notes, and coin, are "personal goods," within the meaning of the sixteenth section of the crimes act of 1790, ch. 36, respecting stealing and purloining on the high seas.[c]

§ 316. An order on the cashier of the Bank of the United States is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States.[d] 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, inclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid.[e] It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed.[f]

§ 317. An instrument may be set out in an indictment, according to its legal effect, but if words are used descriptive of the instrument, though they might have been omitted, yet being stated, they must be proved.[g]

§ 318. A slight and unsubstantial variance between the indictment, on a trial for stealing bank notes inclosed in a letter, and the proof, in regard to the direction of the letter, which was not produced, and which the writer states, after the lapse of two years, with doubt, ought not to exclude the evidence.[h]

§ 319. (*b.*) *Massachusetts.*—An indictment under the act of March 15, 1785, for larceny, alleging that the defendant stole "a bank note of the value of —— of the goods and chattels of ——," is sufficient without a more particular description of the note.[i]

§ 320. (*c.*) *Connecticut.*—Where an information for theft described the property alleged to be stolen, as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank, in this State," it was held that this description was sufficiently certain.[j]

§ 321. (*d.*) *New York.*—A contract, not under seal, is incorrectly described as a bond, and the error is fatal.[k]

§ 322. Where the indictment stated that the defendant stole "four pro-

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[c] U. S. *v.* Moulton, 5 Mason, 537.
[d] U. S. *v.* Harmon, 1 Baldwin, 292.
[e] U. S. *v.* Lancaster, 2 McLean, 431.
[f] Ibid.
[g] U. S. *v.* Keen, 1 McLean, 429.
[h] U. S. *v.* Burroughs, 3 McLean, 405.
[i] Com. *v.* Richards, 1 Mass. R. 337.
[j] Salisbury *v.* State, 6 Conn. 101.
[k] People *v.* Wiley, 3 Hill, 194.

missory notes, commonly called bank notes, given for the sum of fifty dollars each, by the Mechanic's Bank in the city of New York, which were due and unpaid, of the value of two hundred dollars, the goods and chattels of P. C. then and there found, &c.;" it was held a sufficient description, without saying they were the property of P. C. The word chattels denotes property and ownership.[l]

§ 323. Under the New York statute, which makes the stealing of "personal property" larceny, an indictment for grand larceny, in stealing bank notes, alleged that the defendant feloniously stole, took, and carried away ten promissory notes, called bank notes, issued by the Chickapee bank, for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars; ten promissory notes, called bank notes, issued by the Aganam Bank, &c., of the goods, chattels, and property of B. M. It was held, on motion in arrest of judgment, that the indictment was sufficient. It was held also, that it was of no consequence whether the banks were organized within the bounds, and under the laws of New York, or were banks of other States or countries, so far as the allegations in the indictment were concerned; the name of the banks being mentioned by way of description of the property stolen.[m]

§ 324. In an indictment for stealing bank notes, it is sufficient to describe them in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels.[n]

§ 325. (*e.*) *Pennsylvania.*—Under the act of 15th April, 1790, an indictment for stealing bank notes, must lay them as promissory notes for the payment of money,[o] and, therefore, an indictment for stealing a "ten dollar note of the President, Directors and Company of the Bank of the United States," is bad.[p]

§ 326. Upon an indictment for stealing a bank note, or other instrument, evidence of the contents of the instrument stolen may be given, without proving notice to the defendant to produce the original at the trial.[q]

§ 327. Under the act of 1810, an indictment for stealing bank notes must aver in general that they were issued by a bank incorporated by law, or name the bank, and aver that it was incorporated, or show in some sufficient manner that the notes were lawful. Therefore, an indictment for

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[l] People *v.* Holbrook, 13 Johnson, 90.

[m] People *v.* Jackson, 8 Barbour, 637.

[n] People *v.* Jackson, 8 Barbour, 637.

[o] Com. *v.* Boyer, 1 Binn. 201.

[p] Ibid. In Pennsylvania, by the Revised act of 1860, it is provided as follows:—

Forms of indictment in cases of forging, stealing, &c.—In any indictment for forgery, uttering, stealing, embezzling, destroying or concealing, or obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof—*Rev. Act*, 1860, pamph. p. 435.

Forms in other cases.—In all other cases whatsoever in which it shall be necessary to make any averment in any indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, and in such manner as to sufficiently identify such instrument, without setting out any copy or fac-simile of the whole or any part thereof.—*Ibid.*

[q] Com. *v.* Messinger, 1 Bin. 274.

stealing bank notes, generally, describing them as "promissory notes for the payment of money," is bad.[r]

§ 328. An indictment charging that the defendant feloniously did steal and carry away "sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of the said A. M." is too vague and uncertain; the notes should be more particularly described, and it should be set forth that the money was unpaid on them;[s] though in a subsequent case, it was said that where there was enough in the description of the note to show it was unpaid, an express averment to that effect is unnecessary.[t]

§ 329. In the last mentioned case, Kennedy, J., after referring to a previous *dictum* to the contrary, by Duncan J., proceeded to say, "The only reason, I apprehend, that can be given for making such an averment necessary in respect to the notes, is, to show that they are of real value; because if paid, it might be said, perhaps, in most cases, that they could therefore, be of no real value; and that it would not only be oppressive and highly unjust, but contrary to the spirit of our penal code, to make them the subject of larceny. It, however, appears to me, that the description of the notes given in the indictment in this case, taken in connection with the allegations therein contained in respect to them show distinctly that they were of real, substantial valne. I do not consider it at all necessary that an express allegation should be made in the indictment, that the notes were unpaid at the time they are alleged to have been stolen, because that circumstance forms no part of the description of the notes given in the act of assembly itself, that are thereby made the subject of larceny."

§ 330. An indictment for stealing three promissory notes for the payment of money, commonly called bank notes, "on the Bank of the United States," was, in another case, held to be good.[u] It is not necessary to state that the bank was duly incorporated.[v] An indictment for stealing "a bank note of the Bank of Baltimore," without describing it as a promissory note for the payment of money, was bad under the act of 1790.[w]

§ 331. (*f.*) *New Jersey.*—"Bank notes," pleaded as such, are not goods and chattels under the statute.[x]

§ 332. (*g.*) *Maryland.*—In an indictment founded upon the act of 1809, ch. 138, for stealing a bank note, it is sufficient to describe the note as a bank note for the payment of, &c., and of the value of, &c. Nothing more is required than to charge the offence in the language of the act.[y]

§ 333. (*h.*) *North Carolina.*—In an indictment for stealing a bank note, a description of the note in the following words, "one twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars," is good.[z]

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[r] Spangler *v.* Com. 3 Binn. 533.
[s] Stewart *v.* Com. 4 Serg. & Rawle, 194.
[t] Com. *v.* M'Laughlin, 4 R. 464.
[u] McLaughlin *v.* Com. 4 Rawle, 464.
[v] Ibid.
[w] Com. *v.* M'Dowell, 1 Browne, 360.
[x] State *v.* Calvin, 2 Zabriskie, 207.
[y] State *v.* Casial, *alias* Baker, 2 Har. & Gill, 407.
[z] State *v.* Rout, 3 Hawks, 618.

§ 334. An indictment charged the defendant with feloniously stealing, &c., "a certain bank note, issued by the Bank of Newbern." The note offered in evidence upon the trial, purported to be issued by "the President and Directors of the Bank of Newburn," whereupon the defendant was acquitted, because the evidence did not support the charge. He was then indicted for feloniously stealing, &c., a certain note "issued by the President and Directors of the Bank of Newburn. To this indictment he pleaded "former acquittal," and in support of the plea produced the record of the first indictment and the proceedings thereon. It was held that the record produced did not support the plea, and the plea was overruled.[a]

§ 335. (*i.*) *Georgia.*—Where the indictment alleged that the notes stolen, were "notes of the Georgia Railroad and Banking Company," and the owner proved that he received them from such banking company, it was held, in the absence of all proof to the contrary, that this was sufficient proof of their genuineness to support the allegation.[b]

Some evidence of genuineness, however, must be given.[c]

§ 336. (*j.*) *Alabama.*—In an indictment charging the larceny of promissory notes, omission to charge the value of the notes is a material defect.[d]

§ 337. (*k.*) *Mississippi.*—The statute of this State makes obligations, bonds, bills, obligatory or bills of exchange, promissory notes for the payment of money, or notes for the payment of any specific property, lottery tickets, bills of credit, subjects of robbery and larceny.[e] It is not sufficient that the indictment describes a bank note as a promissory note for the payment of money, purporting to be a bank note.[f]

§ 338. (*l.*) *Missouri.*—It is not necessary to allege that the bank is chartered.[g]

§ 339. (*m.*) *Tennessee.*—The place of payment in a bank note, charged to have been stolen, need not be stated as descriptive of the note in the indictment; but if it is stated, it then becomes material as descriptive of the offence charged, and the note produced in evidence must correspond with the description given in the indictment, or it will be a fatal variance.[h]

§ 340. (*n.*) *Ohio.*—An indictment for stealing bank bills, is not sustained by proof that the prisoner stole the orders of the Ohio Railroad Company.[i] Indictments for having in possession counterfeit blank bank notes must specifically describe them.[j]

§ 341. 3d. WHAT GENERAL LEGAL DESIGNATION WILL SUFFICE.

§ 342. (*a.*) "*Purporting to be.*"—The pleader may aver the instrument to be of the class prohibited, or he may aver that it "purports to be," &c.,

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[a] State *v.* Williamson, 3 Murphey, 216.
[b] State *v.* Allen, Charlton, Geo. R. 518.
[c] Ibid.
[d] Wilson *v.* State, 1 Por. 118.
[e] Damewood *v.* State, 1 How. Miss. R. 262; Greesord *v.* State, 5 How. Miss. R. 33.
[f] Damewood *v.* State, 1 How. 262.
[g] M'Donald *v.* State, 8 Miss. 283.
[h] Hite *v.* State, 9 Yerger, 357.
[i] Grammond *v.* State, Wilcox, 510.
[j] M'Millan *v.* State, 5 Ohio, 269.

e. g. he may say that the defendant forged "a certain will," or "a certain false or paper writing *purporting to be* the last will," &c.[k] To aver the purport to be so and so, however, is sometimes dangerous, as it may happen from the imperfection of the instrument, that it is not what the pleader declares its purport to be (as where an instrument declared to "purport" to be a bank note, &c., turns out not to have been signed), in which case the variance is fatal.[l]

343. (*b.*) "*Receipt.*"—"Settled, Sam. Hughes," at the foot of a bill of parcels, was held to support an allegation of a receipt, without any explanatory averment.[m] Anything that avers payment, and is signed, is enough to bring the instrument within the term "Receipt."[n] But if the fact of payment does not either appear on the instrument, or is not avered,[o] or the name of the receipter is wanting, or is obscure and is not helped out by averments,[p] the indictment is bad.

§ 344. (*c.*) "*Bill of Exchange.*"—If the drawee's, payee's, or drawee's name be wanting or be insensible—if there be any conditions of payment—if the amount be uncertain, or if it be not expressed in money, the instrument will not sustain the technical description.[q] And so if there be an obscurity or error in the "acceptance,"[r] or the indorsement.[s] The indorsement it is not necessary to notice, if the indictment be for forging the acceptor's, or the drawer's name.[t]

§ 345. (*d.*) "*Promissory Note.*"—Great liberality has been used in the interpretation of this term when used in statutes making the forgery or larceny of "promissory notes" penal. Thus it has been held to include bank notes,[u] where the statute does not specifically cover "bank notes," though it seems to be otherwise when it does.[v] So, also, it is not necessary that the note be negotiable,[w] or be anything more than a mere due bill.[x] If it is not averred or implied to be still due and unpaid, however, it will not be within the statute,[y] though it is enough if on the face of the paper it appears still outstanding.[z]

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[k] 2 East, P. C. 980; R. *v.* Birch, 1 Leach, C. C. 791.

[l] R. *v.* Jones, Douglass, 300; 1 Leach, C. C. 204; R. *v.* Reading, 1 Leach, C. C. 590; 2 East, P. C. 952; R. *v.* Gilchrist, 2 Leach, C. C. 657; R. *v.* Edsall, 2 East, P. C. 984; 1 Bennett & Heard Lead. Cas. 318.

[m] R. *v.* Martin, 1 Moody, C. C. 483, 7 C. & P. 549; R. *v.* Boardman, 2 Moody & R. 147; R. *v.* Rogers, 9 C. & P. 41.

[n] Testick's Case, 2 East P. C. 925; R. *v.* Houseman, 8 C. & P. 180.

[o] R. *v.* Goldstein, R. & R. C. C. 473; R. *v.* Harvey, R. & R. 227; R. *v.* West, 2 C. & K. 496, 1 Den. C. C. 258.

[p] R. *v.* Hunter, 2 Leach, C. C. 624, 2 East, P. C. 977; R. *v.* Boardman, 2 Mood. & R. 147.

[q] R. *v.* Curry, 2 Moody, 218; People *v.* Howell, 4 Johns. 296; R. *v.* Birkett, R. & R. 251; R. *v.* Smith, 2 Moody, 295; R. *v.* Wicks. R. & R. 149; R. *v.* Hart, 6 C. & P. 106; R. *v.* Butterwick, 2 Mood. & R. 196; R. *v.* Randall, R. & R. 195; R. *v.* Bartlett, 2 Moody & R. 362.

[r] R. *v.* Cooke, 8 C. & P. 582; R. *v.* Rogers, 8 C. & P. 699.

[s] R. *v.* Arscott, 6 C. & P. 408.

[t] Ante, § 312.

[u] People *v.* Jackson, 8 Barbour, 637; Com. *v.* Boyer, 1 Binn. 201.

[v] Damewood *v.* State, 1 How. Miss. 262; Spangler *v.* Com. 3 Binn. 533.

[w] Story on Bills, § 60.

[x] People *v.* Finch, 5 Johns. 237.

[y] Com. *v.* McLaughlin, 4 R. 464; Stewart *v.* Com. 4 S. & R. 194.

[z] Ibid. State *v.* Rout, 3 Hawks, 618; Com. *v.* Richards, 1 Mass. R. 337.

§ 346. (*e.*) "*Bank Note.*"—In England, in an indictment under the 2d Geo. II., c. 25, the instrument stolen must be expressly averred to be a bank note, or a bill of exchange, or some other of the securities specified; and, therefore, it is insufficient to charge the defendant with stealing a certain note, commonly called a bank note, for none such is described in the act.[a] And in the case of a bank note, it is sufficient to describe it generally as a bank note of the Governor and Company of the bank of England, for the payment of one pound, &c., the property of the prosecutor; the said sum of one pound thereby secured, then being due and unsatisfied to the proprietor.[b] And notes, bills, &c., within the act, should be laid to be the property of A. B., and ought not to be described as chattels; but in one case,[c] where they were laid to be the property and chattels of J. S., the word chattels was rejected as surplusage. In Massachusetts, a bank note is sufficiently described as a "bank bill" in an indictment on Rev. Sts. c. 126, § 17, for stealing it.[cc]

An unnecessarily minute description of an instrument may be fatal: as where an indictment for stealing a bank note alleged to be "signed for the governor and company of the bank of England, by J. Booth," and no evidence of Booth's signature was given, the judges held the prisoner entitled to an acquittal:[d] and therefore it is best to describe it as simply as possible.

Whether it is necessary to aver the bank to have been incorporated, depends upon the particular statute. Unless the statute makes incorporation of the bank part of the description of the offence, the allegation of incorporation may be omitted.[e]

§ 347. (*f.*) "*Money.*"—Under the general term "money," bank notes, promissory notes, or treasury warrants, cannot be included.[f] In England, however, it has been held that bank notes are properly described in an indictment for larceny as "money," although at the time they were stolen they were not in circulation, but were in the hand of the bankers themselves.[ff]

§ 348. (*g.*) "*Goods and Chattels.*"—Under "goods and chattels" the better opinion now is that bank notes cannot be included,[g] nor bonds and mortgages,[h] nor coin.[i] But be this as it may, it seems that in such case the words "goods and chattels" may be discharged as surplusage, and a conviction sustained without them.[j]

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[a] Craven's Case, 2 East, P. C. 60.

[b] Starkie's C. P. 217.

[c] 2 East, P. C. 601; post, § 348.

[cc] Eastman *v.* Commonwealth, 4 Gray (Mass.), 416.

[d] R. *v.* Craven, Russ. & Ry. 110.

[e] M'Laughlin *v.* Com. 4 Rawle, 464; People *v.* Jackson, 8 Barbour, 637; see Pomeroy *v.* Com. 2 Va. Cases, 342; and see post, § 1488.

[f] R. *v.* Major, 2 East, P. C. 1118; State *v.* Foster, 3 M'Cord, 442; Williams *v.* State, 12 Sm. & M. 58; State *v.* Jim, 3 Murph. 3; Com. *v.* Swinney, 1 Va. Cases, 146; R. *v.* Hill, R. & R. 190.

[ff] R. *v.* West, 40 Eng. Law and Eq. 564.

[g] Com. *v.* Swinney, 1 Va. Cas. 146; State *v.* Calvin, 2 Zabr. 207; Com. *v.* Eastman, 2 Gray, 76; *contra*, People *v.* Kent, 1 Dougl. (Mich.) 142; as to English practice, see R. *v.* Mead, 4 C. & P. 535; R. *v.* Dunn, 2 Leach, 693; R. *v.* Crone, Jebb, 47; Anon. 1 Crawf. & Dix, C. C. 152.

[h] R. *v.* Powell, 14 Eng. Law and Eq. 575.

[i] Com. *v.* Radley, 3 Cox, C. C. 460; 2 C. & K. 977; 1 Den. C. C. 450.

[j] Ibid.; Com. *v.* Eastman, 2 Gray, 76; S. C. 4 Gray, 416; R. *v.* Morris, 1 Leach, C. C. 109; ante, § 346.

§ 349. (*h.*) *Warrant, order, or request for the payment of money.*—"Warrant" is now held to include any instrument for the payment of money, on which, if genuine, a recovery could be had.[k] "Order" implies beyond this, a mandatory power in the drawer.[l] "Request" is wider still, and includes a mere invitation.[m] Checks, drafts, and bills of exchange, fall under either head.[n] The writing need not be of a business character, nor negotiable.[o] A forged instrument of writing was in the following terms:—

"Mr. Davis: Wen. 19th.

"pleas let the boy have $6 00 dolers for me.

"B. W. EARL."

It was held that such instrument is *prima facie* an "order for the payment of money" within the meaning of the statute.[oo]

§ 350. Many subtleties formerly existed in the English law as to the distinctions between these several designations.[p] The pleader has, however, been relieved from most of these by a more recent case (1850), where it was held that if the instrument be set out *in hæc verba*, a misdescription will be immaterial, at least if it falls within *one* of several terms used to designate it.[q] And the intimation was even thrown out that where the indictment sets forth the forged instrument, the court will see whether it is within the statute (when the indictment is under a statute), and if so, will sustain a conviction, although it was not specifically averred to be an instrument which the statute covered. Thus, where the indictment charged the defendant to have forged a certain warrant, order, and request, in the words and figures following, to wit: "Mr. Bevan, S.—Pleas to send by bearer a quantity of basket nails," &c., the court of criminal appeal, Lord Campbell presiding, sustained the conviction, apparently on the ground that if there was a technical misnomer of the instrument, this was cured by its being fully set forth, and thus speaking for itself.[r]

When the pleader is doubtful as to the class in which the instrument falls, it seems, that instead of averring the instrument, as in the case last cited, to be "a certain warrant, order, and request," the correct course is to aver the uttering of one warrant, one order, and one request.[s]

If the writing, on its face, comes short of being either an order, warrant, or request, averment may be made, and evidence received, bringing it up to

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[k] R. *v.* Vivian, 1 C. & K. 719; R. *v.* Dawson. 1 Eng. Law and Eq. 589.

[l] R. *v.* Williams, 2 C. & K. 51.

[m] R. *v.* James, 8 C. & P. 292; R. *v.* Thomas, 2 Moody, 16; R. *v.* Newton, 2 Moody, 59; R. *v.* Walters, Car. & M. 588; R. *v.* White, 9 C. & P. 282.

[n] R. *v.* Willoughby, 2 East, P. C. 944; R. *v.* Shepherd, ibid.; People *v.* Howell, 4 Johns, 296; State *v.* Nevins, 23 Vt. 519.

[o] 2 Russ. on Crimes, 514.

[oo] Evans *v.* The State, 8 Ohio State Rep. (N. S.) 196.

[p] The following cases are generally referred to under this head: R. *v.* McIntosh, 2 East, P. C. 942; R. *v.* Anderson, 2 Moody & R. 469; R. *v.* Dawson, 1 Eng. Law and Eq. 589; R. *v.* Williams, 2 C. & K. 51; R. *v.* Hart, 6 C. & P. 106; R. *v.* Roberts, C. & M. 652.

[q] R. *v.* Williams, 2 Den. C. C. 61; 4 Cox, C. C. 256; 2 Eng. Law and Eq. 533.

[r] R. *v.* Williams, ibid.

[s] R. *v.* Williams, ibid.

the required standard, as where the name of the party addressed is omitted,[t] or where the body of the writing is on its face insensible.[u]

(*i.*) "*Piece of Paper.*"—It has been sometimes the practice to aver, in larceny, the stealing of "one piece of paper of the value of one dollar, &c.," as the case may be; and it has been thought that in this way the difficulty as to setting out doubtful instruments could be avoided. How far this is the case will be considered hereafter.[v]

VIII. Words spoken.

§ 351. Where words are the gist of the offence, they must be set forth in the indictment with the same particularity as a libel; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office;[w] or for blasphemous or seditious words.[x] It is not enough, in such case, to lay the substance of the words alleged to have been spoken. The words themselves must be laid, but only the substance need be proved.[y] It has been said, however, that as there can be no tenor set forth of words spoken, where the sense and meaning of the words set down in the indictment are precisely the same with those proven in evidence, though not the very same words, such evidence will support the indictment; but then the meaning must be evidently and clearly the same, without the help of any implication or anything extrinsic.[z] Should any substantial difference exist between the words proved and those laid—even if laid as spoken in the third person and proved to have been spoken in the second,[a] the defendant must be acquitted. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient.[b]

§ 352. Where words are laid as an overt act of treason, it is sufficient to set forth the substance of them;[c] for they are not the gist of the offence, but proofs or evidences of it merely.

Where any matter laid in an indictment is to be proved by a record, great care must be taken that the statement corresponds exactly with the record; for the slighest variance in substance will be fatal.[d]

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[t] R. *v.* Carney, 1 Mood. 351; R. *v.* Pullbrook, 9 C. & P. 37; R. *v.* Rogers, 9 C. & P. 41.

[u] R. *v.* Walters, C. & M. 588; R. *v.* Atkinson, C. & M. 325; R. *v.* Cullen, 1 Moody, 300; State v. Crawford, 13 La. Ann. 243.

[v] Post, § 1758.

[w] R. *v.* Bagg, 1 Ro. Rep. 79; R. *v.* How, 1 Str. 699.

[x] R. *v.* Popplewell, 1 Str. 686; R. *v.* Sparling, Id. 498.

[y] Updegraff *v.* Com. 11 Serg. & Rawle, 394; Com. *v.* Kneeland, 20 Pick. 206; Bell *v.* State, 1 Swan (Tennes.), 42. See post, § 2553.

[z] State *v.* Bradley, 1 Hay, 403, 463; State *v.* Coffey, N. C. Term R. 272; State *v* Ammond, 3 Murphey, 123; People *v.* Warner, 5 Wend. 271.

[a] R. *v.* Perry, 4 Tr. R. 217. See post, § 2553.

[b] Com. *v.* Kneeland, 20 Pick. 206.

[c] Fost. 194; R. *v.* Layer, 8 Mod. 93; 6 St. Tr. 328.

[d] Archbold's C. P. 45; post, § 606-10.

IX. Personal chattels.

1st. Indefinite, insensible, or lumping descriptions, § 354.
2d. Value, § 362.
3d. Money or coin, § 363.

§ 353. In this connection it is simply proposed to treat the pleading of personal chattels so far as necessary for the purpose of a demurrer, or a motion in arrest of judgment. The question of variance between the description and the evidence will be considered under a future head.[e]

1st. Indefinite, insensible, or lumping description.

§ 354. When, as in larceny, or receiving stolen goods, personal chattels are the subject of an offence, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated;[f] thus, for instance, "one coat of the value of twenty shillings, two pairs of boots, each pair of the value of thirty shillings, two pairs of shoes, each pair of the value of twelve shillings, two sheets, each of the value of thirteen shillings, of the goods and chattels of one J. S.," or "one sheep of the price of twenty shillings," &c., and the like. If the description were "twenty wethers and ewes," the indictment would be bad for uncertainty; it should state how many of each.[g] On the other hand, in California, an indictment, charging the defendant with feloniously taking three head of cattle is sufficiently certain under the statute, without showing the particular species of cattle taken.[gg]

An indictment charging the defendant with the larceny of "six handkerchiefs" is good, though the handkerchiefs were in one piece, the pattern designating each handkerchief.[h]

§ 355. The common and ordinary acceptation of property is to govern its description, and the certainty must be to a common intent, by which is meant such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject matter of the offence charged.[i]

It is sufficiently certain to describe the article stolen as "one hide of the value," &c.[j]

An indictment charging A. with stealing a book of the value of three dollars, is correct, and the title of the book need not be stated."[k]

§ 356. A count charging manslaughter on the high seas, by casting F. A. from a vessel, whose name was known, is sufficiently certain; and so of a

[e] Post, § 610, 1, 2, 3.

[f] See 2 Hale, 182, 183. Post, § 613.

[g] 2 Hale, 183; Archbold's C. P. 45.

[gg] People v. Littlefield, 5 Cal. 355.

[h] 6 Term R. 267; 1 Ld. Raym. 149.

[i] People v. Jackson, 8 Barb. S. C. 657; Reed's case, 2 Rodger's Rec. 168; Com. v. Wentz, 1 Ashmead, 269; Com. v. James, 1 Pick. 376.

[j] State v. Dowell, 3 Harr. & John, Md. R. Pa. 310.

[k] State v. Logan, 1 Missouri R. 377.

count charging the offence to have been committed from a long-boat of the ship W. B., belonging, &c.[l]

§ 357. An indictment charging the prisoner with stealing "one ham," of the value of ten shillings, of the goods and chattels of T. H., was held good, although it did not state the animal of which the ham had formed a part.[m] But an indictment for stealing "meat" is bad for generality.[mm]

§ 358. A loose and indeterminate designation is bad. Thus in Louisiana judgment was arrested on an indictment which charged the defendant with stealing a "lot of lumber," a "certain lot of furnitnre," and "certain tools."[n] On the other had in North Carolina, "a parcel of oats" was adjudged a sufficient description of the stolen property.[o]

In larceny, however, particular descriptions of the goods taken have never been considered necessary, and the description given in the law which enacts the offence in statutable larcenies, has in general been deemed sufficient. This doctrine is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not therefore enabled to give a minute description; and principally because, notwithstanding the general description, it is made certain to the court from the face of the indictment, that a crime has been committed, if the facts be true.[p]

Substances mechanically mixed should not be described in an indictment as "a certain mixture consisting of, &c.," but by the names applicable to them before such mixture, though it is otherwise with regard to substances chemically mixed."[q]

§ 359. Where the larceny of live animals is charged, it is not necessary to state them to be alive, because the law will presume them to be so unless the contrary be stated; but if when stolen the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal.[r] But if an animal have the same appellation, whether it be alive or dead, and it makes no difference as to the charge whether it were alive or dead; it may be called, when dead, by the appellation applicable to it when alive.[s]

§ 360. An indictment for stealing chattels which are the subject of a larceny only in particular cases or under certain circumstances, must show that they fall within the requisite description. Thus an indictment for stealing "three eggs" was ruled to be bad, because only the eggs of animals *domitæ naturæ* are the subject of larceny.[t] But an indictment for bestiality, which described the animal as "a certain bitch," was held sufficiently certain, al-

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[l] United States *v.* Holmes, 1 Wal. Jun. 1.

[m] R. *v.* Gallears, 2 Car. & Kir. 981; S. C. 1 Den. C. C. 501.

[mm] State *v.* Morey, 2 Wis. 494.

[n] State *v.* Edson, 10 La. R. 229.

[o] State *v.* Brown, 1 Devereux, 137.

[p] State *v.* Scribner, 2 Gill. & J. 246.

[q] R. *v.* Bond, 1 Den. C. C. 517.

[r] R. *v.* Edwards, R. & R. 497; R. *v.* Halloway, 1 C. & P. 128; see R. *v.* Williams, 1 Mood, C. C. 107; see post, § 1751–69.

[s] R. *v.* Puckering, 1 Mood. C. C. 242. Post, § 377.

[t] R. *v.* Cox, 1 C. & K. 494; *sed quære*, 1 Den. C. C. 502.

though the female of foxes and some other animals, as well as of dogs, are so called.[u]

§ 361. The prosecutor is bound by the description of the species of goods stated; thus, for instance, an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles or in their value, is immaterial, provided the value proved be sufficient to constitute the offence at law. So if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest.[v]

2d. Value.

§ 362. It is necessary that some specific value should be assigned to whatever articles are charged as the subjects of larceny.[w] An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value.[x] A count, however, for stealing "one piece of paper, of the value of one cent," would be good, when a count for stealing a bank note fails,[y] in consequence of the instrument described being void, but not where it is valid.[yy]

An averment of the value of bank notes is always necessary, but not so of government coins.[z]

A description in an indictment in these words, "ten five-dollar bank bills of the value of five dollars each," is sufficiently definite. The fact that the notes passed currently at the time of the alleged larceny, for their nominal value, is *prima facie* evidence that they were worth that amount.[zz]

Where value is essential to constitute the offence, and the value is ascribed in the indictment to many articles collectively, the offence must be made out as to all the articles; for the grand jury have ascribed the value to all the articles collectively.[a]

3d. Money or coin.

§ 363. Money is described as so many pieces of the current gold or silver coin of the realm, called ——. The species of coin must be specified.[aa]

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[u] R. *v.* Allen, Id. 495.

[v] People *v.* Wiley, 3 Hill's N. Y. 194; Com. *v.* Eastman, 2 Gray, 76; Com. *v.* Williams, 2 Cush. 583; post, § 619; see 3 Hill's So. C. 1; Thatcher's C. C. 722. Post, § 391, 619, 628.

[w] Roscoe's C. Ev. 512; People *v.* Payne, 6 Johnson R. 103; State *v.* Smart, 4 Rich. 237; State *v.* Tilley, 1 Nott & M'Cord, 9; State *v.* Thomas, 2 M'Cord, 527; State *v.* Wilson, 1 Porter, 110; State *v.* Allen, Charlton, 518; State *v.* Stimson, 4 Zabr. 9. Ante, § 354–5. Post, § 613.

[x] State *v.* Bryant, 2 Car. Law Rep. 617.

[y] R. *v.* Perry, 1 Den. C. C. 69; S. C. 1 Car. & K. 727; R. *v.* Clark, R. & R. 181; 2 Leach, 1039.

[yy] Post, § 1758.

[z] State *v.* Stimson, 4 Zabr. (N. J.) 9.

[zz] Pyland *v.* State, 4 Sneed (Tenn.), 357.

[a] R. *v.* Forsyth, R. & R. 274; Hope *v.* Com. 9 Met. 134.

[aa] R. *v.* Fry, R. & R. 482; see R. *v.* Warshoner, 1 Mood. C. C. 466; *Contra* U. S. *v.* Rigsby, 2 Cranch, C. C. R. 364.

"Bank notes" have been already noticed.[b]

"United States gold coin" is equivalent to "Gold coin of the United States;" such coin is current by law; and both court and jury know, without allegations, that a gold coin of the denomination and valne of ten dollars, is an eagle.[bb]

A count charging the conversion of "$19,000 of money, and $19,000 of bank notes," is bad for uncertainty.[c]

An indictment for larceny from the person of "sundry gold coins, current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors cannot give, as they have no means of knowledge," and containing similar allegations as to bank bills and silver coin, is sufficiently specific to warrant a judgment upon a general verdict of guilty.[cc]

X. Offences created by statute.

1st. Generally sufficient, and always necessary, to use words of statute, § 364.
2d. Common law offences made indictable by statute, § 371.
(a) Statutory directions must be pursued, § 371.
(b) Not enough to charge offence as a mere conclusion of law, § 372.
(c) When common law and statutory indictments are cumulative, § 373.
3d. Technical averments in statutes, § 374.
4th. Description of animals in statute, § 377.
5th. Provisos and exceptions, § 378.

1st. Generally sufficient and always necessary to use words of statute.

§ 364. It is a well settled general rule, that in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute; and if, in any case, the defendant insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule.[ccc] But few exceptions to this rule are recognized.[d] Where the words of the statute are descriptive of the offence, the indictment should follow the language, and expressly charge the described offence on

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[b] Ante, § 346.

[bb] Daily *v.* State, 10 Ind. 536.

[c] State *v.* Stimson, 4 Zabr. (N. J.) 9.

[cc] Commonwealth *v.* Santelle, 11 Cush. (Mass.) 142.

[ccc] Respublica *v.* Trier, 3 Yeates, 451; U. S. *v.* Batchelder, 2 Gall. 15; State *v.* Hickman, 3 Halstead, 299; State *v.* Little, 1 Vermont, 331; Whiting *v.* State, 14 Connect. 487; State *v.* Williams, 2 Strobh. 474; Camp. *v.* State, 3 Kelly, 419; U. S. *v.* Dickey, 1 Morris, 412; State *v.* Click, 2 Ala. 26; Resp. *v.* Bush, 2 Texas, 455; Drummond *v.* Resp. Ibid. 156; State *v.* Seamons, 1 Iowa, R. 418; Com. *v.* Hampton, 3 Grat. 590; State *v.* Hereford, 13 Miss. 3; Buckley *v.* State, 2 Greene, 270; State *v.* Bullock, 13 Ala. 413; State *v.* Ladd, 2 Swan, 226; Lodano *v.* State, 25 Alab. 64; Cook *v.* State, 11 Georg. 53; Com. *v.* Chapman, 5 Wharton, 427; State *v.* Blease, 1 M'Mullin, 472.

[d] State *v.* Stanton, 1 Iredell, 424; State *v.* Rust, 35 N. H. 438; State *v.* Cord, 34 N. H. 510; State *v.* Abbott, 11 Foster (N. H.), 434; Romp. *v.* State, 3 Iowa, 276; State *v.* Ragan, 22 Mis. (1 Jones), 459; U. S. *v.* Andrews, 2 Paine, C. C. 451; U. S. *v.* Pond. 2 Curtis, C. C. 265; State *v.* Garney, 37 Maine (2 Heath), 149; State *v.* Shiflet, 20 Mis. (5 Bennett), 415; Sharp *v.* State, 17 Geo. 290; State *v.* Ladd, 2 Swan (Tenn.) 226.

the defendant, or it will be defective.[e] It is necessary that the defendant should be brought within all the material words of the statute; and nothing can be taken by intendment.[f]

§ 365. If the indictment profess to recite the statute, a material variance will be fatal, or if the statute do not support the verdict, it must fail.[g] Thus, where the defendant was indicted under the South Carolina act of assembly of 1736–37, for forgery and passing a forged bank note, the charge in the indictment being "did dispose of and put away," but the words of the act, "utter and publish;" the judgment was arrested, because the words of the statute describing the offence were not pursued with the requisite exactness.[h]

Where a general word is used, and afterwards, more especial terms, defining an offence, an indictment, charging the offence, must use the most special terms; and if the general word is used, though it would embrace the special term, it is bad.[i]

An indictment on a private statute must set out the statute at full.[j]

§ 366. The indictment must show what offence has been committed, and what penalty incurred, by positive averment. It is not sufficient that they appear by inference.[k] It is not necessary, however, in such an indictment, to indicate the particular section, or even the particular statute, upon which it is founded. It is only necessary to set out in the indictment such facts as bring the case within the provisions of some statute which was in force when the act was done, and also when the indictment was found.[l]

§ 367. Where a statute creates an offence, which, from its nature, requires the participation of more than one person to constitute it, a single individual cannot be charged with its commission unless in connection with persons unknown.[m] Thus, an indictment against one individual unconnected with others based upon that section of the Vermont statute relative to offences against public policy which inflicts a penalty upon each individual of any company of players or persons whatever, who shall exhibit any tragedies, &c., is insufficient.[n]

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[e] State *v.* Gibbons, 1 Southard, 51; State *v.* Calvin, Charlton, 151; 1 Hale, 517, 526, 535; 2 Hale, 170; Staundf. 130, b.; Fost. 423, 424; Hard. 2; Dyer, 304; Kel. 8; Com. Dig. Just. G. 1; 1 Chitty on Pleading, 357; Fost. 424; Moore, 5; 1 Hale, 535; 1 Leach, 264; 1 East, P. C. 419; 2 Hale, 189, 190; 1 Eliz. c. 1, s. 25; 3 Dyer, 363; 2 Hale, 193; 2 Ld. Raym. 791; 2 Burr, 679; 1 T. R. 222; U. S. *v.* Lancaster, 2 M'Lean's R. 431; People *v.* Allen, 5 Denio, 76; Com. *v.* Hampton, 3 Grat. 590; State *v.* Pratt, 10 La. 191.

[f] State *v.* Foster, 3 McCord, 442; State *v.* O'Bannon, 1 Bail. 144; State *v.* La Preux, 1 M'Mull. 488; State *v.* Noel, 5 Black. 548; Chambers *v.* People, 4 Scam. 351; U. S. *v.* Lancaster, 2 M'Lean, 431; State *v.* Duncan, 9 Port. 260; State *v.* Mitchell, 6 Mis. 147; State *v.* Helm, 6 Mis. 263; Ike *v.* State, 23 Miss. 525.

[g] Butler *v.* State, 3 M'Cord, 383.

[h] State *v.* Petty, Harp. 59.

[i] State *v.* Plunkett, 2 Stewart, 11; State *v.* Raiford, 7 Porter, 101; Archbold, C. P. 93.

[j] State *v.* Cobb, 1 Den. & Bat. 115; Goshen *v.* Sears, 7 Connect. 92; 1 Sid. 356. 2 Hale, 172; 2 Hawk. c. 25, s. 103. Bac. Abr. Indict. p. 2.

[k] Com. *v.* Walters, 6 Dana, 291; State *v.* Briley, 8 Porter, 472; Hampton's case, 3 Gratt. 590.

[l] Com. *v.* Griffin, 21 Pick. 523, 525.

[m] See post, § 431.

[n] State *v.* Fox, 15 Vermont, 22.

§ 368. Though the language of the statute be disjunctive, *e. g.*, burned *or* caused to be burned, and the indictment charge the offence in the conjunctive, *e. g.*, burned *and* caused to be burned, the allegation, as has been noticed, is sufficient.[o] On the other hand when the words of the statute are synonymous, it is not error to change them alternately.[oo]

§ 369. Defects in the description of a statutory offence will not be aided by verdict,[p] nor will the conclusion *contra formam statuti* cure it.[q] But if the indictment describe the offence in the words of the statute, in England, after verdict, by the operation of the 7th Geo. 4, c. 64,[r] it will be sufficient in all offences created or subjected to any greater degree of punishment by any statutes.[s] Such cases, however, are rare, and at common law the features of the statute must be enumerated by the indictment with rigid particularity.

§ 370. When the language of a statute, it is said, is intelligible, the courts must give it effect, according to its obvious meaning, notwithstanding its provisions are so extraordinary or peculiar, or so inaccurately expressed as to induce a strong suspicion that they do not convey the true legislative intention.[t]

In Pennsylvania, by the Revised Act of 1860, it is provided—

"That wherever anything is forbidden or directed by the provisions of this code, by using the general terms, any one, any person, the person, every person and such person, or the relative pronoun he, referring to such general term, the same prohibition or direction, if the contrary be not expressed, is extended to more persons than one, and to females as well as males doing or omitting the same act."[tt]

2d. Common law offences made indictable by statute.

§ 371. (*a.*) *Statutory directions must be pursued.*—Where an act not before subject to punishment is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued.[u] Where an offence is created by statute, or the statutes declares a common law offence committed under peculiar circumstances not necessarily included in the original offence, punishable in a different manner from what it would be without such circumstances; or where the nature of the common law offence is changed by statute from a lower to a lower grade, as where a misdemeanor is changed into a felony; the indictment must be drawn in reference to the provisions of the statute, and conclude *contra formam statuti;* but where the statute is only declaratory of what was previously an offence at common

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[o] State *v.* Price, 6 Halsted, 203; Angel *v.* Com. 2 Virg. Cases, 331; Rasnick *v.* Com. Ibid. 356; State *v.* Houseall, 2 Rice's Dig. 346; Jones *v.* State, 1 M'Mullan, 236; ante, 294; post, § 390.

[oo] State *v.* Ellis, 4 Mis. 474, ante, § 294.

[p] See Lee *v.* Clarke, 2 East, 333.

[q] 2 Hale, 170; and see R. *v.* Jukes, S. T. R. 536; Com. Dig. Information, D. 3.

[r] See ante, § 216.

[s] R. *v.* Warsboner, 1 Mood. C. C. 466.

[t] Sneed *v.* Com. 6 Dana, 339.

[tt] Rev. Act Bill, I. § 184.

[u] Com. *v.* Howes, 15 Pick. 231; Journey *v.* State, 1 Missouri, 304.

law, without adding to or altering the punishment, the indictment need not so conclude.[v]

§ 372. (*b.*) *Not enough to charge offence as a mere conclusion of law.*—Where a statute refers to a common law offence by its popular name, and proceeds to impose a penalty on its commission, it is of course insufficient to charge the defendant with the commission of the offence in the statutory terms alone.[w] The cases are familiar where, notwithstanding the existence of statutes assigning punishments to "murder," "arson," "burglary," &c., by name, with no further definition, it has been held necessary for the pleader to define the offences by stating the common law ingredients necessary to its consummation.[x] Under the U. S. statute declaring it an offence to "make a revolt," an indictment averring merely that the defendant "made a revolt," is bad.[y] So, under the Pennsylvania statute making "fraud" in election officers indictable, the indictment must show what the "fraud" was.[z] Again, under the Virginia statute constituting attempts to commit offences misdemeanors, it is not enough to say the defendant "attempted" to maim; the particulars of the attempt must be set forth.[a] But under the Indiana act making gaming indictable it is not necessary to aver the particular game played.[b]

An indictment may well allege an offence to be a misdemeanor, if it comes within a statute definition of a misdemeanor, although the statute creating the offence does not declare it to be such.[c]

The misrecital of the title of a public statute, so as to make it senseless, in a complaint charging an act to have been done in violation thereof, and not otherwise showing that the act was illegal, is a fatal defect.[cc]

§ 373. (*c.*) *When common law and statutory indictments are cumulative.*—Generally where a statute gives a peculiar summary remedy, the remedy by indictment still continues open.[d]

In Pennsylvania, as it has been noticed, it is required by act of assembly, that every act must be followed strictly, and where a statutory penalty is imposed, the common law remedy is forever abrogated.[e] It has accordingly, been held that where a magistrate is guilty of extortion, the common law

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[v] People *v.* Enoch, 13 Wend. 159; State *v.* Loftin, 2 Dev. & Bat. 31; see ante, § 10, 11, 12.

[w] State *v.* Absence, 3 Porter, 397; State *v.* Stedman, 7 Porter, 495.

[x] See ante, § 288; Com. *v.* Stout, 7 B. Monroe, 247.

[y] U. S. *v.* Almeida, U. S. Dis. Ct. 1847, Kane, J., cited ante, § 285, n.

[z] Com. *v.* Miller, 2 Par. 481.

[a] Clark's case, 6 Grat. 675; see R. *v.* Marsh, 1 Den. C. C. 105; and see ante, § 8.

[b] State *v.* Dole, 3 Blackford, 294; State *v.* Brougher, Ib. 309.

[c] Hare *v.* State, 3 Kelly, 18.

[cc] Commonwealth *v.* Unknown, 6 Gray, (Mass.) 489.

[d] State *v.* Thompson, 2 Strobh. 12; R. *v.* Jackson, Cowp. 297; R. *v.* Wigg. 2 Ld. Raym. 1163; U. S. *v.* Halberstadt, Gilpin, 262; Jennings *v.* Com. 17 Pick. 80; Pitman *v.* Com. 2 Robinson, 800; State *v.* Rutledge, 8 Humph. 32; Simpson *v.* State, 10 Yerger, 525; State *v.* Moffett, 1 Greene (Iowa) 247.

[e] Act 21st March, 1806, sect. 13; 4 Smith's Laws, 332; Resp. *v.* Tryer, 3 Yeates, 451; Updegraff *v.* Com. 6 Serg. & Rawle, 5; 3 Ibid. 273; 1 Rawle, 290; Pa. R. 180; 3 Watts, 330; 5 Rawle, 64; 7 Watts 199; 5 Wharton, 357; Evans *v.* Com. 13 Serg. & Rawle, 426 see ante § 11.

remedy, by indictment, is abrogated by the act of assembly giving the injured party, in such case, a *qui tam* action for the penalty.[f] But it must be conceded that the courts have shown great unwillingness to extinguish the common law remedy in all cases where a statutory penalty is created. Thus nuisances to navigable rivers are still indictable at common law though the act of 23d of March, 1803, points out a peculiar procedure by which the obstruction is to be abated;[g] and a common law indictment is preserved against an interference with the health of the city of Philadelphia, though the legislature has particularly committed that interest to the care of a Board of Health, with plenary powers to abate or indict.[h]

3d. Technical averments in statutes.

§ 374. In an indictment on the statute which makes it high treason to clip, round, or file any of the coin of the realm, "for wicked lucre or gain sake," it was necessary to charge the offence to have been committed for the sake of wicked lucre or gain, otherwise it would be bad.[i]

§ 375. In another case, an indictment on that part of the black act (now repealed) which made it felony, "*wilfully and maliciously*," to shoot at any person in a dwelling-house or other place, was holden bad because it charged the offence to have been done "*unlawfully and maliciously*," omitting the word "wilfully;"[l] some of the judges indeed thought that "maliciously" included "wilfully;" but the greater number held, that as wilfully *and* maliciously were both mentioned in the statute, as descriptive of the offence, both must be stated in the indictment. But, in Pennsylvania, an indictment for arson, charging that the defendant did "feloniously, unlawfully, and maliciously set fire, &c., was held to be sufficient without the word "wilfully," though "wilfully" was included in the description of the offence given in the act constituting it.[m] In New Hampshire the contrary view has been taken.[mm]

§ 376. An indictment upon Stat. 7 and 8 G. IV., c. 39, sect. 2, for feloniously, voluntarily, and maliciously setting fire to a barn, was holden bad, because the words of the statute are "unlawfully and maliciously."[n]

Where an indictment charged in one count that the defendant did break *to get* out, and in another that he did break *and get* out, it was holden insufficient, because the words of the statute are "break out."[o] But wherever there is a change of phraseology, and a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. Thus, if the word "*knowingly*" be in the statute, and the word "*advisedly*" be substituted for it in the indictment,[p] or the word "*wilfully*" in the statute, and "*maliciously*" in

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[f] Evans *v.* Com. 13 Serg. & Rawle, 246.
[g] Com. *v.* Church, 1 Barr. 107.
[h] Com. *v.* Vansickle, 1 Brightly, 69; see ante, § 11.
[i] 1 Hale, 220.
[l] R. *v.* Davis, Leach, 556.
[m] Chapman *v.* Com. 5 Wharton, 427.
[mm] State *v.* Cord, 34 N. H. 510.
[n] R. 5. Turner, 1 Mood. C. C. 239.
[o] R. *v.* Compton, 7 C. & P. 139.
[p] R. *v.* Fuller, 1 B. & P. 180.

the indictment, the words "*advisedly*" and "*maliciously*" not being in the statutes respectively, the indictment would be sufficient.

It is not essential on an indictment on the slave trade act of 20th of April, 1818, c. 86, sects. 2 and 3, to aver that the defendant knowingly committed the offence.[q]

4th. DESCRIPTION OF ANIMALS IN STATUTES.

§ 377. Where an indictment on the repealed statutes 15 G. II., c. 34, and 14 G. II., c. 6, which made it felony, without benefit of clergy, to steal any cow, ox, heifer, &c., charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was holden to be a fatal variance; for the statute having mentioned both cow and heifer, it was presumed that the words were not considered by the legislature as synonymous.[r] In South Carolina, however, it was said that the word "horses" may be fairly construed to include mares, as *nomen generalissimum.*[s] In Vermont, "cattle or beast" is said to sustain a conviction where "steer" was the term used in the indictment;[t] and in Tennessee, "beast," under like circumstances, includes cow.[u] But in South Carolina it was determined that the word pig, not being in the act of assembly against hog stealing, an indictment for stealing a pig, contrary to the act, cannot be supported.[v] In England, under the repealed statute,[w] which contained only the words "horse, gelding, or mare," upon an indictment for stealing two colts, the judges were unanimously of the opinion that, as colts were not mentioned *eo nomine* in the statute, they could not take notice that they were of the horse species;[x] although upon the same statute it was decided that an indictment of stealing a "mare" was proved by evidence of stealing a filly.[y] A "ewe"[z] or "lamb"[a] may be included under the general term "sheep," when such general term stands alone in the statute, without "ewes" or "lambs" being specified; but not otherwise.[b] Under the term "cattle" may be included "pigs,"[c] "asses,"[d] "horses,"[e] and "geldings,"[f] but not a domesticated buffalo.[ff] Under the Missouri statute against maliciously killing "the cattle" of another,[g] an indictment for maliciously killing "a certain horse beast, to wit, one mare," is sufficient.[gg]

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[q] U. S. *v.* Smith, 2 Mason, 143.
[r] R. *v.* Cooke, 2 East, P. C. 617; Deach, 123; see also R. *v.* Douglas, 1 Camp. 212.
[s] State *v.* Dunnavant, 3 Brevard, 9.
[t] State *v.* Abbott, 20 Vt. 537.
[u] Taylor *v.* State, 6 Humph. 285.
[v] State *v.* McLain, 2 Brev. 443, *sed quære.*
[w] 2 and 3 Ed. 6, c. 33.
[x] R. *v.* Beany, R. & R. 416.
[y] R. *v.* Welland, R. & R. 494; see also R. *v.* Chard, R. & R. 488; see ante, § 357, 364.
[z] R. *v.* Barran, Jebb, 245; R. *v.* Barmam, 1 Crawf. & Dix, C. C. 147.
[a] R. *v.* Spicer, 1 Car. & K. 699; State *v.* Tootle, 2 Harring. 541.
[b] R. *v.* Puddifoot, 1 Moody, 247; R. *v.* Loom, Ibid. 160.
[c] R. *v.* Chapple, R. & R. 77.
[d] R. *v.* Whitney, 1 Moody, 3.
[e] R. *v.* Moyle, 2 East, P. C. 1076.
[f] R. *v.* Mott, Ibid. 1075.
[ff] State *v.* Crenshaw, 22 Mis. (1 Jones) 457.
[g] Rev. Code, 1845, § 57.
[gg] State *v.* Hambleton, 22 Mis. (1 Jones) 452.

5th. Provisos and Exceptions.

§ 378. If provisos and exceptions are contained in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains.[h] Nor is it even necessary to allege, that he is not within the benefit of its provisos, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereinafter excepted.[hh] For all these are matters of defence, which the prosecutor need not anticipate, but which are more properly to come from the prisoner.[i]

§ 379. But where the proviso adds a qualification to the enactment, so as to bring a case within it, which, but for the proviso, would be without the statute, the indictment must show the case to be within the proviso.[j] Therefore, an indictment under the North Carolina statute of 1790,[k] against bigamy, which avers that the first wife was living at the time of the second marriage, is good, without an averment that the first marriage then subsisted.[l] So it is held, that no allegation of unlawfulness, nor of being against the statute, nor any conclusion, will make good the indictment, if it does not bring the fact prohibited or commanded, in the doing or not doing of which the offence consists, within the material words of the statute. Hence, if the statute forbids the doing of a particular act, without the authority of either one of two things, the indictment must negative the existence of both these things before it can be supported.[m] If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute.[n] Thus, where a statute imposes a penalty on the selling of spirituous liquors without a license, it is necessary to aver the want of a license in the in-

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[h] 1 Sid. 303; 2 Hale, 171; 1 Lev. 26; Poph. 93, 94; 2 Burr, 1037; 2 Stra. 1101; 1 East, Rep. 646, in notes; 5 T. R. 83; 1 Bla. Rep. 230; 2 Hawk. c. 25, s. 112; Bac. Ab. Indict. H. 2; Burn, J., Indict. ix.; 1 Chitty on Pleading, 357; Colson *v.* State, 7 Blackf. 590; Wooley *v.* State, 11 Humph. 172; Metzger *v.* People, 14 Ill. 101; State *v.* Miller, 24 Conn. 522; State *v.* Abbott, 11 Foster (N. H.), 434; Romp *v.* State, 3 Iowa, 276; State *v.* Gurney, 37 Maine (2 Heath), 149; State *v.* Shiflet, 20 Mis. (5 Bennett), 415; State *v.* Wade, 34 N. H. 495; State *v.* Abbey, 3 Williams (29 Vt.), 60; State *v.* Powers, 25 Conn. 48; State *v.* Fuller, 33 N. N. 259. See on this head, a very elaborate and able note in 1 Bennett & Heard's Leading Cases, 250. See also, as to proof of negative averments, post, § 614.

[hh] Matthews *v.* State, 2 Yerger, 233; State *v.* Adams, 6 N. Hamp. 533; State *v.* Sommers, 3 Vermont, 156; People *v.* Nugent, 3 Califor. 341.

[i] 1 Bla. Rep. 230; 2 Hawk. c. 25, s. 113; 2 Ld. Raym. 1378; 2 Leach, 548; People *v.* Nugent, 4 Cal. 341. Post, § 614, 709–10–11, &c.

[j] Reynolds *v.* State, 2 N. & McCord, 365; State *v.* Barker, 18 Verm. 195; see State *v.* Palmer, 18 Ver. 570; State *v.* Godfrey, 11 Shepley, 232; State *v.* Gurney, 37 Maine (2 Heath), 149; State *v.* Abbott, 11 Foster (N. H.), 434; Hinckley *v.* Penobscott, 42 Maine, 89; Bone *v.* State, 18 Ark. 109.

[k] Rev. St. c 34, s. 14.

[l] State *v.* Norman, 2 Dev. 222.

[m] State *v.* Loftin, 2 Dev. & Bat. 31.

[n] 2 Hale, 170; 1 Burr. 148; Fost. 430; 1 East, Rep. 646, in notes; 1 T. R. 144; 1 Ley. 26; Com. Dig. Action statute; 1 Chitty on Pleading, 357; State *v.* Munger, 15 Verm. R. 290; State *v.* Godfrey, 11 Shep. 232; though see State *v.* Price, 12 Gill & J. 260; Elkins *v.* State, 13 Georgia, 435; Metzger *v.* People, 14 Ill. 101.

dictment.[o] So, in an indictment under the Mississippi Act of 1830, prohibiting any person, other than Indians, from making settlements within their territory, it is necessary to aver that the defendant is not an Indian.[p] Again, on an indictment under the Massachusetts statute of 1791, c. 58, making it penal to entertain persons not being strangers on the Lord's day, it must appear that the parties entertained were not strangers.[q] So in Vermont, an indictment under the statute which prohibits the exercise on the Sabbath of any "secular business," &c., except "works of necessity and charity," must allege that the acts charged were not acts of "necessity and charity."[r] And where certain persons were authorized by the legislatnre to erect a dam, in a certain manner, across a river which was a public highway, it was held, that an indictment for causing a nuisance, by erecting the dam, must contain an averment that the dam was beyond the limits prescribed in the charter, and that it was not erected in pursuance of the act of the legislature.[s] In an indictment for a violation of the first section of the act of May 1st, 1854, "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," it is not necessary to a perfect description of the offence, as defined by the first section, that the indictment should contain an averment that the liquor was not "wine manufactured of the pure juice of the grape cultivated in the State of Ohio, or beer, ale, or cider," as specified in the proviso at the end of the eighth section of said act.[ss]

§ 380. Where several statutes authorize licenses to exercise a particular trade, an indictment for a breach of one must negative a right under the others.[t]

XI. Duplicity.

1st. Generally, joinder in one count of two distinct offences is bad, § 381.
2d. Exceptions to the rule, § 383.
- (a) Burglary—adultery—seduction, § 383.
- (b) Assaults with intent, &c., § 385.
- (c) Misdemeanors constituent in felonies, and herein of how far the term "feloniously" may may be rejected, § 388.
- (d) Where successive stages in an offence are united in statute, § 390.
- (e) Double articles in larceny, § 391.
- (f) Double overt acts or intents, § 392.
- (g) Double batteries, libels or sales, § 393.
- (h) Surplusage, § 394.

3d. How duplicity may be objected to, 395.

§ 381. 1st. Generally, joinder in one count of two distinct offences is bad.

§ 382. A count in an indictment which charges two distinct offences, is bad, and the defendant, on a motion to quash, or demurrer, can defeat it.[u]

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[o] Com. v. Thurlow, 24 Pick. 374; State v. Webster, 5 Halsted, 293.
[p] State v. Craft, 1 Walker, 409; see Matthews v. State, 2 Yerger, 233.
[q] Com. v. Maxwell, 2 Pick. 139. [r] State v. Barker, 18 Ver. (3 Wash.) 195.
[s] State v. Godfrey, 11 Shep. 232.
[ss] Becker v. The State, 8 Ohio State R. (N. S.) 391.
[t] Neales v. State, 10 Mis. 498.
[u] Starkie's C. P. 272; Archbold, C. P. 49; State v. Lot, Howe, 1 Richard, 260; Com. v. Gable, 7 Serg. & Rawle, 423; Long. v. State, 12 Georgia, 293.

Where an indictment charged in the same count a capital offence, and a misdemeanor, it was quashed.[v] And in New Hampshire, where horse stealing and ordinary larceny, to which different penalties were affixed, were joined in one count, it was held a good cause for arresting judgment.[w] So in another case, the Mississippi statute against retailing spirituous liquors, making it unlawful to sell in less quantities than one gallon, and also declaring it unlawful for the person selling to suffer the same to be drunk in and about his house; a count in an indictment charging that the defendant sold in less quantities than one gallon, and suffered the same to be drunk in his house, was held bad for duplicity.[x] Where, in an indictment for forgery, two distinct offences, requiring different punishments, are joined in the same count, as where the forging of mortgage, and of a receipt indorsed thereon, are both charged in the same count, and the defendant is convicted, the judgment will be arrested.[y] On the other hand, assault and battery and false imprisonment, may be joined.[yy]

2d. Exceptions to the rule.

§ 383. (*a.*) *Burglary—adultery—seduction.*—In England the only exceptions to this rule are to be found in indictments for burglary, in which it is correct to charge the defendant with having broken into the house with intent to commit a felony, and also with having committed the felony intended; and in indictments for embezzlement by person intrusted with public or private property, which may charge any distinct number of embezzlements, not exceeding three, committed within six months.[z] In this country exceptions are much more frequent. A count stating that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity.[a] So when an indictment alleged that the defendant broke and entered into the dwelling-house of one person, with intent to steal his goods, and having so entered, stole the goods of another person, &c., it was held there was no misjoinder.[b] And so a person may be indicted for breaking and entering a warehouse with intent to steal, and also with stealing, and may be convicted of the larceny simply.[c]

On an indictment for fornication and adultery, the jury having found that the defendants were guilty of fornication but not guilty of adultery, it was held, that the State was entitled to judgment.[d] And so, where on an indict-

[v] U. S. *v.* Sharp, 1 Peters' C. C. R. 131.

[w] State *v.* Nelson, 8 N. Hamp. 163.

[x] Miller *v.* State, 5 How. 250.

[y] People *v.* Wright, 9 Wendell, 193; see Hoskins *v.* State, 11 Geo. 92; State *v.* Morton, 1 Williams (Vt.) 310; Rasnick *v.* Com. 2 Virg. Cases, 356.

[yy] Francisco *v.* State, 4 Zabr. N. J. 30.

[z] Archbold's C. P. 49; post, § 560, 561, &c.; § 616-7-8, 627.

[a] Com. *v.* Tuck. 20 Pick. 356; State *v.* Ayer, 3 Foster (N. H.) 355.

[b] State *v.* Brady, 14 Ver. R. 353.

[c] State *v.* Crocker, 3 Harrington, 554; State *v.* Grisham, 1 Haywood, 12; see post, § 560-5, 617.

[d] State *v.* Cowell, 4 Iredell, 231.

ment for adultery,[e] or seduction,[f] the defendant is found guilty of fornication.[g]

§ 384. Generally speaking, where an accusation includes an offence of an inferior degree, the jury may discharge the defendant of the high crime, and convict him of the less atrocious; and in such case it is sufficient, if they find a verdict of guilty of the inferior offence, and take no notice of the higher.[h]

§ 385. (*b.*) *Assaults with intent, &c.*—Of this the books give numerous instances which will be noticed more fully hereafter, when the effect is considered of acquittals on indictments containing a double count.[i] A common illustration is that of an indictment for assault and battery, or assault with intent to kill, where the defendant may be convicted of assault and battery, or assault alone.[j] So, an indictment under the South Carolina act of 1821, for the murder of a slave, includes within it the inferior offence of "killing in sudden heat and passion," to the same extent and for the same reasons that murder at common law includes manslaughter; and, therefore, on such an indictment, the prisoner may be convicted of the inferior offence described in the second clause of the same act.[k]

§ 386. And so where one is indicted for an assault with intent to commit murder in the first degree, by the Tennessee act of 1832, c. 22, this includes an indictment for an assault and battery; and upon failure of proof to warrant a conviction of felony, the defendant may be convicted of a misdemeanor.[l]

§ 387. Where an offence is, by law, made more highly punishable if committed upon a person of a particular class, than if committed upon a person of another class, an indictment for the offence may be maintained, though

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[e] Com. *v.* Roberts, 1 Yeates, 6. [f] Dinkey *v.* Com. 5 Harris, 126.

[g] Dinkey *v.* Commonwealth, 5 Harris, 126. "The general rule," says Black, C. J., in the last case, "is, that where an indictment charges an offence which includes within it another and less offence, the party may be convicted of the latter if he is guilty, and acquitted of the former if the evidence make it proper. For instance, on an indictment for murder, there being no sufficient proof of malice, the jury may find a verdict for manslaughter. A person charged with burglary and stealing, may be convicted of larceny if the proof fail of the breaking and entering. In Strouse *v.* The Commonwealth, 5 Barr, 83, it was held that the defendants indicted for a riotous assault and battery, might be convicted of assault and battery only. This court then declared it to be enough to prove so much of the indictment as shows that the defendant has committed a substantive offence therein charged. It would be easy to multiply cases to this effect if it were necessary. It is proper, however, to add, that in an indictment for felony, there cannot be a conviction for a minor offence included within it, if such minor offence be a misdemeanor, and this is the foundation of the rule that an acquittal of a felony is no bar to another indictment for the same act, charging it as a misdemeanor, and vice versa."

[h] Swinney *v.* State, 8 S. & M. 576; Cameron *v.* State, 8 Eng. (13 Ark.) 712; State *v.* Walters, 39 Maine (4 Heath), 54; though see as to verdict, State *v.* Flannagan, 6 Md. 166; Johnson *v.* State, 14 Geo. 55; post, § 560, 561, &c.; § 616-7-8.

[i] Post, § 560, 565.

[j] Stewart *v.* State, 5 Ohio R. 242; Clark *v.* State, 12 Georgia, 350; R. *v.* Mitchell, 12 Eng. Law & Eq. 588; State *v.* Burt. 25 Vermont (2 Deane) 373; Carpenter *v.* State, 23 Alab. 84; State *v.* Kennedy, 7 Blackf. 233; State *v.* Stedman, 7 Porter, 495; State *v.* Coy, 2 Aiken, 181; M'Bride *v.* State, 2 Eng. (Ark.) 374; Reynolds *v.* State, 11 Texas, 120; Foley *v.* State, 9 Ind. 363; post, § 617, 627.

[k] State *v.* Gaffney, Rice, 431; see post, § 560, 565, 617, 628.

[l] State *v.* Bowling, 10 Humph. 52.

it does not specify to which of the classes the injured person belongs; and upon a conviction on such an indictment, the milder punishment only will be awarded.[m]

§ 388. (*c.*) *Misdemeanors constituent in felonies, and herein of how far the term "feloniously" may be rejected.*—In Massachusetts, it was held that at common law, one charged with a felony could not be convicted of part of the charge, unless the part amounted to a felony.[n] But, by Rev. Stat. c. 137, sect. 11, on such an indictment, if the jury acquit of part of the charge, the defendant may be sentenced for any offence substantially charged by the residue of such indictment.[o] Thus, on an indictment for rape, one may be convicted of assault and battery,[p] or, on the same charge, of incest;[q] or on an indictment for manslaughter, of assault and battery.[r] And in New York under a similar statute it has been determined that on an indictment for procuring an abortion of a quick child, which, by the revised statutes, is a felony, the prisoner may be convicted, though it turn out the child was not quick, and the offence, therefore, a mere misdemeanor.[s]

In Pennsylvania:—

Party indicted for felony or misdemeanor may be found guilty of attempt to commit the same.—"If on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence, that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return, as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment, and no person so tried as herein lastly mentioned shall be liable to be afterward prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."[ss]

What is the general common law rule on this point in the United States will be considered under another head.[t]

§ 389. In a recent English case, it was said that, in order to convict a prisoner of a felony, not a felony primarily charged in the indictment, it is necessary that the minor felony should be substantially included in the indictment. Thus, an indictment for burglary includes an indictment for house-breaking, and generally, also for larceny, and the prisoner on this may be found guilty of one or other of these felonies. But in an indictment

[m] State *v.* Fielding, 32 Maine (2 Red.) 585.

[n] Com. *v.* Newell, 7 Mass. 245; Com. *v.* Roby, 12 Pick. 496; overruling Com. *v.* Cooper, 15 Mass. 187; post, § 400.

[o] Com. *v.* Drum, 19 Pick. 479. [p] Ibid. [q] Com. *v.* Goodhue, 2 Metcalf, 193.

[r] Com. *v.* Drum, 19 Pick. 479; see, also, Com. *v.* Hope, 22 Pick. 1, 7; Com. *v.* Griffin, 21 Pick. 523.

[s] People *v.* Jackson, 3 Hill's N. Y. R. 92; see post, § 400.

[ss] Rev. Act, 1860, p. 442.

[t] Post, § 400. In Massachusetts, "Feloniously," is made by statute, unnecessary in all cases. Stat. 1852, ch. 40, § 3.

for burglary, and for breaking and entering a house and stealing, the prisoner cannot be found guilty of breaking and entering a house with intent to steal.[u]

§ 390. (*d.*) *Where successive stages in an offence are united in statute.*—Where a statute, as has already been observed, makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offence, it has in many cases been ruled they may be coupled in one count.[v] Thus, setting up a gaming table, it has been said, may be an entire offence; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offence; for either, unconnected with the other, an indictment will lie.[w] Yet when both are perpetrated by the same person at the same time, they constitute but one offence, for which one count is sufficient, and for which but one penalty can be inflicted.[x] An indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly acting and assisting in the said false making, forging, and counterfeiting, is a good indictment, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.[y] So also with charging that the defendant "administered, and caused to be administered," poison, &c.[z] So "obstruct or resist" process may be joined so as to read "obstruct and resist" in the indictment.[a] So, in an indictment on the Massachusetts Rev. Stats. c. 58, sect. 2, by which the setting up or promoting of any of the exhibitions therein mentioned, without license therefor, is prohibited, it is not duplicity to allege that the defendant "did set up and promote" such an exhibition.[b]

A neglect by supervisors of roads, both to open and repair roads may be charged in one count of an indictment against them.[c]

§ 391. (*e.*) *Double articles in larceny.*—In all cases of larceny, and like offences, several articles may be joined in a count, the proof of either of which will sustain the indictment,[d] though where a variety of articles were stolen at the same time and place, and from the same individual, it has been held, that the stealing of various articles at the same time and place, is only one offence, and must be so charged.[e] It has even been ruled, that the same

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[u] R. *v.* Reid, 1 Eng. Law & Eq. 599.

[v] *Antea*, § 294, 368; R. *v.* Bowen, 1 Den. C. C. 21.

[w] See State *v.* Fletcher, 18 Mis. (3 Bennett) 425.

[x] Hinkle *v.* Com. 4 Dana, 518.

[y] Rasnick *v.* Com. 2 Virg. C. 356; State *v.* Houseall, 2 Rice's Dig. 346; Hoskins *v.* State, 11 Geor. 92; State *v.* Morton, 1 Williams (Vt.), 310; Mackey *v.* State, 3 Ohio St. Rep. 363; Stoughton *v.* State, 2 Ibid. 502; *contra*, Kirby *v.* State, 1 Ibid. 185.

[z] Bon *v.* State, 22 Alab. 9.

[a] Slicker *v.* State, 8 Eng. (13 Ark. 397); see, also, State *v.* Locklear, 1 Busbee, 205; ante, § 368.

[b] Com. *v.* Twitchell, 4 Cush. 74.

[c] Edge *v.* Com. 7 Barr, 275.

[d] Ante, § 361, post, 617, 628.

[e] State *v.* Williams, 10 Humph. 101; Lorbon *v.* State, 7 Mis. 55; Com. *v.* Williams, 2 Cush. 523.

count may join the larceny of several distinct articles, belonging to different owners, where the time and the place of the taking of each are the same.[f] An indictment may, in a single count, charge the prisoner with stealing three negroes, and the offence is complete if he stole either of the negroes, and the conviction will be sustained.[g]

§ 392. (*f.*) *Double overt acts, or intents.*—Laying several overt acts in a count for high treason is not duplicity,[h] because the charge consists of the compassing, &c., and the overt acts are merely evidences of it; and the same as to conspiracy. A count in an indictment charging one endeavor or conspiracy to procure the commission of two offences, is not bad for duplicity, because the endeavor is the offence charged.[i] The same rule exists where assaults with two intents are charged.[j]

§ 393. (*g.*) *Double batteries, libels, or sales.*—A man may be indicted for the battery of two or more persons in the same count,[k] or for a libel upon two or more persons, where the publication is one single act,[l] or of selling liquor to two or more persons,[m] without rendering the count bad for duplicity.

§ 394. (*h.*) *Surplusage.*—The cases are noticed elsewhere in which surplusage will not vitiate the indictment when the offence itself is stated with sufficient precision.[n] Thus, where a count in an indictment, charging that the prisoner, a slave, "with force and arms in the county aforesaid, in and upon one A. (then and there being a free white woman), feloniously did make an assault, and her, the said A., then and there feloniously did attempt to ravish, and carnally know, by force and against her will, and in said attempt did forcibly choke and throw down the said A.," this was held not bad for duplicity or uncertainty. The last allegation is but a minute description of the manner of the assault, and may be rejected as surplusage.[o]

3d. How duplicity may be objected to.

§ 395. Duplicity, in criminal cases, may be objected to by special demurrer, perhaps by general demurrer, or the court in general, upon application, will quash the indictment; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment, or of a writ of error; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other. In this country, it has been often held that it is no objection to an indictment, especially after verdict, that charges which might have been the subject of distinct indictments, are included in one count.[p] Duplicity in

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[f] Com. *v.* Williams, Thacher, C. C. 722; State *v.* Nelson, 29 Maine, 329; see Com. *v.* Dobbin, 2 Pars. 380; Ben *v.* State, 22 Ala. 9.

[g] State *v.* Johnson, 3 Hill's S. C. R. 1.

[h] Kelyng, 8.

[i] R. *v.* Fuller, 1 B. & P. 181; R. *v.* Bykerdike, 1 M. & Rob. 179.

[j] R. *v.* Dawson, 2 Camp. 62; post, § 620, 635.

[k] R. *v.* Benefield, 2 Bur. 984; see 2 Str. 890, 2 Ld. Raym. 1572, *contra;* see Ben *v.* State, 22 Ala. 9.

[l] R. *v.* Jenner, 7 Mod. 400; 2 Bur. 983.

[m] State *v.* Anderson, 3 Rich. 172.

[n] Ante, § 291; post, § 622; State *v.* Palmer, 35 Maine (5 Red.), 9.

[o] Green *v.* State, 23 Mis. (1 Cush.) 509.

[p] State *v.* Johnson, 3 Hill, S. C. 1; Com. *v.* Tuck, 20 Pick. 356; post, § 3044.

an information is cured by a verdict of guilty on one of the offences charged, and not guilty on the other.[pp]

XII. REPUGNANCY.

§ 396. When one immaterial averment in an indictment is contradictory to another, the whole is bad. If an indictment charge the defendant with having forged a certain writing, whereby one person was bound to another, the whole will be vicious, for it is impossible any one can be bound by a forgery.[q] When it was averred that the defendant disseise the prosecutor of land, when it appears that he had no freehold whereby he could be disseised, or that the former entered peaceably upon the latter, and then and there forcibly disseised him or charged the prisoner with feloniously cutting down trees, which is only a trespass, the indictment was held insufficient.[r] The same error has been held to exist where an indictment charged an offence to have been committed in Nov. 1801, and in the twenty-fifth year of American Independence,[s] and where the crime was laid to have been committed A. D. 1830.[t] A relative pronoun referring with equal uncertainty to two antecedents, will make the proceedings bad, in arrest of judgment. So, an indictment for forging a bill of exchange, stating it as directed to John King, by the name and addition of John King, Esq., will be defective, and cannot be cured by the evidence.[u] But, as will hereafter be more particularly seen, every fact or circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage.[v]

§ 397. Where there was a general verdict of guilty, on an indictment for procuring a miscarriage, in which one count averred quickness, and the other merely pregnancy, and one count averred the abortion of the mother, and the other of the child, the Supreme Court refused to reverse on the ground of repugnancy.[w]

XIII. TECHNICAL AVERMENTS.

1st. "TRAITOROUSLY," § 398.
2d. "FELONIOUSLY DID KILL," "MALICE AFORETHOUGHT," "STRIKE," § 399.
3d. "FELONIOUSLY—WHEN NECESSARY, AND WHEN IT MAY BE DISCHARGED AS SURPLUSAGE," § 400.
4th. "RAVISH," "CARNALLY KNEW," "FORCIBLY," "FALSELY," § 401.
5th. "BURGLARIOUSLY," "FELONIOUSLY TOOK," "AGAINST THE WILL," "PIRATICALLY," "UNLAWFULLY," "WITH A STRONG HAND," § 402.
6th. "VI ET ARMIS," § 403.

1st. TRAITOROUSLY.

§ 398. In indictments for treason, the offence must be laid to have been

[pp] State *v.* Miller, 24 Conn. 522.
[q] 3 Mod. 104; 2 Show. 460; see Mills *v.* Com. 1 Harris, 634.
[r] Alleyn, 50; 2 Hawk. c. 25, s. 62; Bac. Ab. Indict. G. 1.
[s] State *v.* Hendricks, Conf. R. 369. [t] Serpentine *v.* State, 1 How. Miss. R. 260.
[u] 2 Leach, 590; 1 Leach, 87.
[v] State *v.* Lassety, 1 Richardson, 91; 5 East, 254; 1 Chitty on Pleading, 334, 335; see *postea*, § 622. [w] Mills *v.* Com. 1 Harris, 634.

committed traitorously; but if the treason itself be laid to have been so committed, whether it consist in levying war against the supreme authority, or otherwise, it is not necessary to allege every overt act to have been traitorously committed.[x]

2d. "FELONIOUSLY DID KILL"—"MALICE AFORETHOUGHT"—"STRIKE."

§ 399. The word feloniously is essential to all indictments for felony, whether at common law or statutory;[y] and, in several cases, technical and appropriate words are frequently requisite, in addition to the description of the offence. Thus, in an indictment for murder, it is essential to state, as a conclusion from the facts previously averred, that the said defendant, him, the said C. D., in manner and form aforesaid, feloniously did kill and murder;[z] a term of art, which can in no case be dispensed with. On the same principle, it must also be alleged, that the offence was committed of the defendant's malice aforethought; words which cannot be supplied by the aid of any other; and, if any of these terms be omitted, or if the defendant be merely charged with killing and slaying the deceased, the offence will amount to no more than manslaughter.[a] Where the death arises from any wounding, beating, or bruising, it has been said, that the word struck[b] is essential, and that the wound, or bruise, must be alleged to have been mortal. It cannot be considered safe, however, to omit it where it is applicable.

3d. "FELONIOUSLY"—WHEN NECESSARY, AND WHEN IT MAY BE DISCHARGED AS SURPLUSAGE.

§ 400. If an act be charged to have been done with a felonious intent to commit a crime, and it appears upon the face of the indictment, that the crime, though perpetrated, would not have amounted to a felony, the word felonious, being repugnant to the legal import of the offence charged, may be rejected as surplusage.[c]

Where, however, the indictment, on its face, is for a complete felony, it has been doubted whether a conviction can be had for the constituent misdemeanor. In England the rule at common law was that such a conviction

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[x] Cranbourn's case, 4 St. Tr. 701; Salk. 633; East, P. C. 116.

[y] State *v.* Murdock, 9 Mis. 739; State *v.* Gilbert, 24 Mis. (3 Jones) 365.

[z] 1 Hale, 450, 466; 4 Bl. 307; Yel. 205. The term was originally introduced in order to exclude the offender from his clergy; R. *v.* Clerk, Salk. 377; and is not essential to an indictment for manslaughter.

[a] 1 Hale, 450, 466; East, P. C. 345; Sarah *v.* State, 28 Mississippi, 268, Wharton on Homicide, 260. A killing by misadventure, or chance medley, is described to have been done "casually and by misfortune, and against the will of the defendant." See State *v.* Robin, 4 Rich. 260; post, § 1071.

[b] See post, § 1067–8–9; 2 Hale, 184; 1 Buls. 124; 2 Inst. 319; 2 Haw. c. 23, s. 82; Cro. J. 635; 5 Co. 122; Lad's case, Leach, 112; 2 Hale, 186; 1 Haw. c. 23, s. 82; Kel. 125.

[c] 2 East, P. C. 1028; Cald. 397; Hackett *v.* Com. 3 Harris, 95; Com. *v.* Gable, 7 S. & R. 423; People *v.* Jackson, 3 Hill, 92; People *v.* White, 22 Wendell, 175; Lohman *v.* People, 1 Comstock, 379; Hess *v.* State, 5 Ohio, 1. But see Starkie's C. P. 169, n. r.; see ante, § 388.

could not be had, the reason being that if a misdemeanor be tried under an indictment for a felony, the defendant loses his right to a special jury and a copy of the bill of indictment.[d] In this country, though the reason fails, the principle that under an indictment for a felony there can, at common law, be no conviction for a misdemeanor, is followed in Pennsylvania,[e] in Massachusetts,[f] in Indiana,[g] in Tennessee,[h] and in Maryland.[i] In New York,[j] Vermont,[k] Ohio,[l] North Carolina,[ll] South Carolina,[m] and Arkansas,[mm] it has been held that the English reason ceasing, the rule itself ceases. In Massachusetts this latter position is now established by statute,[n] and now in that State the use of the term "feloniously," is dispensed with entirely.[nn]

The word feloniously is not essential to an assault and battery with intent to kill.[o]

In all cases of mayhem, the words feloniously, and did maim, are requisite;[p] though it is said in Massachusetts, that the offence is not a felony,[q] and in Georgia, to be only so in cases of castration.[r]

4th. "RAVISH," "CARNALLY KNEW," "FORCIBLY," "FALSELY."

§ 401. In indictments of rape, the words feloniously ravished are essential, and the word *rapuit* is not supplied by the words *carnaliter cognovit;*[s] and

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[d] R. *v.* Cross, 1 Ld. Raym. 711; 3 Salk. 193; 2 Hawk. c. 47, s. 6; 1 Chitty, C. L. 251, 639; R. *v.* Walker, 6 C. & P. 657; R. *v.* Gisson, 2 C. & K. 781; R. *v.* Goadby, Ibid. 782; R. *v.* Bird, 2 Eng. Law & Eq. 473; see ante, § 384–5; now, however, the statute of 1 Vict. c. 85, s. 11 (Lord Denman's Act), enables conviction to be had for a constituent misdemeanor.

[e] Com. *v.* Gahle, 7 S. & R. 433. Hackett *v.* Com. 3 Harris, 95, may seem to conflict with this, but in point of fact it does not; there the word "feloniously" was mere impertinent surplusage in the bill.

[f] Com. *v.* Newell, 7 Mass. 245.

[g] State *v.* Kennedy, 7 Blackf. 233; Wright *v.* State, 5 Indiana, 527.

[h] State *v.* Valentine, 6 Yerg. 533.

[i] Black *v.* State, 2 Md. 376; though see Burk *v.* State, 2 Har. & J. 426; State *v.* Sutton, 4 Gill. 494; ante, § 388.

[j] People *v.* White, 22 Wend. 175; People *v.* Jackson, 3 Hill, 92; Lohman *v.* People, 1 Coms. 379.

[k] State *v.* McCoy, 2 Aiken, 181; State *v.* Wheeler, 3 Ver. 344; State *v.* Scott, 24 Ver. (1 Deane) 129.

[l] State *v.* Hess, 5 Ohio, 1; Stewart *v.* State, 5 Ohio, 241.

[ll] State *v.* Upchurch, 9 Iredell, 455.

[m] State *v.* Gaffney, Rice, 431.

[mm] Cameron *v.* State, 8 Eng. (13 Ark.) 712.

[n] Com. *v.* Squires, 1 Metc. 258; ante, § 388.

[nn] Stat. 1852, ch. 40, § 3; Com. *v.* Scannel, 11 Cush. (Mass.) 547.

[o] Stout *v.* Com. 11 Serg. & R. 177; State *v.* Scott, 24 Ver. (1 Deane) 27; though in Illinois the omission was held fatal; Curtis *v.* People, 1 Breese, 199; and see post, § 1287.

[p] 1 Inst. 118; 2 Hawk. c. 23, s 15, 16, &c.; 2 Hawk. c. 25, s. 55; Com. *v.* Reed, 3 Am. L. Journ. 140.

[q] Com. *v.* Newell, 7 Mass. 244.

[r] Adams *v.* Barrett, 5 Geo. 404.

[s] Gongleman *v.* People, 3 Parker, C. R. (N. Y.) 15; 1 Hale, 628; 2 Hale, 184; 1 Dev. 142; 1 Ins. 190; 2 Ins. 180. An indictment for arson charged that the defendants "feloniously, wilfully, and unlawfully," set fire to, burned, and consumed a certain building used as a brewery for the manufacture of beer. It was held that the indictment was defective in not alleging that the burning was malicious. Kellenbeck *v.* State, 10 Md. 431 (ante, § 375).

Where a statute makes criminal the doing of the act, "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and un-

it seems that the latter words are also essential in indictments,[t] though the contrary has been ruled in the case of an appeal.[u] The usual course in an indictment for rape, is to aver that it was committed forcibly, and against the will of the female, and therefore it would not be safe to omit the averment,[v] though in Pennsylvania the omission was held not to be fatal.[w] In an indictment for an unnatural crime, the descriptive words of the statute, taking[x] away clergy, must be used; and it is not sufficient to say, *contra naturæ ordinem rem habuit veneream et carnaliter cognovit.*[y]

In an indictment for perjury, it is necessary to charge that the defendant wilfully and corruptly swore falsely.[z]

5th. "BURGLARIOUSLY," "FELONIOUSLY TOOK," "AGAINST THE WILL," "PIRATICALLY," "UNLAWFULLY," "WITH A STRONG HAND," "MALICIOUSLY," "WILFULLY."

§ 402. In burglary, the essential words are "feloniously and burglariously broke and entered the dwelling-house, in the night-time;" and the felony intended to be committed, or actually perpetrated, must also be stated in technical terms.[a] So, in case of simple larceny, the words feloniously took and carried away the goods,[b] or took and led away the cattle, are essential.

In an indictment,[c] for robbery from the person, the words feloniously, violently,[d] and against the will, are essential, and it is usual, though it seems to be unnecessary, to allege a putting in fear.

Piracy must be alleged to have been done feloniously and piratically.[e]

The phrase "unlawful" is in no case essential, unless it be a part of the description of the offence as defined by some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word unlawful cannot render it indictable,[f] and the same observation is applicable to the terms wrongfully, unjustly, wickedly, wilfully, corruptly, to the evil example, falsely, maliciously, and such like; which are unnecessary, if they are not to be found in the very definition of the offence, either at common law, or in the purview of a statute: and at common law it seldom happens that one of these expressions may not be supplied by an equivalent one. Thus, though it is usual to allege that the

lawfully," or feloniously, unlawfully, and wilfully; these latter terms not being synonymous, equivalent, of the same legal import, or substantially the same as "wilfully and maliciously." State *v.* Gove, State *v.* Card, 34 N. H. 510, though see ante, § 375-6. Post, § 1175.

[t] 1 Hale, 632; 3 Ins. 60; Co. Lit. 137; 2 Ins. 180.

[u] 11 H. 4, 13; 2 Hawk. c. 23, s. 79; Summ. 187; Stann. 81.

[v] State *v.* Jim. 1 Dev. 142; post, § 1154.

[w] Harman *v.* Com. 12 Serg. & R. 69; post, § 1154.

[x] 5 Eliz. c. 17, 3, 4; W. & M. c. 9, s. 2; Fost. 424; Co. Ent. 351; 3 Ins. 59; 1 Hawk. c. 4, s. 2.

[y] East, P. C. 480; 3 Ins. 59.

[z] Thomas *v.* Com. 2 Robinson's Adm. R. 795; see post, § 2234.

[a] 1 Hale, 549; post, § 1607.

[b] 1 Hale, 504; 2 Hale, 184; post, § 1811.

[c] 1 Hale, 534; Fost. 128; 3 Inst. 68.

[d] *Qu. et vide* Smith's case, East's P. C. 783, in which it was holden that *violenter* is not an essential term of art; see post, § 1700.

[e] 1 Hawk. c. 37, s. 6, 10.

[f] State *v.* Bray, 1 Missouri, 126; State *v.* Williams, 3 Foster (N. H.) 321; Capps *v.* State, 4 Iowa, 302; State *v.* Verm. Cent. R. R. 1 Williams (Vt.) 103.

party falsely forged and counterfeited, it is enough to allege that he forged, because the word implies a false making, and in indictment for libels, it is sufficient either to use the word falsely or maliciously,[g] or an equivalent epithet.

In forcible entry, at common law, the defendants must be charged with having used such a degree of force as amounts to a breach of the peace.[h] But it is sufficient, in such an indictment, to aver, that the defendants unlawfully, and with a strong hand, entered the prosecutor's mills, &c., and expelled him from the possession thereof.[i]

6th. Vi et armis.

§ 403. The practice still exists of introducing, in indictments for forcible injuries, the technical words, *vi et armis*, but by the stat. 37 H. 8, c. 8, it is enacted, that "inquisitions or indictments lacking the words *vi et armis*, viz: *baculis, cultellis, arcubus, et sagittis*, or any such like words, shall be taken, deemed and adjudged, to all intents and purposes, to be good and effectual in law, as the same inquisitions and indictments having the same words, were therefore taken, deemed, and adjudged to be." These words are, therefore, clearly superfluous, even where the crime is of a forcible nature, and were unnecessary at common law, where the injury was not forcible.[j] And in case of murder, the force at common law is implied from the very nature of the offence.[k] The stat. 37 H. 8, c. 8, is in force in Pennsylvania,[l] in New Hampshire,[m] in Vermont,[n] in Massachusetts,[nn] in North Carolina,[o] in Tennessee,[p] in Indiana,[q] and in Louisiana;[r] and in these States, as well as generally in this country, the term may be properly omitted.

XIV. Clerical errors.

§ 405. Verbal or grammatical inaccuracies, which do not affect the sense, are not fatal.[s] Thus, in an indictment for selling spirituous liquors by the small measure, without license, the omission of the auxiliary verb "did," which should have been joined with the words "sell and dispense of," has

[g] Sty. 392; 2 Will. Saun. 242; Starkie, C. P. 86.
[h] R. *v.* Wilson et al. 8 T. R. 357; 6 Mod. 178.
[i] Ibid. See postea, § 2047, &c.
[j] 2 Lev. 221; Cro. Jac. 473; 3 P. Wms. 497; Skinner, 426; 2 Hawk. c. 25, s. 90.
[k] 2 Hale, 187; 1 Hawk. c. 25, s. 3; 1 Hale, 534; 3 Ins. 68; Pulton, 131 b.
[l] Roberts' Dig. 34; Com. *v.* Martin, 2 Barr, in which case the omission of the "*vi et armis*," was held immaterial.
[m] State *v* Kean, 10 N. Hamp. 347.
[n] State *v.* Munger, 15 Ver. R. 290; 2 Tyler, 166.
[nn] Com. *v.* Scannel, 11 Cush. 547.
[o] State *v.* Duncan, 7 Iredell, 236.
[p] Tipton *v.* State, 2 Yerger, 542; Taylor *v.* State, 6 Humph. 285.
[q] State *v.* Elliot, 7 Blackf. 280.
[r] Territory *v.* M'Farlane, 1 Martin, 224; see State *v.* Thornton, 2 Rice's Dig. 386.
[s] See Com. *v.* Ailstock, 3 Grat. 650; Lazier *v.* Com. 10 Grattan, 708; Com. *v.* Moyer, 7 Barr, 439; State *v.* Hedge, 6 Ind. 330, and see particularly as a specimen of how much carelessness can be passed by, when the sense is preserved; Hackett *v.* Com. 3 Harris, 95; see, also, ante, § 305, 7, 9; post, § 597, 606.

been held in one case to be immaterial[t] In an indictment, however, for passing counterfeit money, which charged that the defendant "feloniously utter and publish, dispose and pass," &c. &c., omitting the word "did" before utter, &c., the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner did the act.[u]

§ 406. An indictment charging the offence *first* of March instead of the *first day* of March, was held good.[v] So also, the writing "*fifty-too*" for "*fifty-two*," was held not fatal.[w] And so writing "assalt" for "assault."[ww] The omission of a letter, in the prisoner's name, in the title of a bill found by a grand jury, is not a good ground for a motion in arrest of judgment, as the prisoner had pleaded to it, and had been convicted upon it, especially where the name is properly stated in the body of the bill of indictment itself;[x] and so where "mark," in an indictment for putting a false mark on sheep, was written "make."[y] But in an indictment for murder, where the letter *a* was omitted in the word breast, in describing the place of the wound, judgment, in an old case, was arrested.[z] In a subsequent case, however, in the same court, it was held, that false spelling, which does not alter the meaning of the words misspelt, is no ground for arresting judgment.[a] And such is sound law.

§ 407. In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury, "on their oath" present (the first two counts being regular in that respect), the objection is obviated by the fact, that the record states, that the grand jury was sworn in open court.[b]

The substitution of "an" for "the" in an indictment for perjury, was held immaterial;[c] and the substitution of "on" for "of," in the expression, "notes on the bank U. S.," will be disregarded.[d]

It is not fatal to omit the word "so," in the passage, "and so the jurors, &c., do present,"[e] nor the word "did" before "assault," in an indictment for an assault.[f]

§ 408. Words written at length are not only more certain, but less liable to alteration than figures; and, therefore, when the year and day of the month are inserted in any part of an indictment, they are more properly inserted in words written at length than in Arabic characters, but a contrary practice will not vitiate an indictment.[g] The terms *anno domini*, in an information or bill of indictment, are equivalent to the year of our Lord.

[t] State *v.* Whitney, 15 Ver. R. 298.
[u] State *v.* Halder, 2 M'Cord, 377.
[v] Simmons *v.* Com. 1 Rawle, 142.
[w] State *v.* Hedge, 6 Indiana, 333.
[ww] State *v.* Crane, 4 Wisc. 400.
[x] State *v.* Dustoe, 1 Bay. 377.
[y] State *v.* Davis, 1 Iredell, 153.
[z] State *v.* Carter, Conf. Rep. 210; S. C. 2 Hay. 140, Taylor, J., dissent.
[a] State *v.* Molier, 1 Dev. 263; State *v.* Wemberly, 3 M'Cord, 298.
[b] Hoffman *v.* Com. 6 Randolph, 685.
[c] People *v.* Warner, 5 Wend. 271.
[d] M'Laughlin *v.* Com. 4 Rawle, 464.
[e] State *v.* Moses, 2 Dev. 450
[f] State *v.* Edwards, 19 Mo. 674.
[g] State *v.* Raiford, 7 Porter, 101; State *v.* Seamous, 1 Iowa, 418; Lazier *v.* Com. 10 Grattan, 708; Kelly *v.* State, 3 Smedes & Marsh. 518; State *v.* Reed, 35 Maine (5 Red.), 489; Winfield *v.* State, 3 Iowa, 339; though see contra, State *v.* Voshall, 4 Indiana, 596; Berrian *v.* State, 2 Zabr. 9, 679; see ante, § 205.

Either is good, and so is the want of either.[h] It is not fatal that the date, instead of being written in full, is abbreviated, as A. D. 1830, if the figures are plainly legible.[i] Where a bill was found on the 2d of January, 1839, and the endorsement of the plea of not guilty was dated as of the 2d of January, 1838, this was held to be a mere clerical error, and amendable.[j]

Where an indictment commenced, "the grand jurors within and the body of the county," &c., it was held, that the omission of the word "for" was not fatal.[k] And so of the omission of word "present," in the commencement.[kk]

It is not a fatal objection to an indictment that the name of a grand juror in the caption does not correspond with his name in the panel, nor that the indictment is stated as found upon the *oaths*, instead of the *oath* of the inquest.[l]

§ 409. A clerk of the court placed on the margin, by several counts, the numbers one, two, and so on, and, by mistake or otherwise, began to number at the second count, and the same error was continued through the whole number of counts; and the jury returned a verdict of guilty on the seventh or eighth count, "as marked." It was held, that it was error for the court to render sentence on the seventh and eighth counts of the indictment as found.[m]

Interlineations do not affect an indictment otherwise legible.[mm]

XV. Conclusion of indictments.

1st. What conclusions are required by the constitutions and statutes of the several states, § 410.
2d. When the conclusion is to be statutory, § 411.
3d. When the statutory conclusion must be in the plural, § 412.
4th. When the statutory conclusion may be rejected as surplusage, § 413.

1st. What conclusions are required by the constitution and statutes of the several states.

§ 410. The constitutions of most of the States contain a provision that all indictments shall conclude against their peace and dignity respectively.[n] Thus, in Vermont, all indictments shall conclude with these words, "against the peace and dignity of the State."[o] In Pennsylvania it is provided, that all prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude, "against the peace and dignity of the same."[p] The proper conclusion of an indictment in Pennsylvania, said the Supreme Court, is "against the peace and dignity of the Commonwealth of Pennsylvania."[q] In New Hampshire, the Constitution

[h] State *v.* Gilbert, 13 Ver. Rep. 647; Hall *v.* State, 3 Kelly, 18; but see Whitesides *v.* People, Breese's R. 4.

[i] State *v.* Hodgeden, 3 Ver. Rep. 481; Bouvier's Law Dictionary, "Figures."

[j] Com. *v.* Chauncey, 2 Ash. 90.

[k] State *v.* Brady, 14 Ver. Rep. 353.

[kk] State *v.* Freeman, 21 Mis. (6 Bennett) 481.

[l] State *v.* Dayton, 3 Zabr. 49.

[m] Woodford *v.* State, 1 Ohio State R. 427.

[mm] French *v.* State, 12 Ind. 670.

[n] See for forms, Wharton's Prec. 3, 4, 5, &c.

[o] Constit. sec. 32, part ii.

[p] Constit. Art. v. sec. xi.

[q] Com. *v.* Rogers, 5 Serg. & R. 463.

requires all indictments to terminate "against the peace and dignity of the State;" and it has been held, that it is sufficiently complied with by an indictment concluding, "against the peace and dignity of our said State."[r] In South Carolina, an indictment stating an offence against the State, and concluding with the words, against the peace and dignity of the same, is not faulty, but good within the terms of the Constitution of 1790.[s] Where an indictment commenced "South Carolina," and not the "State of South Carolina," and concluded against the peace and dignity of the said State, and not against the peace and dignity of the same, the court held the termination good.[t] In the same State, an indictment was held good, though it concluded "against the peace and dignity of this State," instead of concluding "against the peace and dignity of the same State."[u] In Virginia, Texas, and Missouri, the omission of the conclusion "against the peace," &c., is fatal.[v] By the Constitution of Arkansas, indictments must conclude, "against the peace and dignity of the State of Arkansas," but the interpolation upon this form of the words, "people of the," will not vitiate. "The form adopted by the Constitution," it was said, "is merely declaratory, and in affirmance of an old principle, not the creation of a new one."[w] In Mississippi, an indictment commencing with the words, "the State of Mississippi," and concluding, "against the peace and dignity of the same," is sufficient.[x] In Illinois, an indictment concluding "against the peace and dignity of the people of the State of Illinois," is good.[xx] An indictment in Kentucky which states in the commencement correctly the name of the Commonwealth, by the authority of which it proceeds, may well conclude against the peace and dignity of the Commonwealth, without stating the name.[y] The Constitution of Iowa requires proceedings to be conducted in the name of the "State of Iowa," and under it, it is held that a prosecution in the name of the "State of Iowa," was valid.[z] In the United States courts, a conclusion "contrary to the true intent and meaning of the act of Congress, in such case made and provided," has been held sufficient.[zz] An indictment charging A. with having committed an offence, made such by a statute, "in contempt of the laws of the United States of America," without specifying the statute, is bad.[o]

2d. When the conclusion is to be statutory.

§ 411. In deciding whether an indictment should be drawn as at the

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[r] State *v.* Kean, 10 N. Hamp. R. 347.

[s] State *v.* Washington, 1 Bay. 120.

[t] State *v.* Anthony, 1 M'Cord, 285.

[u] State *v.* Yancey, 1 Tr. Con. R. 237.

[v] Com. *v.* Carnly, 4 Grat. 546; State *v.* Durst, 7 Texas, 74; State *v.* Lopez, 19 Mo. 254.

[w] Anderson *v.* State, 5 Pike, 445. And if there be several counts in an indictment, each one must so conclude, or the court will quash the count in which the proper conclusion is omitted. State *v.* Cadle, 19 Ark. 613.

[x] State *v.* Johnson, 1 Walker, 392.

[xx] Zarresseller *v.* People, 17 Ill. 101.

[y] Com. *v.* Young, 7 B. Mon. 1.

[z] Harriman *v.* State, 2 Greene (Iowa), 270.

[zz] U. S. *v.* La Coste, 2 Mason, 129; U. S. *v.* Smith, 2 Mason, 143. But see U. S. *v.* Crittenden, 1 Hemp. 61.

[o] United States *v.* Audrews, 2 Paine, C. C. 451.

common law, or should appear to be founded upon a statutory provision which is applicable to the offence, as has been before noticed, several rules are to be observed. If the statute creates an offence, or declares a common law offence, when committed under particular circumstances, not necessarily in the original offence, punishable in a different manner from what it would have been without such circumstances; or, where the statute changes the nature of the common law offence to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should be drawn in reference to the provisions of the statute creating or changing the nature of the offence, and should conclude against the form of the statute;[a] but, if the statute is only declaratory of what was a previous offence at common law, without adding to or altering the punishment, as was the statute of 25 Edward III., declaring what should be considered an adjudged treason, the indictment need not conclude against the form of the statute.[b] Where a statute only inflicts a punishment on that which was *an offence* before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude *contra formam statuti*, &c.[c] If a statute create an offence, or alter an offence at common law, as by turning a misdemeanor into a felony, the indictment must conclude against the form of the statute; and if an offence be made so, not by one statute only, but by two or more taken together, the strict conclusion formerly was against the form of the statutes.[d] The reason of the rule, it is said, is that the indictment should refer clearly and explicitly to the statute as the foundation of the suit.[e] In such case "against the peace and dignity of the commonwealth" merely, is bad.[f] But, in Massachusetts, a conclusion "against the peace and the statute," is good;[g] though in the same State it was held insufficient to charge the offence as committed against the law in such case made and provided.[gg] In Kentucky, by the code, an indictment is sufficient if it show intelligibly the offence intended to be charged, and need not conclude "against the form of the statute."[h]

In Arkansas, the omission of the words "contrary to the form of the

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[a] See ante, § 10, 11; though see in Arkansas, Brown *v.* State, 8 Eng. (13 Ark.) 96; see particularly People *v.* Cook, 2 Parker, C. R. 21.

[b] 1 Deac. Crim. Law, 661; People *v.* Enoch, 13 Wendell, 175, per Walworth, Chanc.; State *v.* Ripley, 2 Brevard, 382; Warner *v.* Com. 1 Barr, 154; State *v.* Evans, 7 Gill & Johnson, 290; State *v.* Jim, 3 Murphey, 3; see ante, § 10.

[c] Com. *v.* Searle, 2 Binney, 489; Russel *v.* Com. 7 Serg. & Ra. 177; White *v.* Com. 6 Binney, 179; 2 Hale, 190; 1 Saund. 135 a, n. 6; 2 Roll. Abr. 82; 2 Hale, 190; 1 Saund. 135 a, n. 3.

[d] State *v.* Jim, 3 Murphey, 3; post, § 412.

[e] Browne's case, 3 Greenl. 177; Com. *v.* Springfield, 7 Mass. 9; State *v.* Soule, 20 Maine R. 19; Chapman *v.* Com. 5 Wharton, 427; 1 Hale, 172, 189, 192; Dougl. 441; 1 Salk. 370; 13 East, 258; 5 Mod. 307; 2 Ld. Raym. 1104; 1 Saund. 135 a, n. 3, 4; 2 Hawk. c. 25, s. 116, c. 23, s. 99; Bac. Ab. Indictment, H. 4; Burn, J., Indict. ix.; Cro. C. C. 39; 1 Chitty on Pleading, 358; 2 Hale, 189; 2 Hawk. c. 25, s. 116; 1 Salk. 370; Com. *v.* Stockbridge, 11 Mass. 279; Com. *v.* Northampton, 2 Mass. 116; Com. *v.* Cooley, 10 Pick. 37; Com. *v.* Searle, 3 Binney, 332.

[f] Com. *v.* Northampton, 2 Mass. 116; Com. *v.* Springfield, 7 Mass. 9.

[g] Com. *v.* Caldwell, 14 Mass. 330. [gg] Com. *v.* Stockbridge, 11 Mass. 279.

[h] Commonwealth *v.* Kennedy, 15 B. Mon. (Ky.) 531.

statute in such case made and provided," does not vitiate the indictment under the code,[hh] though the offence be created by statute.[i]

The proper office of the conclusion, *contra formam statuti*, is to show the court the action is founded on the statute, and is not an action at common law.[ii]

One count concluding "*contra formam*," &c., does not cure another without the proper conclusion.[j]

3d. WHEN THE STATUTORY CONCLUSION MUST BE IN THE PLURAL.

§ 412. Where the offence is governed or limited by two statutes, there have been various distinctions taken respecting the conclusion against the form of the statutes in the plural, or statute in the singular only. The rule given by the older writers is, that where an offence is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be, that a conclusion in the singular will suffice.[k] The general practice now is, to conclude in the singular in all cases, though in Maryland[l] and in Indiana,[m] it has been held that when an offence is committed by one act of Assembly, and the punishment prescribed and affixed by another, the conclusion should be against the acts of Assembly.

Though there is but one statute prohibiting an offence, it is not fatal for the indictment to conclude contrary to the "statutes."[n]

4th. WHEN THE STATUTORY CONCLUSION MAY BE REJECTED AS SURPLUSAGE.

§ 413. In a common law indictment, the words *contra formam statuti* may be rejected as suplusage.[o] Where an offence, both by statute and common law, is badly laid under the statute, the judgment may be given at common law.[p]

[hh] Dig. c. 52. s. 98.

[i] State *v.* Cadle, 19 Ark. Rep. 613.

[ii] Crain *v.* State, 2 Yerger, 390.

[j] State *v.* Soule, 20 Maine R. 19.

[k] 1 Hale, 173; Sid. 348; Owen, 135; 2 Leach, 827; 1 Dyer, 347 a; 4 Co. 48; 2 Hawk. c. 25, s. 117; Kane *v.* People, 9 Wend. 203; Bufman's case, 8 Greenleaf, 113; State *v.* Jones, 4 Halstead, 357; State *v.* Dayton, 3 Zabr. 49; Bennett *v.* State, 4 Indiana, 167; State *v.* Robbins, 1 Strobh, 355; State *v.* Bell, 3 Iredell, 506; Townley *v.* State, 3 Harr. 311.

[l] State *v.* Cassel, 2 Harr. & Gill, 407; see, also, State *v.* Pool, 2 Dev. 202.

[m] Francisco *v.* State, 1 Carter, 179; King *v.* State, 2 Ibid. 253; see Crawford *v.* State, 2 Ired. 305. An indictment for murder was found and concluded *contra formam statuti.* By the statute of 1843, the punishment of that crime was death; but by the act of 1846, the punishment is either death or imprisonment in the State prison at hard labor during life, at the discretion of the jury. It was held that the conclusion of the indictment in the singular, to wit, *contra formam statuti*, was correct. Bennett *v.* State, 3 Ind. 167.

[n] Townley *v.* State, 3 Harrison, 311; Carter *v.* State, 2 Carter (Ind.), 617; but see *contra*, State *v.* Cassel, 2 Harr. & Gill, 407; State *v.* Abernathy, 1 Busbee, 428.

[o] State *v.* Buchman, 8 N. Hamp. 203; Knowles *v.* State, 3 Day, 103; State *v.* Cruiser, 3 Harrison, 108; Southworth *v.* State, 9 Conn. 560; Com. *v.* Gregory, 2 Dana, 417; Com. *v.* Hoxey, 16 Mass. 385; Resp. *v.* Newell, 3 Yeates, 407; Vanderworker *v.* State, 8 Eng. (13 Ark.) 700; State *v.* Burt, 25 Vt. (2 Deane) 373; Pennsyl. *v.* Bell, Addison, 171; 2 Hale, 190; Allyn, 43; 1 Salk. 212, 213; 5 T. R. 162; 2 Leach, 584; 2 Salk. 460; 1 Ld. Raym. 1163; 4 T. R. 202; 1 Saund. 135, n. 3; 2 Hawk. c. 25, s. 115; Bac. Ab. Indict. H. 2; Burn, J. Indict. ix.; Haslip *v.* State, 4 Haywood, 273.

[p] Com. *v.* Lanigam, 2 Boston Law Rep. 49; State *v.* Phelps, 11 Ver. R. 117; ante, § 10–11.

XVI. Joinder of offences.

1st. Where such joinder is permissible, § 414.
2d. Where an election will be completed, § 422.
3d. Advantages of alternative statements in distinct counts, § 424.
4th. How second and subsequent counts are to be prefaced, § 426.
5th. Effect of one bad count upon others, and herein of the transposition of counts, § 427.

1st. Where such joinder is permissible.

§ 414. In the United States courts:—

"Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts of transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated."[a]

In Pennsylvania:—

"In every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the said property, knowing it to have been stolen; and in any indictment for feloniously receiving property, knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing said property; and it shall be lawful for the jury trying the same, to find a verdict of guilty either of stealing the property, or of receiving the same, knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty of either stealing the property or of receiving it, knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it, knowing it to have been stolen."[b]

A defendant, as has been already seen, cannot generally be charged with

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[a] 26 Feb. 1853, § 1. 10 Stat. 162. See U. S. *v.* O'Callahan, 6 McLean, 596.

[b] Rev. Law 1860, Pamp. 436.

The Revisers say as to this: "This section is new, and is intended to remedy difficulties arising from the common law doctrines in relation to the joinder of offences and joint offenders. At common law, a felony and a misdemeanor, such as burglary and receiving stolen goods, could not be regularly joined. In larceny, counts for receiving were sometimes added, but the practice was regarded as of doubtful legality, until in the cases of Rex *v.* Galloway, 1 Moody's Crown Cases, 234; and of Rex *v.* Madden, 1 Moody's Crown Cases, 277, it was decided to be erroneous. In Pennsylvania, the uniform practice has been to unite counts for larceny and receiving, but in no other kind of felonious taking has such joinder been permitted. So at common law, if two persons are charged with jointly receiving stolen goods, a joint act of receiving must be proved. Proof that one received in the absence of the other, and afterwards delivered to him will not suffice. Rex *v.* Messingham, 1 Moody's Crown Cases, 257. The proposed section will obviate these technical difficulties, as it permits a count for receiving to be joined with all indictments for felonious taking, and authorizes the conviction of one or more of several persons, jointly indicted, for felonious taking or receiving, either as principals or receivers, according to their actual guilt."

two distinct offences in a single count. How far, however, he may be charged with distinct offences in different counts of the same indictment, has received more varied adjudication. Offences, it is held, though differing from each other, and varying in the punishments authorized to be inflicted for their perpetration, may be included in the same indictment, and the accused tried upon the several charges at the same time, provided that the offences be of the same character, and differ only in degree, as, for instance, the forging of an instrument, and the altering and publishing it, knowing it to be false.[q] In misdemeanors, the joinder of several offences will not, in general, vitiate the prosecution in any stage.[r] For in offences inferior to felony, the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, is rarely exercised.[s] On the contrary, it is the constant practice to receive evidence of several libels and assaults upon the same indictment.[t] In a leading case[u] under several counts for a conspiracy, alleging several conspiracies of the same kind, on the same day, the prosecutor was allowed to give in evidence several conspiracies on different days.[v] But where two defendants were indicted for a conspiracy and for a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy, but no evidence against one of them as to the libel, the judge observed that it was more fair that the prosecutor should elect which charge he should go upon, and it was done accordingly.[w]

§ 415. It cannot be objected in error, that two or more offences of the same nature on which the same or a similar judgment may be given, are contained in different counts of the same indictment; nor can such objection be maintained, either on demurrer or arrest.[x] It appears to have been formerly holden, that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence.[y] But in a subsequent case,[z] the court held the latter case not to be law, and said, "Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one? It is a prosecution in the king's name

[q] Baker v. State, 4 Pike's Ark. 56; People v. Rynders, 12 Wend. 425; Edge v. Com. 7 Barr, 275; Coulter v. Com. 5 Metc. 532; State v. Kirvy, Miss. 317; Mills v. Com. 1 Harris, 631; Hoskins v. State, 11 Georgia, 92; Engleman v. State, 2 Carter (Ind.), 91; U. S. v. O'Callahan, 6 McLean, C. C. R. 569; Johnson v. State, 29 Alab. 62; Orr v. State, 18 Ark. 540.

[r] Young v. Rex, 3 T. R. 105; R. v. Jones, 2 Camp. 132; R. v. Saunders, 2 Burr. 984; R. v. Kingston, 8 East, 41; Harman v. Com. 12 S. & R. 69; Com. v. Gillespie, 7 S. & R. 476; U. S. v. Peterson, 1 W. & M. 305; People v. Costello, 1 Denio, 83 Weinzorpflinn v. State, 7 Black. 186; Com. v. Demain, Brightly, R. 441; U. S. v. Porter, 2 Cranch, C. C. R. 60. The offences of receiving and concealing a specified stolen article, may be joined in the same count, Keefer v. State, 4 Ind. 246.

[s] R. v. Jones, 2 Camp. 132; Com. v. Manson, 2 Ashmead, 31.

[t] Id.

[u] R. v. Levy, 2 Stark. C N. P. 458; see Res. v. Hevice, 2 Yates, 114.

[v] See, also, R. v. Broughton, Trem. P. C. 111, where the indictment charged no less than twenty distinct acts of extortion.

[w] R. v. Murphy, 8 Car. & P. 276; as to election, see more fully post, § 422.

[x] Carlton v. Com. 5 Metc. 532; Kane v. People, 9 Wend. 203; Cory v. State, 3 Port. 186; Stone v. State, 1 Spencer, 404; R. v. Ferguson, 29 Eng. Law & Eq. 536.

[y] R. v. Clendon, 2 Ld. Raym. 1572; 2 Str. 870.

[z] R. v. Benfield and Saunders, 2 Burr. 984.

for the offence charged, and not in the nature of an action, where a person injured is to recover separate damages." Even a bad count after general verdict and judgment, does not in this country vitiate the good counts that surround it.[a]

Nothing is more common than to join counts for a misdemeanor with counts for a conspiracy to commit a misdemeanor.[b] An indictment may also contain a count at common law, and another under a statute.[c] And in England in 1855, in a case reserved, it was held by Lord Campbell, C. J., Creswell, J., Coleridge, J., Plat, B., and Williams, J., that it is no ground for arresting a judgment upon conviction of felony that the indictment contained a count for a misdemeanor.[d]

§ 416. In cases of felony, where two or more distinct offences are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed,[e] but such election will not be required to be made where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offence.[f] And in Massachusetts it would seem to be the practice to join counts for distinct felonies, when constructed on different sections of the same statute. Thus, for instance, in indictments under the revised statute for arson or burglary, where the common law offence is divided into distinct grades, counts may be joined, embracing each section.[g] And in Tennessee, where an indictment combined four counts, the first charging the defendant with stealing A., a slave, the property of B.; the second, with stealing A., a slave, the property of C.; the third, with stealing a gray mare, the property of D.; and the fourth, with stealing a bay horse, the property of E.; on motion to quash the indictment, it was held, that there was no objection in point of law, to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment, against the same offender; and that such joinder was no ground of demurrer or arrest of judgment.[h]

§ 417. Where an indictment charges in one count, a breaking and entering of a building, with intent to steal, and in another count, a stealing in the same building on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not

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[a] Post, § 3047.

[b] 3 M. & S. 550; Com. *v.* Gillespie, 7 S. & R. 476, 477; 1 Ch. C. L. 255.

[c] State *v.* Williams, 2 McCord, 301; Com. *v.* Sylvester, 6 P. L. J. 283; Brightly, R. 331; State *v.* Thompson, 2 Strobh. 12.

[d] R. *v.* Ferguson, 29 Eng. Law & Eq. 536.

[e] Lazier *v.* Com. 10 Grattan, 708; post, § 422.

[f] Kane *v.* People, 9 Wend. 203; Wright *v.* State, 4 Humph. 194; Weinzorpflin *v.* State, 7 Black. 186; State *v.* Hazard, 2 R. I. 474; Sarah *v.* State, 28 Mississippi, 267; State *v.* Jacob, 10 La. R. 141; Ketchingham *v.* State, 6 Wisc. 426; Com. *v.* Hills, 10 Cush. (Mass.) 530; Sarah *v.* State, 28 Miss. (6 Cush.) 267; Donnelly *v.* State, 2 Dutch. (N. J.) 463, 601. See post, § 423.

[g] Com. *v.* Hope, 22 Pick. 1.

[h] Cash *v.* State, 10 Humph. 111; see State *v.* Nelson, 29 Maine, 324; Com. *v.* Dobbin, 2 Parsons, 380; R. *v.* Trueman, 8 C. & P. 727; Sarah *v.* State, 28 Mississippi, 267.

show whether one offence only, or two were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved.[i] A count in an indictment, which charges the breaking and entering in the night-time of a shop adjoining to a dwelling-house, with intent to commit a larceny, may be joined with a count which charges the stealing of goods in the same shop, and the defendant, if found guilty generally, may be sentenced for both offences. But if the breaking and entering, and the actual stealing, are charged in one count, only one offence is charged, and the defendant on conviction, can be sentenced to one penalty only.[j]

§ 418. The general rule is, if the legal judgment on each count would be materially different, as in felony and misdemeanor, then the joinder of several counts would be bad on demurrer, in arrest of judgment, or on error.[k] But the objection may be cured at the trial by taking a verdict on the counts only that can be joined.[l] And in Vermont, after a general verdict of guilty, it is no objection to an indictment, on motion in arrest, that offences of different grades, and requiring different punishments, are charged in the different counts. If any one or more of the counts are sufficient, the court will render judgment upon such counts; and, if all the counts are sufficient, judgment will be rendered on the count charging the highest offence.[m] In Pennsylvania, in an early case, where two distinct counts, under two different statutes, were joined, having, it would seem, two distinct penalties, the joinder was held fatal, on writ of error.[n] And in South Carolina, that where an indictment contained a count for a misdemeanor at common law, and one for a misdemeanor *contra formam statuti*, the first being punishable by fine and imprisonment, and the second under the statute, by a fine of $500, and a general verdict of guilty was rendered, it was held that the sentence must be imposed according to the statute, it being in mitigation of the common law.[o] In Pennsylvania, however, this position may be said to be very much shaken by a case where a count for a common law misdemeanor was joined with a count of a statutory misdemeanor, and on a verdict of guilty on each, the Supreme Court imposed a separate sentence on each, common law on the one, statutory on the other.[p]

§ 419. On an indictment in the United States Circuit Court, for manslaughter, which contained two counts for the same transaction, one for a felony, and the other for a misdemeanor, where the jury found the prisoner guilty on the last count, a motion for arrest of judgment was refused.[q]

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[i] Crowley *v.* Com. 11 Metc. 575; Kite *v.* Com. 11 Metc. 581. *Contra,* Wilson *v.* State, 20 Ohio, 26.

[j] Josslyn *v.* Com. 6 Metc. 236.

[k] Young *v.* The King, 3 T. R. 103; Hancock *v.* Haywood, Id. 435; but see 1 East, P. C. 408; 1 Chitty's C. L. 254, 255; State *v.* Freels, 3 Humph. 228; Hildebrand *v.* State, 5 Mis. 548; see Buck *v.* State, 1 Ohio St. R. 61; see post, § 3044.

[l] R. *v.* Jones, 8 C. & P. 776.

[m] State *v.* Hooker, 17 Ver. 658; Cook *v.* State, 4 Zabr. N. J. 843.

[n] Updegraff *v.* Com. 6 Serg. & Rawle, 10.

[o] State *v.* Thompson, 2 Strobh. 12; see State *v.* Anderson, 1 Strobh. 445.

[p] Com. *v.* Sylvester, 6 P. L. J. 283; Brightly, R. 331; Com. *v.* Gillespie, 7 Ser. & R. 476; though see Com. *v.* Hartman, 5 Barr. 60; post, § 420.

[q] U. S. *v.* Stetson, 3 W. & M. 164.

Where one count in a bill of indictment charges the offence to have been committed in one county, and another count charges it in another, the general rule is, that the counts are repugnant, and the indictment will be quashed on motion, or the prosecutor be compelled to elect which he will proceed on.[qq]

Where an assault is an ingredient of a felony, as in the case of rape, and assault with intent to commit rape, or where the misdemeanor is of the nature of a corollary to the felony, as in larceny and the receiving of stolen goods, a joinder is good.[r] So, by Judge Woodbury, it was ruled that, if there be two counts in one indictment, for offences committed at the same time, and place, and of the same class, but different in degree, as one for a revolt, and another for an attempt to excite it, the judgment will not be arrested, though a verdict of guilty is returned on both.[s] In New York, when by statute an offence comprises different degrees, an indictment may contain counts for the different degrees of the same offence, or for any of such degrees.[t]

§ 420. In England, as well as in this country, the correctness of the joinder of larceny with receiving stolen goods, may be considered as established.[u] Thus an indictment, in the first count, charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the

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[qq] State *v.* Johnson, 5 Jones, N. C. 221.

[r] Harman *v.* Com. 12 Serg. & Ra. 69; Stephen *v.* State, 11 Georg. 225; Dowdy *v.* Com. 9 Gratt. 727; State *v.* Hazard, 2 R. I. 474; Keefer *v.* State, 4 Indiana, 246; U. S. *v.* Prior, 5 Cranch, C. C. R. 37; State *v.* Posey, 7 Richardson, 484; Buck *v.* State, 2 Harr. & John. 426; State *v.* Sutton, 4 Gill, 495; State *v.* Coleman, 5 Porter, 52; State *v.* Montague, 2 M'Cord, 287; State *v.* Gaffney, Rice, 431; Stephen *v.* State, 11 Geor. 225. In a recent case in South Carolina, the question was examined by the court with great learning. "The rule in England," it was said by the learned judge who gave the opinion of the court, "is, that a felony cannot be joined with a misdemeanor, in the same indictment. The reason which is assigned for this, that the defendant would thereby lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel, has no application at all in this country: on the contrary, the defendant would gain by being indicted for felony, as he would have the right of challenge, in addition to the other privileges, which are equally secured to all defendants, in criminal prosecutions. From analogy to the rule of pleading in civil actions, I suppose that whenever the same plea may be pleaded, and the same judgments given, the offences may be joined. No doubt two felonies may be joined, so far as regards the objection in point of law, as matter of form. And so of several misdemeanors. (3 T. R. 98.) And by the English practice, larceny, and receiving stolen goods, may be joined. (1 Cr. Ca. 234.) But here the receiving is charged as a felony. A case is cited by Mr. Rice, in his Digest, tit. Indictment, 52, State *v.* Smith, MSS., where it is said there is a repugnancy in charging a felony in one count, and a misdemeanor in another, which would be fatal. But, if fatal at all, I should suppose it would be so on demurrer, or in arrest of judgment; and yet the judgment there was not arrested, although the defendant was convicted only of the receiving. Since the act of 1829, subjecting the receiver to the punishment of whipping, and that of 1834, imposing the same punishment for grand larceny, the act of 1833 having abolished branding, I can perceive no greater incongruity or repugnancy in joining larceny and receiving stolen goods, in the indictment, than there is in joining any other distinct offences, where the same judgment must be accorded. It is true, the offences are technically of different natures. One is a felony, and the other a misdemeanor. A second conviction of the former would be capital; but as the formality of praying the benefit of the clergy, on the first conviction, is wholly dispensed with, and the punishment of whipping is peremptorily substituted, the offences are so far assimilated, that the technical objection which prevails in England to their being joined, does not exist here. (State *v.* Boyes and Stuke, 1 M'Mullan, 190.")

[s] U. S. *v.* Peterson, 1 W. & M. 305.

[t] Rev. Stat. part iv. chap. 11, tit. 3, art. 2, sec. 51.

[u] R. *v.* Craddock, 1 Eng. R. 563, S. C. 2 Den. C. C. 563; Keefer *v.* State, 4 Ind. 246.

prisoner was charged with "having received the article so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held that there was no repugnancy, for that although the word "aforesaid," in a subsequent count, virtually incorporates all necessary averments as to time and place in that count, the words "so as aforesaid feloniously stolen," did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had been feloniously stolen by some person.[v]

§ 421. Where a prisoner is found guilty generally, under an indictment containing two counts, neither of which is defective, it is no ground of objection to the verdict that it does not state upon which count it was found.[vv] Not only may a verdict of guilty be rendered on one count and not guilty upon another, but if the jury find the defendant guilty on one count, and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of not guilty on such counts.[w]

On trial of an indictment containing two counts relating to the same transaction, where a general verdict of guilty is rendered, such a verdict is in effect a finding as to both counts, the lesser crime being thus merged in the greater, and judgment must be for the greater.[ww]

Where a count for a misdemeanor is joined to a count for felony, the jury have no power, in acquitting the prisoner, to impose costs upon him; and though such a verdict be rendered and judgment ordered, the county is liable for the costs.[x]

2d. Where an election will be compelled.

§ 422. As a general rule when two offences charged form parts of one transaction, yet are of such a nature, that the defendant may be found guilty of both, the prosecutor will not be called upon to elect upon which charge he will proceed, for in such case the joinder of counts cannot prejudice the defendant, which is the only ground on which this application to the discretion of the judge can be founded to make the prosecutor elect.[xx] Thus the prosecutor will not be compelled to elect where a count, charging a person with being accessary before the fact, is joined with one charging him with being accessary after.[y] So the defendant may be indicted as a principal in

[v] R. *v.* Craddock, 1 Eng. R. 563, S. C. 2 Den. C. C. 31; see State *v.* Hazard, 2 R. I. 474; ante, § 418.

[vv] Scott *v.* State, 31 Mis. (2 George) 473.

[w] Weinzorpflin *v.* State, 7 Blackf. 186; Morris *v.* State, 8 Smede & Mar. 762; Com. *v.* Bennet, 2 Virg. Cases, 235; Kirk *v.* Com. 9 Leigh, 627; Stultz *v.* People, 4 Scam. 168; State *v.* Phinney, 42 Maine, 384; R. *v.* Craddock, 1 Eng. R. 569; S. C. 2 Den. C. C. 31. Post, § 3047.

[ww] Manly *v.* State, 7 Md. 135; Cook *v.* State, 4 Zabr. (N. J.) 843.

[x] County of Wayne *v.* Commonwealth, 26 Penn. State R. (2 Casey) 171.

[xx] R. *v.* Austin, 7 C. & P. 796; R. *v.* Hartall, Id. 475; R. *v.* Wheeler, Id. 170. Reg. *v.* Pulham, 9 C. & P. 281; People *v.* Costello, 1 Denio, 83; State *v.* Hogan, R. M. Charlton, 274; Dowdy *v.* Com. 9 Gratt. 727; State *v.* Jackson, 17 Mis. (2 Ben.) 544; Sarah *v.* State, 28 Miss. (6 Cush.) 267; Mayo *v.* State, 30 Alab. 32.

[y] R. *v.* Blackson, 8 C. & P. 43; Tompkins *v.* State, 17 Geo. 356.

the first degree in one count, and as principal in the second degree in another count.[z] On the same principle where there are counts in an indictment for forging a bill, acceptance, and endorsement, the prosecutor is not driven to elect on which he will proceed.[zz]

§ 423. The right of election, in this country,[a] if not in England, is confined to cases where the indictment contains charges which are actually distinct, and grow out of different transactions.[b] The court will not compel the prosecutor to elect upon an indictment charging prisoner with larceny and receiving stolen goods, &c., where it appears by the indictment, that the charges relate to the same transaction, modified to meet the proof.[c] In New York, the law has been similarly stated, and in cases of felony, where two or more repugnant offences are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will proceed; but such election will not be required to be made when several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offence.[d] In cases of misdemeanor, however, punishable by fine and imprisonment, the prosecutor may join several distinct offences in the same indictment, and try them at the same time,[e] unless the number of counts is so great as to embarrass the trial.[f] Even in felonies, when the offences are part of the same act, no election will be compelled.[g] Whether a court will compel a prosecuting officer to elect which court to proceed on, rests in the discretion of the court, and cannot be assigned for error.[gg]

3d. Advantages of alternative statements in distinct counts.

§ 424. Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus he may vary the ownership of articles stolen in larceny;[h] of houses burned in arson;[i] or of the fatal instrument in homicide.[j] The reason for this is thus excellently stated by Chief Justice Shaw:—

"To a person unskilled and unpractised in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the

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[z] R. v. Gray, 7 C. & P. 174.

[zz] R. v. Young, Peake's Add. Cas. 228. Le Blanc.

[a] Com. v. Manson, 2 Ashmead, 31; State v. Hye, 26 Maine, 312; State v. Jacob, 10 La. R. 141.

[b] State v. Hogan, R. M. Charlton, 474; ante, § 416.

[c] Ibid.; Engleman v. State, 2 Carter (Ind.) 91; Dowdy v. Com. 9 Gratt. 727.

[d] See People v. Austin, 1 Parke, C. C. 154; ante, § 416.

[e] Kane v. People, 8 Wendell, 203; State v. Earle, 3 Harrington, 561; State v. Haney, 2 Dev. & Bat. 390; U. S. v. Dickenson, 2 McLean's C. C. R. 325.

[f] State v. Nelson, 29 Maine, 324.

[g] R. v. Trueman, 8 C. & P. 727; see State v. Hazard, 2 R. I. 474; ante, § 414.

[gg] State v. Leonard, 22 Mis. (1 Jones) 449; Bailey v. State, 4 Ohio (N. S.) 440.

[h] State v. Nelson, 29 Maine, 324; Com. v. Dobbin, 2 Parsons, 380.

[i] R. v. Trueman, 8 C. & P. 727.

[j] See post, § 1059.

charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third, alleging a death by the joint results of both causes, combined.[k]

§ 425. How generally the same practice exists in England may appear from the very pertinent inquiry of Alderson, B., in a recent case: "Why may there not be as many counts for receiving as there are for stealing—one for each? It is really only one offence laying the property in different persons. It is one stealing, and one receiving; and because there was some doubt as to the person to whom the property really belonged, the property is laid five different ways. If a late learned judge had drawn the indictment, you would very likely had it laid in fifty more.[l]

In Iowa, it was said in 1858, that the court would permit a defendant to withdraw a plea of not guilty, in order to enable him to apply for a motion to compel the prosecutor to elect.[ll]

A verdict of guilty on four counts, charging the murder to have been committed with a knife, a dagger, a dirk, and a dirk-knife, is not repugnant, inconsistent, or void, since the same kind of death is charged in all the counts.[m]

4th. How second and subsequent counts are to be prefaced.

§ 426. As both in civil and criminal pleading, two counts charging the same thing, would be bad on special demurrer for duplicity—though the fault in civil pleading is cured by pleading over—it has been usual by inserting the word "other" in a second count to obviate this difficulty through the fiction that the cause of action thus stated is new and distinct. The rule is clear that when two counts setting out the same offences occur, judgment will be arrested. "Neither, as we think," says Lord Denman, in a case in 1846, "can one offence, whether felonious or not, be properly charged twice over, when with one indictment or two; and as special demurrers are not necessary in criminal cases, we think that if the two counts in an indictment

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[k] Bemis' Webster case, 471; see also State *v.* Melville, 10 La. R. 456.

[l] Reg. *v.* Beeton, 2 Car. & Kir. 961, Alderson, B.

[ll] State *v.* Abrahams, 6 Iowa (Clarke), 117.

[m] Donnelly *v.* State, 2 Dutch. (N. J.) 463; affirmed in error, 2 Dutch. (N. J.) 601. Ante, § 416.

necessarily appear to be for the same charge, the objection might be taken in arrest of judgment. But still the court would, if possible, hold them not to be for the same offence; and certainly the omission of the word 'other' would not of itself make the same; though the insertion of the word 'other' would make them different."[mm] In New Hampshire, however, it is said that where the same offence is described in different counts, it is not necessary to allege the offence described in each of the several counts to be other and different from that described in the others.[n]

The relative "said" used in one of the subsequent counts of an indictment referring to matter in a previous count, is always to be taken to refer to the count immediately preceding where the sense of the whole indictment does not forbid such a reference.[nn]

5th. Effect of one bad count upon others, and herein of the transposition of counts.

§ 427. Where the first count of an indictment is holden to be bad, a subsequent count may be sustained even though it refers to the first count for some allegations, and without repeating them.[o] Generally, however, one bad count cannot help another bad count, which is defective in a distinct way.[oo]

Under the statute of Virginia, 1849, c. 208, § 34, a prisoner may move the court to instruct the jury to disregard a bad count; and a motion to exclude evidence only applicable to a bad count, is in effect a motion to disregard that count.[p]

§ 428. There may be cases, it seems, in which counts may be transposed after verdict, so as to invest the second with the incidents of the first, or vice versa. Thus, in a late English case, A. and B. were indicted for the murder of C., by shooting him with a gun. In the first count A. was charged as principal in first degree, B. as present aiding and abetting him; in the second count B. as principal in first degree, A. as aiding and abetting. The jury convicted both, but said they were not satisfied as to which fired the gun. It was held, that the jury were not bound to find the prisoners guilty of one or other of the counts only (Maule, J., dissentiente); and that notwithstanding the word "afterward" in the second count, both the counts related substantially to the same person killed, and to one killing, and might have been transposed without any alteration of time or meaning.[q]

The effect of a bad count after verdict will be considered hereafter.[r]

[mm] Campbell *v.* R. 11 Ad. & El. N. S. 800.
[n] State *v.* Rust, 35 A. K. 438.
[nn] Sampson *v.* Com. 5 W. & S. 385
[o] Com. *v.* Miller, 2 Par. 480.
[oo] State *v.* Longley, 10 Ind. 482.
[p] Rand *v.* The Commonwealth, 9 Gratt. (Va.) 738.
[q] R. *v.* Downing, 1 Den. C. C. 52.
[r] Post, § 3047.

XVII. Joinder of defendants.

1st. Who may be joined, § 429.
2d. Where a particular number of defendants is necessary, as in riot or conspiracy, § 431.
3d. How misjoinder may be excepted, § 432.
4th. Severance on trial, § 433.
5th. Verdict and judgment, § 434.

1st. Who may be joined.

§ 429. When more than one join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately.[r] Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly[s] or separately; and the same, where two or more commit a battery, or are guilty of extortion, or the like.[t] And even parties to the crime of adultery may be indicted jointly;[u] though where two are jointly indicted for fornication or adultery, and are tried together, and one party is found guilty and the other not guilty, no judgment can be rendered against the former.[v] Whenever property has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of others, all of whom acted in concert together, it was holden that they might all be indicted jointly.[w] Where two persons are jointly indicted, and one only is tried, a separate count charging him alone with the crime is unnecessary.[ww]

§ 430. As a general rule, where the offences are several, there can be no joinder.[x] Thus, though where a libellous song was sung by two men, it was holden that they might be indicted jointly;[y] and though a similar rule was held, where two or more persons join in any other kind of publication of a libel, yet if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. Two or more cannot be jointly indicted for perjury,[z] or for seditious, obscene, or blasphemous words or the like, because such offences are in their nature distinct.[zz] If A. and B. are jointly indicted and tried for gaming, and the evidence shows that A. and others played at one time when B. was not present, and B. and others played at an other time when A. was not present, no conviction can be had against them.[a]

If the offence charged does not wholly arise from the joint act of all the

[r] State *v.* Gay, 10 Mis. 540; U. S. *v.* O'Callahan, 6 McLean, 596.

[s] 2 Hale, 173.

[t] R. *v.* Atkinson, 1 Salk. 382; R. *v.* Trafford, 1 B. & Ad. 874; Kane *v.* People 8 Wendell, 203.

[u] Com. *v.* Elwell, 2 Met. 190; State *v.* Mainor, 6 Iredell, 340.

[v] State *v.* Mainor, 6 Ired. 340.

[w] R. *v.* Young, 3 T. R. 98.

[ww] State *v.* Bradley, 9 Rich. Law. (S. C.) 168.

[x] Elliott *v.* State, 26 Alab. 78; though see Young *v.* R. 3 T. 106; R. *v.* Kingston, 8 East, 46.

[y] R. *v.* Benfield, 2 Bur. 985.

[z] R. *v.* Phillips, 2 Str. 921.

[zz] State *v.* Roulstone, 3 Sneed (Tenn.) 107.

[a] Elliott *v.* State, 26 Ala. 78.

defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, the indictment must charge them severally and not jointly.[aa]

Persons holding different offices with separate duties, cannot be jointly indicted for a misdemeanor in office. Thus an indictment charging such an offence against the inspectors, clerks, and judge of an election was held bad on demurrer.[b]

Principals in the first and second degree, and accessaries before and after the fact, may all be joined in the same indictment;[c] or the principals may be indicted first, and the accessaries after the conviction of the principals.

2d. Where a particular number of defendants is necessary, as in riot or conspiracy.

§ 431. In riot and conspiracy, when one cannot be indicted for an offence committed by himself alone, the acquittal of those charged in the same indictment with him as co-defendants, must of course extend to him.[d] In an indictment for conspiracy, less than two cannot possibly be joined;[e] a wife and husband together not being sufficient. It has been doubted whether a charge of conspiracy could be sustained against two defendants one of whom is found by the jury to be insane.[f] In an indictment for riot, when the offence is not charged to have been committed with persons unknown, unless three of the defendants are proved to have been concerned, they must all be acquitted.[g] Where there is an allegation of defendants unknown the case is otherwise.[h] The effect of charging the offence to have been committed by persons "unknown," has been considered under another head.[i]

3d. How misjoinder may be excepted to.

§ 432. Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error; or the court will in some cases quash the indictment.[j] If, however, two be improperly found guilty separately on a joint indictment, the objection may, in general, be cured by producing a pardon, or entering a *nolle prosequi* as to the one of them who stands second on the verdict. Where two persons are indicted for a conspiracy, and one of them dies before the trial, and it proceeds against both, it is no mistrial, and entry of a suggestion of the death on the record is unnecessary.[k] Where two are charged with a joint offence, either may be found

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[aa] Com. *v.* Miller, 2 Par. 481. [b] Com. *v.* Miller, 2 Par. 481. [c] 2 Hale, 173.

[d] R. *v.* Kinnersley, 1 Stra. 193; R. *v.* Ludbury, 12 Mod. 262; 2 Salk. 593; 13 East, 412; 1 Ld. Raym. 484; State *v.* Allison, 3 Yerger, 428; People *v.* Howell, 4 John. 296; Turpin *v.* State, 4 Blackf. 72; State *v.* Mainor, 6 Ired. 340; post, §§ 2339, 2490, 2503.

[e] Com. *v.* Manson, 2 Ashm. R. 31; State *v.* Covington, 4 Ala. 603; State *v.* Tom, 2 Dev. 569; U. S. *v.* Cole, 5 McLean, 513; R. *v.* Gompertz, 9 Q. B. 824; see postea, § 2339.

[f] Breckenbridge's Miscellanies, 223. [g] Penn *v.* Hurton, Addis. R. 334.

[h] State *v.* Egan, 10 La. R. 698. [i] Ante, § 242–251; post, § 2295.

[j] Young *v.* King, 3 T. R. 103–106; R. *v.* Clarke, 1 East, 46; 2 Camp. 132.

[k] Reg. *v.* Kenrick, 5 Ad. & El. N. S. 49.

guilty, but they cannot be found guilty of the separate parts of the charge, subjecting the prisoners to distinct punishment.[l] And if they be found guilty separately, judgment cannot be passed upon one, unless a pardon be obtained, or a *nolle prosequi* be entered as to the other.[m] Where two are charged jointly with receiving stolen goods, a joint act must be proved: proof that one received in the absence of the other, and afterwards delivered to him, will not suffice.[n] It has been decided that several receivers may be charged on the same indictment with separate and distinct acts of receiving.[o] At least it is too late, after verdict, to object that they should have been indicted separately.[p] But where several persons are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of larceny only.[q]

In a recent case, three persons were jointly charged with procuring certain other persons to utter a forged will. The only evidence for the prosecution was of separate acts, at separate times and places, done by each of the persons charged as accessaries. One of them having ultimately pleaded guilty, it was held that the other two might, notwithstanding, be convicted.[r]

4th. Severance on trial.

§ 433. Where several persons are jointly indicted, they may be tried separately, at the election of the commonwealth to do so.[s] Where they elect to be tried separately, and where the application is granted, the prosecuting officer may elect whom he will try first.[t]

They cannot claim separate trials as a matter of right, although they sever in their pleas; but the court in its discretion may allow them to be tried separately.[tt] After the jury have been sworn, and part of the evidence heard, it is too late for the prisoner to demand a separate trial.[u] The law that defendants, jointly indicted, may be tried separately, does not extend to informations, and the matter is, as at common law, within the discretion of the court.[uu]

5th. Verdict and judgment.

§ 434. Joint defendants may be convicted of different grades.[v] Thus

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[l] R. v. Hempstead, R. & R. 344. [m] Ibid. [n] R. v. Messingham, R. & M. 257.

[o] Reg. v. Pulham, 9 C. & P. 281. [p] R. v. Hayes, 2 M. & Rob. 156.

[q] R. v. Butterworth et al., R. & R. 520; see R. v. Turner, 1 Sid. 171; Jervis, Archb. C. L. 9th ed. 58.

[r] R. v. Barber, 1 Car. & Kir. 442. [s] Curran's case, 7 Gratt. 619.

[t] Jones v. State, 1 Kelly, 610; People v. McIntyre, 1 Harris. C. C. 371; People v. Stockham, Ibid. 424.

[tt] Hawkins v. State, 9 Ala. 137; U. S. v. Collyer et al., Wharton on Homicide, Appendix; see Com. v. Manson, 2 Ashmead, 31; State v. Wise, 7 Richards, 9; State v. Conley, 39 Maine (4 Heath), 78; post, § 3195.

[u] McJunkins v. State, 10 Ind. 140. [uu] Lawrence v. State, 10 Ind. 453.

[v] Shouse v. Com. 5 Barr, 83; State v. Arden, 1 Bay. 487; R. v. Butterworth, R. & R. 520. "It remains to consider how far averments charging defendants with a joint offence are divisible. These averments of joint offences are divisible (as to the degree of criminality in the several persons charged) where the offence is of such a nature as that the defendants may act a different part in the transaction; and if the

where two or more defendants are jointly charged in the same indictment with murder, it is competent to the jury to find one guilty of murder, and another of manslaughter, and on such a verdict being rendered it will not be disturbed by the court as irregular.[vv] The defendants cannot, however, be found guilty separately of separate parts of the charge.[w]

On an indictment against three, a joint verdict finding each defendant guilty by name, is in substance a distinct verdict against each defendant.[ww]

§ 435. In an indictment against two or more, it is generally true, that the charge is several as well as joint;[x] so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. To this rule there are exceptions, as in case of conspiracy or riot, to which the agency of two or more is essential; but violations of the license law, not being within the reason of these exceptions, come under the general rule.[y]

One defendant on an indictment is not liable for the costs of others jointly indicted with him.[yy]

Where several persons are jointly indicted and convicted, they should be sentenced severally,[z] and the imposition of a joint fine is erroneous.[zz]

On an indictment charging two persons with the commission of a joint offence, both cannot be convicted upon proof that each one committed an act constituting an offence similar to the act charged in the indictment.[a]

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evidence affects them differently, the judge may select such parts as are applicable to each, and leave their cases separately to the jury. And it was, accordingly, held by the judges in the case of Butterworth, Braithwaite, and Moss, who were indicted for a burglary, in breaking into the dwelling-house of W. K. in the night-time, *and stealing therein to the value of* 40*s.*; that upon such an indictment the offence of one might be aggravated by burglary in him alone; because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking; and, accordingly, there was judgment against Moss for the burglary and capital larceny, and against the other two for the capital larceny. Russell & Ryan, C. C. 520. But it is important to observe, says Gabbett (2 Crim. Law, 416), first, that this was a *single* or continuing transaction, in which *all* the defendants joined or co-operated; and secondly, that the judgment, as against all the prisoners, was for a capital felony and *the same;* and it is distinguishable in these respects, from the case of Mary and John Messingham, where the defendants were charged jointly with receiving stolen goods; and it was decided, on a case reserved, that as on the joint charge, it was necessary to prove a joint receipt, and as it appeared from the evidence that Mary Messingham was absent when John Messingham received the goods, her receipt afterwards was to be considered as a *separate* transaction, and the conviction therefore wrong. 1 Moody C. C. 257. In such case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. Regina *v.* Dovey, 2 Denison C. C. 86; 4 Cox C. C. 428; 2 Eng. Law and Eq. Rep. 532;" 2 Benn. & Heard Lead. Cases, 138.

[vv] U. S. *v.* Harding, 1 Wal. Jun. 127; Mash *v.* State, 32 Miss. (3 Georg.) 406.

[w] Hull *v.* State, 8 Ind. 439; post, § 621.

[ww] Fife *v.* Commonwealth, 29 State R. 429.

[x] State *v.* Smith, 2 Iredell, 402.

[y] Com. *v.* Griffin, 3 Cush. 523.

[yy] State *v.* McD. Blenis, 21 Mis. (6 Bennett) 272.

[z] Waltzer *v.* State, 3 Wis. 785; Straughan *v.* State, 16 Ark. 37; Cord *v.* Com. 14 B. Monroe, 386.

[zz] State *v.* Gay, 10 Mis. 440; Cord *v.* Com. 14 B. Mon. 386; State *v.* Barry, 21 Mis. (6 Bennett) 504.

[a] Stephens *v.* State, 14 Ohio, 386.

XVIII. Limitation of prosecutions.

1st. As to finding of bill, § 436.
(a) United States, § 436.
(aa) Massachusetts, § 436.
(b) New York, § 437.
(c) Pennsylvania, § 438.
(d) Virginia, § 442.
(e) Ohio, § 443.
(f) Practice under the statutes, § 445.
2d. As to time of trial, § 450.

1st. As to finding of bill.

United States.

§ 436. (a.) No person or persons shall be prosecuted, tried, or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried, or punished for any offence[b] not capital, nor for any fine or forfeiture under any penal statute,[c] unless the indictment or information for the same shall be found or instituted[d] within two years from the time of committing the offence,[e] or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice.[g]

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[b] This applies to offences under subsequent statutes. Johnson *v.* United States, 3 McLean, 89; Adams *v.* Woods, 2 Cr. 342; United States *v.* Ballard, 3 McLean, 469; United States *v.* White, 5 Cr. C. C. 73. And to common law offences in the District of Columbia, United States *v.* Slacum, 1 Cr. C. C. 485; United States *v.* Porter, 2 Ibid. 60; U. S. *v.* Watkins, 3 Ibid. 442.

[c] A *qui tam* action on the act prohibiting the slave trade is within the limitation, Adams *v.* Woods, 2 Cr. 336. So is an action for a penalty under the consular act of 1803, Parsons *v.* Hunter, 2 Sumn. 419. The two years' limitation of suits for penalties is repealed by implication by act of 28th February, 1839, which extends the time to five years, Stimpson *v.* Pond, 2 Curt. C. C. 502. See tit. "Fines, Penalties, and Forfeitures," 11.

[d] The finding of an informal presentment is not sufficient to take the case out of the statute, United States *v.* Slacum, 1 Cr. C. C. 485. Nor will a former indictment on which a *nolle prosequi* was entered, United States *v.* Ballard, 3 McLean, 469.

[e] The limitation may be specially pleaded, or it may be taken advantage of, either by demurrer, or on the general issue, United States *v.* Watkins, 3 Cr. C. C. 442; United States *v.* White, 5 Ibid. 38, 60, 368. See Commonwealth *v.* Hutchinson, 2 Pars. 453. It runs in favor of an offender, although it was not known to the United States, or any of their officers, that he was the person who committed the offence, United States *v.* White, 5 Cr. C. C. 39.

[g] A fleeing from justice does not necessarily import a fleeing from prosecution begun, United States *v.* Smith, 4 Day, 123. A person may flee from justice though no process was issued against him, United States *v.* White, 5 Cr. C. C. 39. The defendant is not entitled to the benefit of the limitation, if within the two years, he left any place, or concealed himself, to avoid detection or punishment for any offence; s. c., Ibid. 73. Although he should within the two years have returned openly to the place where the offence was committed, so that, with ordinary diligence and due means, he might have been arrested; s. c., Ibid. 116. Such a fleeing from justice need not be averred in the indictment; Ibid.

In Vondersmith's case (Phil., April, 1859), Judge Cadwalader charged the jury as follows:—

"The Act of Congress of 30th April, 1790, provided for the punishment of certain crimes defined or specified in it, some of which were, and others were not, made capital offences. The offences made capital were treason, wilful murder in places within the exclusive jurisdiction of the United States, certain crimes, including murder committed on the high seas defined in the act as piracy, forging public securities issued in the

MASSACHUSETTS.

§ 436. (*aa.*) An indictment for the crime of murder may be found at any period, after the death of the person alleged to have been murdered; all other indictments

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name of the United States, and the forcible rescue of persons convicted of treason, murder, or any other capital crime. The 32d section enacts 'that no person shall be prosecuted, tried, or punished for treason or other capital offence *aforesaid*, wilful murder or *forgery excepted*, unless the indictment for the same shall be found by a Grand Jury within three years next after the treason or other capital offence *aforesaid*, shall be done or committed; nor shall any person be prosecuted, tried, or punished for any offence, *not capital*, nor for any fine or forfeiture under any penal statute, unless the indictment, or information for the same, shall be found, or instituted, within two years from the time of committing the offence, or incurring the forfeiture aforesaid; provided that nothing herein contained shall extend to any person or persons fleeing from justice.' The Supreme Court has decided that the limitation of time for the prosecutions for fines or forfeitures under the latter clause of the act extends to prosecutions for penalties afterwards created. (2 Cranch, 336.) The limitation of two years for the prosecution of offences *not capital* must extend, therefore, to offences afterwards made the subject of criminal prosecution. Prosecutions for these offences are provided for in the same sentence, and by the same words, as fines and forfeitures. Therefore the limitation of two years in the act of 1790, includes the offences not capital which were made felony by the subsequent acts of 1823 and 1825, unless offences of the denomination of *forgery*, though not capital, are excepted by the words of exception in the prior clause of the act of 1790.

"This prior clause differs from that which was the subject of consideration by the Supreme Court, in the introduction of the word *aforesaid*, which is twice used. Literally the wilful murder and forgery which are excepted from the limitation in this prior clause, are such wilful murder and forgery only as had been made offences in prior parts of the act. An exception ordinarily does not include a particular subject not embraced in the definition of the general subject out of which it is taken. Nevertheless if this had been an act of a legislature of one of the States of our Union, having a system of criminal *jurisprudence*, and likewise a general power of *legislation* as to crimes, I should think that this exception of wilful murder and forgery designated the whole classes of offences embraced in those respective denominations, and that the legislative meaning of the words was that there should be no limitation of time for prosecutions of *such* offences. Many reasons on the face of the act for such an interpretation of it might be suggested, and the word *aforesaid*, as used in it, might, under such a system of government, be reconcileable with such an interpretation. But whatever opinion may have prevailed in Congress at the date of the act of 1790, there is no federal *jurisprudence;* and, therefore, no offence against the United States could *legally* constitute a crime until made such by an act of *legislation*. We are bound to presume that the act was passed with a knowledge, in this respect, of the law. A mistake of law cannot be imputed to legislators unless it is apparent in the language of their legislation, and even when their language seems to indicate it should never be imputed without extreme caution. In the present instance, no such mistake on the subject is apparent; and, therefore, none should be imputed. Now, neither the crime of wilful murder, nor that of forgery, as an offence against the United States, could be cognizable as a capital offence *aforesaid*, unless it had been provided for in this act, because it was the first act in the federal code of *criminal* legislation. Supposing, therefore, that the question could be relieved, as possibly it might, of the effect of the single word *capital*, I do not see how the word *aforesaid* in this clause of the act can be safely disregarded.

"With great doubt upon the subject, in the absence of all pertinent authority except the single decision in 2 Cranch, which has been mentioned, I instruct you that the limitation of time contained in the act of 1790 applies to the crimes in question, which are made felonies, but not capital offences, by the acts of 1823 and 1825.

"But if you believe, as you probably do, that the defendant *fled from justice*, on the 19th of February, 1854, the time between this date and the finding of these bills of indictment in the next following month of March, should be disregarded. The counsel for the prosecution have asked me to instruct you that under the words of the act of 1790, you can go back still farther to the 7th of February, when the defendant was first arrested by the Deputy Marshal, which they say was the time when the prosecution was instituted. The words of the act in the clause in question are, unless the *indictment* or *information* 'shall be *found* or *instituted* within two years,' &c. But I am

shall be found and filed within six years after the commission of the offence, but any period, during which the party charged was not usually and publicly resident within this State, shall not be reckoned as part of the six years. (Rev. Stat. Mass. c. 136, sect. 16.)

NEW YORK.

§ 437. (*b.*) Indictments for murder may be found at any time after the death of the person killed; in all other cases, indictments shall be found and filed in the proper court, within three years after the commission of the offence; but the time during which the defendant shall not have been an inhabitant of, or usually resident within this State, shall not constitute any part of the said limitation of three years. (Rev. Stat. N. Y., part iv. c. 11, title 4, art. 2, sect. 37.)[h]

PENNSYLVANIA.

§ 438. (*c.*) *Limitation of prosecutions.*—All indictments which shall hereafter be brought or exhibited for any crime or misdemeanor, murder and voluntary manslaughter excepted, shall be brought or exhibited within the time and limitation hereafter expressed, and not after; that is to say, all indictments and prosecutions for treason, arson, sodomy, buggery, robbery, burglary, perjury, counterfeiting, forgery, uttering or publishing any bank note, check, or draft, knowing the same to be counterfeited or forged, shall be brought or exhibited within five years next after the offence shall have been committed; and all indictments and prosecutions

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of opinion that the word *instituted* applies to the proceeding by *information*, and the word *found* to a proceeding by *indictment*. This opinion is confirmed by a recurrence to the phraseology of the prior clause of the act. Consequently, I do not think that the prosecution can go back to a date prior to that of the defendant's flight on the 19th of February, 1854. I advise you, therefore, if you view the evidence as I do, to take this date as the time.

"Under these views the prosecution under the two indictments upon the original Russell papers, is barred by lapse of time. The two indictments upon the subsequent Russell powers of attorney of the year 1853, are not in any manner affected by lapse of time. The two other indictments, which are those in the Lytle case, require more particular consideration. As to the papers mentioned in these indictments, no act of the defendant appears to have been performed in *this* district after the 19th of February, 1852, when they were transmitted by letter to Washington. His flight, according to the testimony which I have already quoted, occurred on the same day of the same month, in the year 1854. Unless the 19th of February, 1854, was 'within two years from' the 19th of February, 1852, in the sense in which the words of limitation are used in the act of 1790, the prosecution under these two indictments are barred. I should have had no doubt that an indictment found on the second anniversary was too late, if it had not been for the contrast of the phraseology in the two clauses of the 32d section of the act of 1790. The prior clause bars prosecutions in certain cases, unless the indictment is found 'within three years *next after* the' offence committed. The subsequent clause now in question bars the prosecution unless the indictment is found *within two years from* the time of committing the offence. If either phraseology had been adopted in both clauses, the prosecution would be barred. The only question is, whether the *contrast* in phraseology warrants a distinction which, in the interpretation of this act, would, under one of its clauses, include, and, under the other clause, exclude the anniversary. This would be contrary to established rules for interpreting statutes of limitation. (See 5 Barnw. & Alders, 215; 3 Brod. & Bing. 227; 10 Serg. & Raw. 211; 1 Watts, 17; 3 Harris & McH. 258, 289, 294, 297, 301, 317; 5 Cranch Circ. Ct. Rep.) Such statutes are so construed that the application of their several clauses may, if possible, be uniform, notwithstanding variances in their phraseology. I am, therefore, of opinion that the prosecution under these two indictments is barred."

[h] It was said, under this statute, that the crime of an accessary before the fact to murder was murder, and therefore was not barred by time; People *v.* Mather, 4 Wend. 232.

for other felonies not named or excepted heretofore in this section, and for all misdemeanors, perjury excepted, shall be brought or exhibited within two years next after such felony or misdemeanor shall have been committed: *Provided, however*, That if the person against whom such indictment shall be brought or exhibited, shall not have been an inhabitant of this State, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution as aforesaid, then such indictment shall or may be brought or exhibited against such person at any period within a similar space of time during which he shall be an inhabitant of, or usually resident within this State: *And provided also*, That indictments for misdemeanors committed by any officer of a bank, or other corporation, may be commenced and prosecuted at any time within six years from the time the alleged offence shall have been committed. (Rev. Act, 1860, Pamp. p. 451.)

§ 439. *Of the trial of prisoners committed.*—If any person shall be committed for treason or felony, or other indictable offence, and shall not be indicted and tried some time in the next term, session of oyer and terminer, general jail delivery, or other court where the offence is properly cognizable, after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required on the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them, upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, session, or court after his or her commitment, unless the delay happen on the application or with the assent of the defendant, or upon trial he shall be acquitted, he shall be discharged from imprisonment: *Provided always*, That nothing in this act shall extend to discharge out of prison, any person guilty of, or charged with, treason, felony, or other high misdemeanor in any other State, and who by the Constitution of the United States ought to be delivered up to the executive power of such State, nor any person guilty of, or charged with a breach or violation of the laws of nations.[1] (Ibid.)

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[1] "This section considerably extends the existing laws relating to the limitation of criminal prosecutions. These only relate to misdemeanors, in all of which, prosecutions must be commenced within two years, if the alleged offender is accessible to justice, except in forgeries, perjuries, and misdemeanors, by bank officers, the limitations in the latter cases being six years. The present section extends the principle to all crimes, murder and voluntary manslaughter excepted. Where the alleged offender is accessible to justice, prosecutions should not be unnecessarily delayed. Such delays do not often take place from worthy motives. Charges are often kept suspended over the heads of the accused to subserve the ends of the accuser, and the accuser kept in a state of moral slavery, to which no human being should be subjected. It is true, that stale prosecutions are looked upon with an unfavorable eye by courts and juries, but the very existence of this feeling in criminal tribunals is a strong argument in itself in favor of reasonable limitations in criminal prosecutions. In the more serious class of felonies and misdemeanors, the limitation has been extended to five years; in those of less malignity, the limitation of two years has been adopted. The existing laws on this subject are the first section of the act of the 10th of April, 1848, entitled 'A further supplement to the penal laws of this State,' Pamphlet Laws, 428. The seventh section of the act of the 16th of April, 1849, entitled 'An act relating to lunatics and habitual drunkards,' &c., Pamphlet Laws, 663. The thirty-sixth section of the act of the 25th of April, 1850, entitled 'An act relating to the bail of executrixes,' &c., Pamphlet Laws, 569. The act of the 10th March, 1852, entitled 'A further supplement to the penal laws of this State, and to render their limitations uniform,' Pamphlet Laws, 124; Brightly's Digest, 542; Title, Limitations of Action, No. 26, and the act of the 24th of April, 1857, entitled 'An act to repeal the act of the 10th of March, 1852, limiting the commencement of prosecutions for misdemeanor to two years,' Pamphlet Laws, 305; Brightly's Annual Digest, 1237; Title, Limitation of Actions, No. 1.

[*Under the act prohibiting betting on elections, prosecutions must be brought within six months.*—Act March 24, 1817, sect. 115.]

§ 442. (*d.*) In Virginia, there is generally no limitation as to the time within which offences are punishable by death or confinement in the penitentiary, shall be prosecuted; and cases have frequently occurred in which offenders have been convicted and punished many years after the offence had been forgotten. But inferior offences are required by particular statutes, to be prosecuted within particular periods. The most general of these enacts, that all proceedings on any penal law, where the punishment to be inflicted is neither death nor confinement in the penitentiary, shall be commenced within one year after the offence committed, and not after, unless a longer or shorter period be fixed by law.[a] By other statutory provisions, prosecutions for perjury, subornation of perjury, and such forgeries as do not amount to felony, are required to be commenced within three years after the commission of the offence;[b] for offences against the marriage act (including the felony of forcible abduction), within five years;[c] for offences against the road act, within six months;[d] for petit larceny within five years;[e] and for giving credit to students of colleges, within five years.[f]

OHIO.

§ 443. (*e.*) That no person shall be indicted or prosecuted for any offence against the provisions of this act (except for the offence of larceny, for which the offender may be indicted and punished any time within three years from the commission of the offence), unless such indictment shall be found, or such prosecution commenced, within one year from the time such offence was committed. (Act of March 18, 1831. Swan's Stat., sect. 1, 281.)

§ 444. That no person shall be indicted or criminally prosecuted for any offence, misdemeanor, or immoral practice, made punishable by the criminal laws of this State, and the prosecution of which is not limited by law, except such as are punishable capitally or by imprisonment in the penitentiary, unless such indictment shall be found, or such prosecution commenced, within three years from the time such offence, misdemeanor, or immoral practice was committed. (Act of January 15, 1845. Swan's Stat., sect. 1, 281.)

§ 455. (*f.*) *Practice under the statutes.*—In Pennsylvania, it was once decided that the act must be pleaded specially, if the defendant wishes to avail himself of its provisions.[i] This case, however, has been overruled,[ii] and the general rule is, that advantage may be taken of the statute on the general issue, or, when it appears on record, by motion in arrest of judgment, or

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The act of 1852, which provides for a general limitation of two years in all cases of misdemeanors, forgeries, and perjuries excepted, may be regarded as having repealed all antecedent laws. The act of 1857, though purporting by its title to be a repeal of the act of 1852, is only a modification thereof, extending the limitation in cases of prosecutions for misdemeanors of bank or other corporation officers to five years."—*Revisers' Report.*

[a] R. C. c. 169, sec. 60.
[b] Id. sec. 61.
[c] Id. c. 106, sect. 28.
[d] Act of 1835, c. 77, sect. 28.
[e] Sup. R. C. 280.
[f] Act of 1838, c. 18.
[i] Com. *v.* Hutchinson, 2 Parsons, 453.
[ii] Com. *v.* Ruffney, 28 Pa. St. Rep. 259.

motion to quash.[j] In Tennessee it is said that the defendant cannot avail himself of the limitation prescribed in the act as a bar to the prosecution, by plea, demurrer, or motion in arrest of judgment; but only by proof of the facts upon the trial.[k]

§ 446. It has even been said that although the offence, on the face of the record, is outside of the statute, the prosecution may prove that the defendant, by having fled the State, was within the exception of the statute; and this, though the exception was not averred in the indictment.[l] This, however, cannot be safely relied on by the practitioner; and it will be always prudent to insert in the indictment a special averment that will bring the case within the exception.

In Pennsylvania it has been ruled that in misdemeanors, where the jury acquit on the ground of the statute, they can put the costs on the defendant.[m]

The act is retrospective.[n]

In Pennsylvania, costs may be imposed by a jury upon a defendant in a criminal prosecution, who is acquitted on the plea of the statute of limitations; but not costs of former indictments for the same offence, which were quashed, or on which judgment was arrested.[nn]

§ 447. In Georgia, the statute of limitations requires an indictment for an assault with intent to murder, to be found and filed within four years from the commission of the offence, and for an assault and battery within two years. The defendant was indicted for the former, and found guilty of the latter offence more than two years after it was committed. It was held, that the statute of limitations applied to the offence for which the defendant was indicted, and not to the minor offence, of which he was found guilty on a traverse of the indictment.[o]

Where a grand jury finds a special presentment within the limitation specified for prosecuting an offence, the fact that the indictment was not made and filed until the limitation expired, is not ground for demurrer.[oo]

§ 448. The defendant, in a prosecution for a misdemeanor, is not entitled to the benefit of the limitation in the Act of Congress, of the 30th of April, 1790, § 31, if, within the two years he fled from justice; although he should within two years have returned openly to the place where the offence was committed, so that with ordinary diligence and due means he might have been arrested.[p]

§ 449. If within two years after the commission of the offence, the defendant left the district in which it was committed with intent to avoid detection or punishment for that offence, he was a "person fleeing from jus-

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[j] State *v.* Robinson, 9 Foster, 274; McLane *v.* State, 4 Georg. 335; U. S. *v.* Watkins, 3 Cranch, C. C. R. 441; U. S. *v.* White, 5 Cranch, C. C. R. 73; Hubbard *v.* State, 7 Ind. 160; State *v.* Hussey, 7 Iowa, 409.

[k] State *v.* Bowling, 10 Humph. 52.

[l] U. S. *v.* White, 5 Cranch, C. C. R. 73.

[m] Baldwin *v.* Com. 2 Casey, 170.

[n] Com. *v.* Hutchinson, 2 Par. 453.

[nn] Baldwin *v.* Commonwealth, 26 Penn. State R. (2 Casey) 171.

[o] Clark *v.* State, 12 Geo. 350.

[oo] Brock *v.* State, 22 Geo. 98.

[p] U. S. *v.* White, 5 Cranch, C. C. R. 116.

tice," although he might at various other periods, within the two years, have been arrested in the United States.[q]

2d. As to the time of trial.

§ 450. In several of the States restrictions exist requiring trials in criminal cases to take place within a specified period after the institution of the prosecution.[r] Thus, in Pennsylvania—"If any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term of Oyer and Terminer, General Jail Delivery, or other court, where the offence is properly cognizable, after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required, upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be procured; and if such prisoner shall not be indicted and tried the second term, session, or court, after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment. Provided always, that nothing in this act shall extend to discharge out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor, in any other State, and who, by the confederation, ought to be delivered up to the executive power of such State, nor any person guilty of, or charged with a breach or violation of the laws of nations."[s] The power of discharging a prisoner under this act, it has been held, where he has not been tried at the second term, is strictly confined to the court in which he was indicted; and the Supreme Court will not interfere, if the commitment is unexceptionable on the face of it.[t] A prisoner who stands indicted for aiding and abetting another to commit murder, and who was

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[q] U. S. *v.* White, 5 Cranch, C. C. R. 116.

[r] One or two analogous cases under the English Statute may not be here out of place. In R. *v.* Willice, 1 East, P. C. 186, it was holden upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those acts. (See also R. *v.* Brooks, 1 Den. C. C. 217; 2 C. & K. 402.) So, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, this was held sufficient. R. *v.* Austin, 1. C & K. 621. But proof by *parol* that the prisoner was apprehended for treason respecting the coin, within three months after the offence was committed, was holden not to be sufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. R. *v.* Phillips, R. & R. 369. In R. *v.* Killminster, 7 C. & P. 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterward another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, Coleridge, J., doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed; he reserved the point, but the defendant was acquitted upon the merits. See also Tilladam *v.* Inhabitants of Bristol, 4 N. & M. 166.

[s] Act of 18th Feb., 1785, sect. 3; 2 Smith's Laws, 275; Purdon's Dig. 6, 533; see post, § 2922–6, where this subject is discussed in connection with the right to a continuance.

[t] Ex parte Walton, 2 Wharton, 501.

not tried at the second term, is not entitled to be discharged under the third section of the act, if the principal has absconded, and proceedings to outlawry against him were commenced without delay, but sufficient time had not elapsed to complete them.[u] A prisoner is not entitled to demand a trial at the second term, if he has a contagious or infectious disease, which may be communicated in the court, to the prejudice of those present.[v]

§ 451. In Virginia it is required, "when any prisoner committed for treason or felony, shall apply to the court the first day of the term, by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty, upon his giving bail, in such penalty as they shall think reasonable, to appear before them at a day to be appointed, of the succeeding term. Every person charged with such crime, who shall be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance, granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict."[w] It has been decided that the word term, where it occurs in this act, means, not the prescribed time when the court should be held, but the actual session of the court.[x] When the accused has been tried and convicted, and a new trial awarded to him, although he should not be again tried till after the third term from his examination, he is not entitled to a discharge.[y]

CHAPTER VI.

ON THE FINDING OF INDICTMENTS, AND HEREIN OF GRAND JURIES.

I. POWER TO INSTITUTE PROSECUTIONS, § 452.
I. SUMMONING GRAND JURIES, § 464.
III. SELECTION OF FOREMAN AND OATH, § 466.
IV. DISQUALIFICATION OF GRAND JUROR, AND HOW IT MAY BE EXCEPTED TO, § 468.
V. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY, § 474.
VI. SUMMONING OF WITNESSES, AND INDORSEMENT OF THEIR NAMES ON BILL, § 476.
VII. EXAMINATION OF TESTIMONY, § 488.
VIII. FINDING AND ATTESTING OF BILL, § 497.
IX. MISCONDUCT OF GRAND JUROR, § 507.
X. HOW FAR GRAND JUROR MAY BE COMPELLED TO TESTIFY, § 508.

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[u] Com. *v.* Sheriff, &c., of Allegheny, 16 Serg. & R. 304, Gibson, C. J., dissenting.
[v] Ex parte Phillips, 7 Watts, 363.
[w] R. C. of Va. c. 169, sect. 28.
[x] 2 Va. Cases, 363.
[y] 2 Va. Ca. 162; Davis' Va. Cr. Law, 422.

I. Power to institute prosecutions.

1st. That grand juries may on their own motion institute all prosecutions whatever, § 453.

2d. That grand juries may act upon and present such offences as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate, § 458.

3d. That grand juries are in all instances limited in their actions to cases in which there has been such a primary hearing as enables the defendant, before he is put on trial, to be confronted with the witnesses against him, and meet his prosecutor face to face, § 459.

§ 452. The institution of grand juries presents questions of a political as well as a legal character, which have been the subject of a conflict of opinion in this country in recent times, as great as that which existed with regard to the same agency in England before the revolution. The point of discussion, however, is not the same. In the time of James II., when Lord Somers' famous tract was written, a barrier was needed against frivolous state prosecutions, and this barrier grand juries presented. In our own times a restraint is required upon the malice of private prosecutors, and the violence of popular excitement; and it is to the adequacy of grand juries for that purpose, that public attention has been turned. Assuming, therefore, as now settled definitely, that on all prosecutions instituted either by government or individuals, the grand jury has an absolute veto at the outset, the fundamental question still remains, have grand juries anything more than the power of veto, or in other words, can they originate prosecutions, and if so, with what qualifications?

On this point three views are advanced, which it will be out of the compass of this work to do more than state, with the authorities by which they are respectively supported, leaving the question for that local judicial arbitrament by which alone it can be settled.

These views are:—

1st. That grand juries may on their own motion institute all prosecutions whatsoever.

§ 453. That this was the view which obtained at the institution of the federal government admits of little doubt.

The right of a prosecutor to make complaint personally to a grand jury is practically recognized by Mr. Bradford, at the time Attorney General of the United States, in a letter to the Secretary of State, dated Philadelphia, February 20, 1794.[a] A question had arisen whether a tumultuous assemblage before the house of a foreign consul, coupled with a demand for the delivery of persons supposed to have been concealed therein, was the subject of prosecution in the courts of the United States. The District Attorney thought it was not, and of the same opinion was Mr. Bradford. "But

[a] 1 Opinions of Attorney General, 22.

if the party injured is advised or believes that the federal courts are competent to sustain the prosecution," said the latter eminent authority, "I conceive that he ought not to be concluded by my opinion or that of the District Attorney. If he desires it he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to present the offence in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will be thus put in a train for judicial investigation." Mr. Bradford's language is too pointed, when taken in consideration with his long practical experience with the duties of a prosecuting officer, and his remarkable precision as a lawyer, to admit of the supposition that he contemplated an approach to the grand jury through the return of a committing magistrate. The grand jury were to "present" the offence without the interposition of magistrate or attorney general, and they were to receive personally the prosecutor and his witnesses, for the purpose of determining whether a presentment should be made.

Such, also, appears to have been the view of the late Judge Wilson, of the Supreme Court of the United States.[b]

§ 454. In the works of the first Judge Hopkinson, the right of the grand jury to call such additional witnesses as they desire, not in themselves part of the witnesses for the prosecution, is defended in a tract written with much spirit, though in a style intended at the time more for popular than professional effect.[c] A similar latitude of inquiry is apparently advocated by Judge Addison. "The matters which, whether given in charge, or of their own knowledge, are to be presented by the grand jury, are all offences within the county. To grand juries is committed the preservation of the peace of the county, the care of bringing to light for examination, trial, and punishment, all violence, outrage, indecency, and terror; everything that may occasion danger, disturbance, or dismay, to the citizens. Grand juries are watchmen stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated, or our constitution and laws infringed."[d] As the learned judge, however, in the same charge, intimates an opinion that a grand jury is not to be permitted to summons witnesses before it, except under the supervision of the court, it would seem that the inquisitorial powers which he describes, are to be only exercised on subjects which are given in charge, or rest in the personal knowledge of the jurors.

§ 455. The general understanding of the early practice in this respect in Pennsylvania, is shown by a case as recent as in 1838, when Judge King, whose authority in all matters connected with the court where he so long presided is of the greatest weight, said, on discharging a defendant *after* a binding over by a magistrate:—

"I rejoice that our judgment (discharging the defendant on *habeas corpus*)

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[b] 2 Wilson's Lectures on Law, 361.

[c] 1 Hopkinson's Works, 194.

[d] Addison's Charges, 47.

is not conclusive of the subject; the sole effect of this decision is, that in the present state of the evidence, we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer to submit the case to the grand jury; that respectable body are entirely independent of us, they may form their own view of the prosecutor's case, and may, if their judgment so indicate, place the defendant on his trial."[e]

That in Pennsylvania the law is now somewhat narrowed, will be presently seen.

§ 456. Perhaps, however, the broadest exposition is found in an opinion of the Supreme Court of Missouri, where it was held that a grand jury have a right to summon witnesses and start a prosecution for themselves; and that the court was bound to give them its aid for this purpose.[f]

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[e] Ridgway's case, 2 Ashmead, 247. And see also State *v.* Wolcott, 21 Conn. 272.

[f] The grand jury for the county caused a subpœna to be issued for one Ward, to appear before them and testify generally, without saying in what particular matter or cause he was to testify. Ward accordingly appeared, and was sworn to give evidence to the grand jury. He went before the grand jury to testify. The first question asked by the foreman of the grand jury was this: "Do you know of any person or persons having bet at a faro table in this county, within the last twelve months?" To which the witness answered—"I do." The foreman then desired the witness to tell what person or persons have so bet, other than himself, and not naming himself. The witness declined answering, saying that he could not answer without implicating himself. Ward was then directed by the court to answer the requirement of the grand jury, but not to name himself as a bettor; which he refused, alleging that to answer thus would implicate himself. Whereupon the court committed him to prison till he should consent to give the evidence required, and till the further order of the court. It does not appear from the statement of facts, however, whether the court, acting as committing magistrates, had previously given the matter in question as a public nuisance to the grand jury in charge. A writ of errors was sued out, and a *supersedeas* asked for. "On this state of facts," to follow the language of the Supreme Court, "several questions are made. The first in order is, that the grand jury have no right to interrogate a witness in this general way; but that an indictment should have been drawn up, charging some particular person with crimes, and that the witness should then be required to give his testimony as to the matter of indictment. Otherwise the grand jury may send for every person in the county and inquire generally of each, if he knows of any offence against law—and that this would be oppressive to witnesses and dangerous to citizens. The first answer to this is, that it is the duty of the grand jury to inquire diligently of all offences against law. Now if it should ever happen that a grand jury should determine to have summoned every person in the county, with a view to make the experiment, if perchance they might find out some offence, I have no doubt that it would be the duty of the court to withhold its process, and stop such a course. This would be an abuse of power. The next answer to this is, that no such case appears by the record. I take this case to be an ordinary case, when perhaps the jury had probable cause to believe that some offences had been committed against law; and that, so believing, they desired, in discharge of their oaths and of their duties to their country, to inquire; and how should they inquire? Not by going into the secret recesses of gamblers and gambling devices to ask and seek information, but to send for persons who might, in their opinion, be most likely to possess evidence relating to these matters. It is a solemn and important duty which every citizen owes to his country, to give evidence in courts of justice against offenders against the peace and good order of the community. A grand jury should be considered trustworthy in this matter; they stand as a rampart between a malicious or incensed prosecution, in case of life and death; no man can be brought to trial on the lowest or highest offences known to law, unless the grand jury shall say so; yet they are not to be trusted with the power to send for witnesses, till some malignant prosecutor or some injured person shall cause an indictment to be sent up to them. This would strip them of their greatest utility, would convert them into a mere engine to be acted upon by circuit attorneys, or those who might choose to use them. This point is untenable." (Ward *v.* State, 2 Missouri, 120.)

§ 457. The same view seems to be taken in the Circuit Court of the United States in the District of Columbia.[g]

A similar question was raised more recently (1851) in the Circuit Court of the United States for the Middle District of Tennessee. The grand jury, it would seem without the agency of the District Attorney, called witnesses before them whom they interrogated as to their knowledge concerning the then late Cuban expedition. The question was brought before the presiding judge (Catron, J., of the Supreme Court of the United States), who sustained the legality of the proceeding, and compelled the witnesses to answer.[h]

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[g] U. S. *v.* Tompkins, 2 Cranch, C. C. R. 46; though see U. S. *v.* Lloyd, 4 Cranch, C. C. R. 469.

[h] "The grand jury," said Judge Catron, "is bound to present on the information of one of its members. He states to his fellow jurors the facts that have come to his knowledge by seeing, or hearing them confessed by the guilty party. The juror makes his statement as a witness under his oath taken as a grand juror. He does state, and is bound by his oath to state, the person who did the criminal act, and all the facts that are evidence tending to prove that a crime had been committed.

"The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime. If a grand juror was a witness, he would be bound to give the information to his fellow jurors voluntarily, as his oath requires him to do so. And so also the general oath taken in court by a witness, who comes before a grand jury, imposes upon him the obligation to answer such legal questions as are propounded by the jury, to the end of ascertaining crimes and offences (and their perpetrators) that the jurors suppose to have been committed. If general inquiries could not be made by the grand jury, neither the offence nor the offender could be reached in many instances where common law jurisdiction is exercised. In the federal courts such instances rarely occur; still they have happened in this circuit, in cases where gangs of counterfeiters were sought to be detected; but especially in cases where spirituous liquors had been introduced among the Indians residing west of the Missouri River. That drunkenness, riots, and occasionally murder, had been committed by Indians who were intoxicated, was notorious; but who had introduced the intoxicating spirits into the Indian country was unknown. The fact of introduction was the crime punishable by act of Congress. In the Missouri district many such cases have arisen; there the grand jury is instructed, as of course, to ascertain who did the criminal act. The fact and the offender it is their duty to ascertain; and these they do ascertain constantly, by general inquiries of witnesses, whether they know that spirituous liquors have been introduced into the Indian country; and, secondly, who introduced them. It is part of the oath of the grand jury to inquire of matters given them in charge by the court, and to present as criminal such acts as the court charges them to be crimes or offences indictable by the laws of the United States. And in executing the charge, it is lawful for the grand jury—and it is its duty—to search out the crime by questions to witnesses of a general character. The questions propounded by the jury in this instance, and presented to the court for our opinion, are in substance—'Please to state what you may know of any person or persons in the city of Nashville, who have begun or have set on foot, or who have provided the means for a military expedition from hence against the island of Cuba. 2d. Or of any person who has subscribed any amount of money to fit out such an expedition. 3d. Or do you know of any person who has procured any one to enlist as a soldier in a military expedition to be carried on from hence against the island of Cuba? 4th. Or of any person asking subscriptions for, or enlisting as soldiers in a military expedition to be carried on from hence against the island of Cuba?'

"As all these questions tend fairly and directly to establish some one of the offences made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded to the witness under examination, and he is bound to answer any or all of them, unless the answer would tend to establish that the witness was himself guilty according to the act of Congress.

"This doctrine is believed to be in conformity to the former practice of the State Circuit Courts of Tennessee, and is assuredly so according to the practice in other

Perhaps, however, the writer may venture the remark that the learned jndge, in citing a former edition of this book, goes too far in assuming that it is there unqualifiedly stated that the general practice is as he lays down.

2d. THAT THE GRAND JURY MAY ACT UPON AND PRESENT SUCH OFFENCES AS ARE OF PUBLIC NOTORIETY, AND WITHIN THEIR OWN KNOWLEDGE, SUCH AS NUISANCES, SEDITIONS, &C., OR SUCH AS ARE GIVEN TO THEM IN CHARGE BY THE COURT, OR BY THE PROSECUTING ATTORNEY, BUT IN NO OTHER CASES WITHOUT A PREVIOUS EXAMINATION OF THE ACCUSED BEFORE A MAGISTRATE.

§ 458. This is the view which may be now considered as accepted in Pennsylvania, and in many judicial districts in New York. In Pennsylvanin the annoyances and disorders attending the unlimited access of private prosecutors to the grand jury room, has led a court of great respectability to hold it to be an indictable offence for a private citizen to address the grand jury nnless when duly summoned.[i]

In accordance with those views, Judge King, in a very able decision delivered in 1845, refused to permit the grand jury, on their own motion, to issue process to investigate into alleged misdemeanors in the officers of the Board of Health, a public institution established in Philadelphia for the preservation of public health and comfort.[j]

States, as will be seen by the opinions of the Supreme Conrts and Circuit Jndges found in Wharton's Criminal Law, ch. 6."

[i] Com. *v.* Crans, 3 P. L. J. 442.

[j] "A warrant of arrest," he said, "founded on probable cause snpported by oath or affirmation, is first issued against the accused by some magistrate having competent jurisdiction. On his arrest he hears the 'nature and cause of the accusation against him,' listens to the testimony of the witnesses 'face to face,' has the right to cross-examine them, and may resort to the aid of counsel to assist him. It is not until the primary magistrate is satisfied by proof that there is probable cause that the accused has committed some crime known to the law, that he is further called to respond to the accusation. He is then either bailed or committed to answer before the appropriate judicial tribunal, to whom the initiatory proceedings are returned for further action. On this return, the law officer of the commonwealth prepares a formal written accusation called an indictment, which, with the witnesses named in the proceeding as sustaining the accusation, are sent before a grand jury, composed of not less than twelve, nor more than twenty-three citizens, acting under oath, only to make true presentments, who again examine the accuser and his witnesses, and not until at least twelve of this body pronounce the accusation to be well founded by returning the indictment a true bill, is the accused called upon to answer whether he is guilty or not guilty of the offence charged against him. No system can present more efficient gnaranties against the oppressions of power or prejudice, or the machinations of falsehood and fraud. The moral and legal responsibilities of a public oath, the liability to respond in damages for a malicious prosecution, are cautionary admonitions to the prosecutor at the outset. If the primary magistrate acts corruptly and oppressively, in furtherance of the prosecution, and against the truth and justice of the case, he may be degraded from his judgment seat. By the opportunity given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place, and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defence, a thing of the hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defence unless he is informed, not merely what is charged against him, bnt when, where, and how he is said to have violated the public law. It is not true that a bill of indictment fonnd, without a preliminary hearing, furnishes him with this vital information. It practically neither describes the time, place, nor circumstances of the offence charged. Time is sufficiently described, if the day on which the crime is

So it was held in Tennessee, that a presentment found not on the knowledge of any of the grand jury, but upon information delivered to the jury by others, should be abated on a plea of the defendant.[k]

[k] State *v.* Love, 4 Humph. 255; see also State *v.* Camm, 1 Hawks, 252; post, § 480.

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charged is any day before the finding of the bill, whether it is the true day of its commission or not. Place is sufficiently indicated, if stated to be within the proper county where the indictment is found; and circumstances are adequately detailed, when the offence is described according to certain technical formula. Hence the inestimable value of preliminary, public investigations, by which the accused can be truly informed, before he comes to trial, what is the offence he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place, by which the first intimation to an accused of the tendency of a proceeding against him, involving life or liberty, should be given, when arraigned for trial under an indictment, the keen sense of equal justice, and the innate detestation of official oppression which characterize the American people, would make it of brief existence. It is the fitness and propriety of the ordinary mode of criminal procedure, its equal justice to accuser and accused, that renders it of almost universal application in our own criminal courts, and makes it unwise to depart from it, except under special circumstances, or pressing emergencies."

Three exceptions were laid down to the general rule thus described as follows:—

"The first of these is, where criminal courts, of their own motion, call the attention of grand juries to, and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions, rather bears on things than persons, the object being the suppression of general and public evils, affecting, in their influence and operation, communities rather than individuals, and, therefore, more properly the subject of general than special complaint. Such as great riots, that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances, affecting the public health and comfort; multiplied and flagrant vices, tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries directed by them, summon, swear, and send before the grand jury such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offence and the offenders. But this course is never adopted in cases of ordinary crimes, charged against individuals, because it would involve, to a certain extent, the expression of opinion by anticipation of facts subsequently to come before the courts for direct judgment, and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, the court act under their official responsibilities, and must answer for any step taken not justified by the proper exercise of a sound judicial discretion.

"Another instance of extraordinary proceeding is where the attorney general, ex officio, prefers an indictment before a grand jury without a previous binding over or commitment of the accused. That this can be lawfully done, is undoubted. And there are occasions where such an exercise of official authority would be just and necessary, such as where the accused has fled the justice of the State, and an indictment found may be required previous to demanding him from a neighboring State, or where a less prompt mode of proceeding might lead to the escape of a public offender. In these, however, and in all other cases where this extraordinary authority is exercised by an attorney general, the citizen affected by it is not without his guarantees. Besides, the intelligence, integrity, and independence which always must be presumed to accompany high public trust, the accused, unjustly grieved by such a procedure, has the official responsibility of the officer to look to. If an attorney general should employ oppressively this high power, given to him only to be used when positive emergencies or the special nature of the case requires its exercise, he may be impeached and removed from office for such an abuse. The court, too, whose process and power is so misapplied, should certainly vindicate itself by protecting the citizen. In practice, however, the law officer of the commonwealth always exercises this power cautiously —generally under the directions of the court—and never unless convinced that the general public good demands it.

"The third and last of the extraordinary modes of criminal procedure known to our penal code, is that which is originated by the presentment of a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence, from

Perhaps with this position may be harmonized a case in New York, where it was held that a grand jury may find a bill against parties who are under

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their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring on it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser, and except that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by this court. And it is equally true, that in making such a presentment, the grand jury are entirely irresponsible, either to the public or to individuals aggrieved—the law giving them the most absolute and unqualified indemnity for such an official act. Had the grand jury, on the present occasion, made a legal presentment of the parties named in their communication, the court would, without hesitation, have ordered bills of indictment against them, and would have furnished the grand jury with all the testimony, oral and written, which the authority we are clothed with would have enabled us to obtain. While the power of presentment is conceded, we think no reflecting man would desire to see it extended a particle beyond the limit fixed to it by precedent and authority. It is a proceeding which denies the accused the benefit of a preliminary hearing—which prevents him from demanding the endorsement of the name of the prosecutor on the indictment before he pleads,—a right he possesses in every other case, and which takes away all his remedies for malicious prosecution, no matter how unfounded the accusation on final hearing may prove to be; a system which certainly has in it nothing to recommend its extension."

Within these limits it was held, the action of a grand jury was confined, and in the particular case before the court, where a communication had been received from the grand jury, stating that charges had been made by one of their number, to the effect that one or more members of a public trust had been guilty of converting to their own use public money, and asking that witnesses should be furnished them, to enable them to examine the charge, the court held, that such an investigation was incompatible with the limits of the common law. "Grand juries," it was said, "are high public functionaries, standing between accuser and accused. They are the great security to the citizens against vindictive prosecution, either by government, or political partisans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize a presentment. Nor should courts give, unadvisedly, aid or countenance to any such innovations. For if we are bound to send for persons and papers, to sustain one charge by a grand juror before the body, against one citizen, we are bound to do so upon every charge which every other grand juror, present and future, following the precedent now sanctioned, may think proper hereafter to prefer. It is true, that in the existing state of our social organization, but partial and occasional evils might flow from grand jurors receiving, entertaining, and acting on criminal charges against citizens, not given them by the public authorities, nor within their own cognizance. But we cannot rationally claim exemption from the agitations and excitements which have at some period of its history convulsed every nation. Those communities which have ranked among the wisest and the best, have become, on occasions, subject to temporary political and other phrensies, too vehement to be resisted by the ordinary safeguards provided by law for the security of the innocent. Under such irregular influences, the right of every member of a body like a grand jury, taken immediately from the excited mass, to charge what crime he pleases, in the secret conclave of the grand jury room, might produce the worst results. It is important also, in the consideration of this question, to be borne in mind, that the body so to be clothed with these extraordinary functions, is perhaps the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates, they mingle again with the general mass of the citizens, intangible for any of their official acts, either by private action, public prosecution, or legislative impeachment. That the action of such a body should be kept within the powers clearly pertaining to it, is a proposition self-evident; particularly where a doubtful authority is claimed, the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights, secured by the Constitution. Our system of criminal administration is not subject to

arrest on a coroner's warrant, after the coroner's jury has returned an inquest implicating them, and before the examination by the coroner has been completed.[kk]

[kk] People v. Hyler, 2 Parker, C. R. (N. Y.) 566.

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the reproach, that there exists in it an irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury, in direct criminal accusations, are confined to the investigation of matters given them in charge by the conrt, of those preferred before them by the attorney general, and of those which are sufficiently within their own knowledge and observation to authorize an official presentment. And they cannot, on the application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority, we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity, introduced into the grand jury room, might subject him to. And it conserves the dignity of the grand jury, and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and the accused, instead of assuming the office of the former."

"We have less difficulty in coming to these conclusions, from the consciousness that they have no tendency to give immunity to the parties named in the communication of the grand jury, if they have violated any public law. The charge preferred by the grand juror alluded to in the communication, is clear and distinct. It is one over which every committing magistrate of the city and county of Philadelphia has jurisdiction. Any one of this numerous body may issue his warrant of arrest against the accused, his subpœna for the persons and papers named, and may compel their appearance and production. And if sufficient probable cause is shown, that the accused have been guilty of the crimes charged against them, he may bail or commit them to answer to this court. The differences to the accused between this procedure and that proposed, are, that before a primary magistrate, the defendants have a responsible accuser, to whom they may look, if their personal and official characters have been wantonly and maliciously and falsely assailed. They have the opportunity of hearing the witnesses, face to face. They may be assisted by counsel, in cross-examining those witnesses, and sifting from them the whole truth. And not the least, they by this means know what crime is precisely charged against them; and when, where, and how it is said to have been perpetrated: rights which we admit and feel the value of, and of which we would most reluctantly deprive them, even if we had the legal authority to do so."

"On the whole, we are of opinion that we act most in accordance with the rights of the citizen, most in conformity with a wise and equal administration of the public law, by declining to give our aid to facilitate the extraordinary proceedings proposed against the parties named in the communication of the grand jury; and by referring any one who desires to prosecute them for the offences charged, to the ordinary tribunals of the Commonwealth, which possesses all the jurisdiction necessary for that purpose, and can exercise it, more in unison with the rights of the accused, than could be accomplished by the mode proposed in the communication of the grand jury."

To the same effect are the remarks of the Commissioners lately appointed to revise the Criminal Code of New York:—

"It had its origin," they say, p. 116, "in England, at a time when the conflicts between the power of the government on the one hand, and the rights of the subject on the other, were fierce and unremitting; and it was wrung from the hands of the crown, as the only means by which the subject, appealing to the judgment of his peers, under the immunity of secrecy, and of irresponsibility for their acts, could be rendered secure against oppression. Happily, in our country, no illustration of its value in this respect has been furnished. But it was nevertheless introduced among us in the same spirit in which it took its rise in the mother country, and as the very language of the Constitution shows, was designed to be a means of protection to the citizen against the dangers of a false accusation, or the still greater peril of a sacrifice to public clamor. That language is, that 'no person shall be held to answer for a capital or otherwise infamous crime (except in cases which are enumerated), unless on presentment or indictment of a grand jury. Acting within this sphere, the institution of a grand jury may be regarded, not merely as a safeguard to private right, but as an indispensable auxiliary to public justice; and within these limits, it is the duty alike of the legislature and of the people, to sustain it in the performance of its duties. But when it transcends them—when it can be used for the gratification of pri-

3d. THAT THE GRAND JURY ARE IN ALL INSTANCES LIMITED IN THEIR ACTION TO CASES IN WHICH THERE HAS BEEN SUCH A PRIMARY HEARING AS ENABLES THE DEFENDANT, BEFORE HE IS PUT ON TRIAL, TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, AND MEET HIS PROSECUTOR FACE TO FACE.

§ 459. For an elaborate and able argument in support of this view, the reader is referred to a pamphlet, by Mr. E. Ingersoll, of the Philadelphia

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vate malignity—or when, wrapping itself in the secrecy and immunity with which the law invests it, its high prerogatives are prostituted for purposes frowned upon by every principle of law and human justice—it may become an instrument dangerous alike to public and to private liberty.

"That it has been so used, is a fact which admits of no disguise. Cases are not unfrequent where parties, stimulated by avarice or revenge, have found their way into the secrecy of a grand jury room, and upon a state of facts which would not warrant the commitment of the defendant in any other form, have succeeded in obtaining an indictment against him.

"It is well known, among the legal profession at least, that the just legislation, which has abolished the imprisonment of the debtor in a civil action, has led to an unexambled number of complaints against many whose greatest crime was their misfortune, upon the allegation of the fraudulent procurement of property, and the experience of every lawyer will attest the fact, that there are few cases in which the disappointed creditor would not, if he could, invoke the aid of the criminal law, as the means, not so much of punishment as of coercion. In cases of this kind as well as in others rather of a private than of a public nature, it will be readily perceived, there is some danger that the grand jury may be nsed for purposes not only unnecessary, bnt absolutely hostile to the interests of the public. This is but one class of cases illustrating the danger of allowing the grand jury, under their general power to inquire into all offences triable within their county, to hear complaints in the first instance, aud to originate accusations. But a still more striking example of the danger of this unrestricted power, is to be found in the fact that cases have existed, where prosecutors, who have been defeated before the examining magistrate, have availed themselves of the privilege of the subpœna of the district attorney, to present themselves before the grand jury, and upon a one-sided statement obtain an indictment. The powers and duties of the grand jury being in this respect wholly undefined, the practical result has been, that private information conveyed to a grand juror, or the permission of the district attorney (who may literally be said to keep the keys of the grand jury room), has led to numberless prosecutions prompted by private interest, and to speculations upon the fears of the unfortunate, which would have been defeated by a public scrutiny, or by an opportunity afforded to the accused of explaining or defending himself against the charge.

"If the grand jury is to be preserved in its purity—if the confidence of the people is to be enlisted in its behalf, without which its usefulness must cease—these things must be corrected by wholesome legislation. The grand jury was designed to be, and the commissioners are willing to admit, in most cases is, a body of discreet and thinking men, called together to protect the public interests, and not to be converted into instruments of private cupidity or vengeance. Instead of being an accusing party it is, and ought to be, a judicial tribunal. Instead of acting hastily and unadvisedly, upon an accusation against the citizen, and placing him upon trial for the gratification of private feeling, it should be made to stand upon the higher ground of vindicating the dignity of the public law. To do this, limits must be set to the extent of its powers, and restrictions must be placed upon their exercise. Without these—rendered necessary by the secrecy by which the grand jury was surrounded—the full assurance cannot exist, that public and private interests are safe in its hands. Under the present system, these safeguards cannot be found. Within the sphere of what they choose to consider their duties, the grand jury is omnipotent. Accusations, in which the public are deeply concerned, may be dismissed without a question. Indictments may be preferred upon slight evidence or upon no evidence; and the action of the graud jury is beyond the reach of the law. And, in short, acting as it does, without responsibility, there is no slight reason to fear, that from being conservative in its aim, it may ultimately degenerate into an object of private aversion. From the abuses of which it is susceptible and which have been too often practised under its unconscious sanction, it is not to be disguised, that even now its moral power is waning, and unless preserved by legislation, may eventually cease."

bar, and to the note of the same learned gentleman to a recent edition of Hale's Pleas of the Crown.[1]

[1] The History and Law of the Writ of Habeas Corpus, with an Essay on the Law of Grand Juries, by E. Ingersoll, of the Philadelphia bar, 1849; 2 Hale's Pleas of the Crown, by Stokes & Ingersoll, 164.

"According to the existing practice," says the British Commissioners, in their eighth report, 359 (see London Law Mag. No. 64), "prosecutions by indictment may commence, either by bringing against the defendant a public accusation before a magistrate, or a private accusation before the grand jury. Let us imagine that the first course is adopted. Complaint having been made to a magistrate, and the accused having been summoned or apprehended, the prosecutor and his witnesses are called upon, in a public court, and in the presence of the defendant, to state on oath the circumstances on which the charge is founded. The accused, or his legal adviser, has then an opportunity of cross-examining the witnesses, of calling others to contradict them, and of making any statement, with the view of explaining, justifying, or disproving the charge. If the facts be intricate, if important witnesses be absent, or if time be required for a more careful scrutiny, the inquiry may be postponed to some future day; till at length, the case, having been fully and openly heard on both sides, and the testimony having been reduced into writing, the magistrate decides, whether or not the circumstances are sufficiently suspicious to warrant their submission to a jury. If this decision be in the negative, the accused is discharged; if in the affirmative, he is committed or bailed.

"Such being the nature of a preliminary investigation before a magistrate, it would seem that, for the purposes of justice, no further inquiry would be requisite previous to the trial. But this is not the law; before the case can be presented for the consideration of the jury, the prosecutor and his witnesses, who may either be the parties previously examined, or different persons, must go, one by one, before a secret tribunal, composed of twenty-three gentlemen unacquainted with the law, and repeat the substance of their accusation, in the absence of the accused. No means are provided for testing the accuracy of their statements; the depositions taken before the committing magistrate, excepting at the Old Bailey, are not before them; neither, with a similar exception, is any person present, beyond the grand jurors themselves, to marshal the evidence, or in any way to conduct the proceedings. If, after this inquiry, twelve out of the twenty-three jurors consider that a prima facie case of guilt is established, a true bill is found and the indictment is tried; if a like number entertain a contrary opinion, the bill is rejected, and the prosecutor must then either abandon the charge or try his fortune before another grand jury on some future occasion.

"Now if we contrast the different modes in which these two examinations are conducted, is it not obvious that, even supposing no conclusive practices to exist, and assuming the committing magistrate to have no more legal experience than the members of the grand jury, his decision is more likely to be correct than theirs; that where they agree with him, they do not corroborate him; where they differ from him, they are probably wrong; thus, they can seldom do good, and may often do evil. But, if this be the case, where the committing magistrate is a mere justice of the peace, with how much greater force does the argument apply, when, as in London, Liverpool and Manchester, he is a professional man, well acquainted with the rules of evidence, and admirably fitted, from long experience, to unravel the tangled thread of human testimony.

"Besides, it is idle to suppose, that frauds are not daily practised on the grand jury. At the preliminary inquiry before the magistrate, the defendant has an opportunity of ascertaining who are the witnesses who depose against him, and what is the nature of their evidence. If, then, he be admitted to bail, what is to prevent *him*—if he is committed to custody, what is to prevent his friends—from tampering with the witnesses? It would be useless, or, at least highly dangerous, to attempt to do so if they were to be only examined at the trial; because, on that occasion, the evidence being given in public court, would be publicly known, and the depositions being returned to that court, any material variance in the testimony would be immediately detected, and would render the witnesses liable to an indictment for perjury. But the case is far different before the grand jury. There the jurors being sworn to secrecy, and each witness being examined alone, who is to discover any falsehood that one or more of them may be bribed to utter? Yet, if any unexplained inconsistency appear in the narrative, the grand jury can scarcely fail to doubt its truth, and the consequence is that the bill is ignored. The prosecutor has no means of avoiding this result. He knows

§ 460. The ordinary functions of a grand jury are based on a fundamental principle of the common law, incorporated in the Constitution of the United States,[11] that "in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

§ 461. No act of Congress confers on the United States courts the right to summon grand juries or describe their powers. The laws of Congress have invested the courts of the United States with criminal jurisdiction, and since this jurisdiction can only be exercised through the instrumentality of grand juries, the power to direct them results by necessary implication. Hence the powers of grand juries are co-extensive with, and are limited by

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that some of his witnesses have betrayed him, perhaps he has reason to suspect the individual who has done so; but he has no remedy. An indictment for perjury must specify the words spoken, and how can he discover what those words were? The law, indeed, may say that a false witness before a grand jury is subject to prosecution; but the law does not add how a conviction can be obtained; and we believe that, with one solitary exception, no trace can be discovered of such a proceeding.

"Again, if the witnesses are of such a character as to preclude the hope of their being successfully suborned, the accused may still escape, providing he can only bribe (and this is no difficult matter) some person to go to the prosecutor, and pretend that he is acquainted with facts corroborative of the charge. These facts being narrated with the semblance of zeal, the confidence of the prosecutor is gained; the defendant's friend, with the witnesses previously examined, is sent before the grand jury, and there, by an artful statement, throws such doubt on the matter, that no bill is found. It is true, that both these last mentioned abuses might be partially avoided, either by making the grand jury perform their functions, as in former days they frequently did, in open court, or by directing that the attorney for the crown should in all cases attend them with the depositions, and conducting the examination of the witnesses, and by distinctly empowering him, as also the grand jurors themselves, to repeat the evidence of any witness whom it might become necessary to indict for perjury. Still the inutility of the inquiry must remain as before; and when we find, as we presently shall do, that this useless machinery is productive alike of a large expense to the country, and of serious inconvenience to witnesses, are we not justified in advocating its immediate abolition?

"Next let us suppose that the prosecutor, in the first instance, goes before the grand jury. In this case the earliest intimation of the charge which the accused receives, is, that a bill is found against him. The particulars are kept secret. Who his accusers are, or what they have testified against him, he has no means of discovering; indeed, he cannot, except in some cases of high treason, so much as demand a copy of their names, nor, in cases of felony, is he entitled even to a copy of the indictment. The law, which now in fairness enables the accused, immediately after the investigation has closed before the magistrate, to obtain a copy of the depositions at a small cost, and at the trial to inspect these depositions, without any cost at all, refuses any such indulgence in the case of a bill being found without a previous examination. That which the legislature admits to be just in the one case, it wholly disregards in the other; and thus, while a man, who has been publicly accused before a magistrate, has the amplest means of showing the character and motives of the witnesses, and of confuting the charge against him, a party secretly attacked before the grand jury, is placed on his trial, under circumstances of cruel disadvantage, and must rely on chance, rather than the purity of his conduct, to establish his innocence. But this is not all. A prosecutor who prefers a bill before a grand jury, is not compelled to proceed to trial, in the event of its being found; neither are his witnesses bound over to appear and testify in court. A door is consequently opened to the most disgraceful practices. A bill found by perjury, becomes the instrument of extortion to the innocent but timid man; a bill found by true testimony, is employed with still greater power, to wring money from the guilty."

[11] Amendments, Art. iv.

the criminal jurisdiction of the courts of which they are an appendage. Hence, too, a presentment by a grand jury in the Circuit Court of the United States, of an offence of which that conrt has no jurisdiction, is *coram non judice,* and is no legal foundation for any prosecution, which can only be instituted on the presentment or the indictment of a grand jury, to be carried on in another court, unless that court has no right to direct grand juries.[m]

§ 462. In Virginia, in cases of treason or felony, it is essential in every case, before an indictment is found, that the offence should previously be examined into by an examining court.[n]

§ 463. Except where proceedings originate *ex officio,* from the attorney general, or where a grand juror possesses in his own breast sufficient knowledge of the commission of a crime to enable his fellows to find a bill exclusively on his evidence, cases, both in England and this country, are rare where an indictment is found without a preceding hearing and binding over to answer; and even where the bill is based on the evidence of a member of the grand jury, it has been held in one of the States that public safety required his name to be endorsed on the bill as prosecutor.[o]

II. SUMMONING OF GRAND JURORS.

§ 464. In England, on the summoning of any session of the peace, or on the issuing of a commission of Oyer and Terminer and jail delivery, there goes out a precept, either in the name of the king, or of two or more justices, directed to the sheriff, upon which he is to return twenty-four men, or more —*probi et legales homines*—out of which the grand inquest at the sessions of the peace, or Oyer and Terminer, are taken. In Massachusetts, and in the New England States generally, as is stated in detail, in a work which has frequently been the subject of reference in the present inquiry,[p] the selection is by lot, "from a body of the most respectable citizens in the several towns in the county, whose names are kept in a box, which is called the 'jury box,' and from which the jurors are drawn." In New York[q] it is made the duty of the supervisors of the several counties of the State, except the city and county of New York, where the same dnty is imposed on the mayor, recorder, and alderman, at the annual meetings, to prepare a list of the names of three hundred persons, to serve as grand jurors, from among which, after having been deposited in a box, and sealed, until the period for selection arrives, the names of twenty-four persons are drawn, by lot, by the county clerk, in the presence, and with the assistance of, the sheriff and of the county jndge and justice of the peace. In Pennsylvania, the original selection of the names of those who are to be placed within the *wheels* from which the juries are, at the proper time, to be drawn, is intrusted to the sheriff, and at

[m] U. S. *v.* Hill, 1 Brock, 156.
[n] Rev. Code Va. c. 169; Davis' C. L. 415, 422.
[o] State *v.* Camm. 1 Hawks. 252.
[p] Precedents of Indictments, Davis.
[q] Revised Statutes, part iv. title iv. chap. ii. art. i.

least two of the county commissioners; and it is made the duty of the same officers, when any writ of *venire* issues, to draw, from the proper wheel, the names of so many persons to be jurors, as may be required by the writ.[r] In Virginia, the sheriff of each county, before every term of the Circuit Superior Court of law, is required to summon twenty-four of the most discreet freeholders of the county, being citizens of this commonwealth, and not constables, nor ordinary keepers, nor surveyors of highways, nor owners or occupiers of a grist-mill, to appear at the succeeding Circuit Court, on the first day thereof; and the said twenty-four freeholders, or any sixteen of them, shall be a grand jury, who shall be sworn to inquire of, and present, all treasons, murders, felonies, and misdemeanors, whatsoever, which shall have been committed or done within the county for which they are impanelled; and if a sufficient number of the said freeholders should not attend on the first day of the court, the sheriff shall summon from the by-standing freeholders, qualified according to law, a sufficient number to form, together with such of the first mentioned freeholders as do attend, a grand jury.[s]

§ 465. Though twenty-four are usually summoned on grand juries, not more than twenty-three can be impanelled, as, otherwise, a complete jury of twelve might find a bill, when at the same time, a complete jury of twelve might dissent.[t] If of twenty-four, the finding is void.[tt] And it appears that a grand jury composed of any number from twelve to twenty-three is a legal grand jury.[u] If less than twelve, the defect is fatal.[uu]

III. Selection of foreman and oath.

§ 466. After the jury is assembled, the first thing, if no challenges are made, or exceptions taken, is to select a foreman, which, in the United States courts, in New York, in Pennsylvania, and in most of the remaining States, is done by the court; in New England, by the jury themselves.[v] The oath administered to the foreman is substantially the same in most of the States. "You, as foreman of this inquest, for the body of the county of ——, do

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[r] Act April 14, 1833, pamph. p. 333. By an act, however, passed in the session 1845–6, the duty of original selection, in the city and county of Philadelphia, is deposited with the assessors of the several wards or townships.

[s] Davis' Virg. Cr. Law, 423. In Vermont, a system in part different, prevails. Each town, at its annual meeting, chooses a grand jury, "whose duty it is to inquire into, and due presentment make to proper authority, of all offences which may come to his knowledge, within the town for which he is appointed, against the laws and peace of this State, which he shall think the design of the law and the good of community require to be prosecuted." (Rev. Stat. Ver. 94.) In Connecticut, a similar provision exists. But it will be observed, that in each State, the grand juries, constituted as at common law, still convene and determine upon all cases of infamous crime.

[t] Cro. Eliz. 654; 2 Hale, 121; 2 Hawk. c. 25, s. 16; Hudson *v.* State, 1 Blackf. 317; Rev. Stat. N. Y. p. iv. c. 4, s. 26; Com. *v.* Wood, 2 Cushing, 149.

[tt] People *v.* Thurston, 5 Cal. 69; R. *v.* Marsh, 6 Ad. & El. 236.

[u] Pybos *v.* State, 3 Humph. 49; Dowling *v.* State, 5 Smedes & Marsh, 664; State *v.* Davis, 2 Iredell, 153. See as to Iowa, Norris *v.* State, 3 Iowa, 513.

[uu] Clyncard's case, Cro. Eliz. 654; State *v.* Symonds, 36 Maine, 128; Barney *v.* State, 12 S. & M. 68.

[v] Smith's Laws of Pa., vol. vii. p. 685; Rev. Stat. N. Y. part iv. c. 2, tit. 4, s. 26; Davis' P. p. 9.

swear (or affirm) that you will diligently inquire, and true presentment make of such articles, matters, and things as shall be given you in charge; the Commonwealth's (or State's) counsel, your fellows, and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding (so help you God)." The rest of the grand jury, three at a time, are then sworn (or affirmed) as follows: "The same oath (or affirmation) which your foreman hath taken, on his part, you and every of you, shall well and truly observe, on your part (so help you God)."[w] In Pennsylvania, after the words "shall be given you in charge," in the foreman's oath, occur the words, "or otherwise come to your knowlege, touching the present service." In Virginia, the same expression is introduced; but the subsequent clause, enjoining secrecy, is omitted.[x] In Massachusetts, the jury are sworn in a body, the foreman being afterwards elected, but the oath is the same as the above.[y]

§ 467. Where on the first day of the term of a Circuit Superior Court, a grand jury was impanelled and sworn, and proceeded in discharge of its duties, but next day, it was discovered that one of the grand jurors wanted legal qualification, upon which the court discharged him, and ordered another to be sworn in his place, it was held that this was regular, and the grand jury was duly constituted.[z]

IV. Disqualification of grand jurors, and how it may be excepted to.

§ 468. Irregularities in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can, in general, only be objected to by challenge to the array.[zz] However numerous the grand jury may be, it seems that if one of them be open to exception, he vitiates the whole of the jury, since it cannot be assumed that he was not one of the twelve that united in finding the bill.[a]

§ 469. When a person who is disqualified is returned, it is a good cause of challenge, which may be made by any person who is concerned in the business to come before the grand jury.[b] The same objection which may be made by challenge, to a petit juror, may be made to a grand juror.[c] In New York, while it is said to be a good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case will probably be presented to the consideration of the grand inquest, it is added, that such exceptions must be taken before the indictment is found,

[w] See Cr. Cir. Com. p. 11, 6th ed.

[x] Tate's Dig. tit. Juries.

[y] Rev. Stat. Mass. 136, s. 5.

[z] Com. *v.* Burton, 4 Leigh, 645; see Jetton *v.* State, 1 Meigs, 192.

[zz] Vanhook *v.* State, 12 Texas, 252.

[a] Barney *v.* State, 12 S. & M. 68; State *v.* Duncan, 7 Yerger, 271; State *v.* Jacobs, 6 Texas, 197.

[b] 2 Hawk. c. 25, s. 16; Bac. Ab. Juries, A.; Burn, J., 29th ed., Jurors, A.; post, § 3219.

[c] Burr's Trial, 38.

and will not afterwards be heard.[d] In a case in Pennsylvania, before Tilghman, Ch. J., and Breckenridge, J., in 1814, the defendants, who were confined in jail, on a charge of homicide, were allowed to challenge a grand juror for favor, after the grand jury were sworn.[e] Any one, it is said, in Indiana, under a prosecution for a crime, may, before he is indicted, challenge any of the persons on the grand jury; but this privilege of challenging is very properly limited to those who are at the time under a prosecution for an offence about to be submitted to the consideration of the grand jury.[f] In the same State, where the prosecuting attorney asked a grand juror, "if he could, in his conscience, find any man guilty of an offence which would subject him to the punishment of death;" to which he replied, that he "thought he could not," it was held, that the question was a general one, upon an abstract principle, and might, under the circumstances, be properly asked; and that he was properly set aside in the court below.[g] A challenge to the array, however, will not be allowed on the ground that in the selection of the grand jurors, all persons belonging to a particular fraternity were excluded, if those who are returned are unexceptionable, and possess the statutory qualifications.[h] Nor does it appear a good cause of challenge to the array, that the officers, whose duty it was to make the original selection, were two or three weeks at the work; nor, that one of them was temporarily absent; nor, that they employed a clerk to write the names selected, and put them in the wheels.[i] In Massachusetts it was held, in an early case, that the court will not set aside a grand juror because he has originated a prosecution against a person for a crime, whose case was to come under the consideration of the grand jury.[j] In Vermont, a still more extreme doctrine has been maintained, it being held that the court has no power to order a grand juror to withdraw from the panel in any particular case, although it were one of a complaint against himself.[k] In New York, by the revised statutes, a person held to answer to any criminal charge, may object to the competency of a grand juror, *before he is sworn*, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, subpœnaed or recognized as such; and if such objection is established, the juror is to be set aside. But no challenge to the array, or to any person summoned on it, shall be allowed in any other cases.[l]

§ 470. In Michigan the court will not quash the array of grand jurors, unless good cause is shown by a person "under prosecution;" and the fact that the party by whose counsel the motion to quash was made, was after-

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[d] People *v.* Jewett, 3 Wend. 314; S. P., U. S., *v.* White, 5 Cranch, C. C. R. 457.

[e] Com. *v.* Clark, 2 Browne, 325.

[f] Hudson *v.* State, 1 Blackf. 318; Ross *v.* State, 1 Blackf. 390.

[g] Jones *v.* State, 2 Blackf. 477; State *v.* Rockafellow, 1 Halst. 332; State *v.* Duncan, 7 Yerger, 271; State *v.* Richey, 5 Halst. 83; Gross *v.* State, 2 Carter (Ind.), 329; post, § 3020.

[h] People *v.* Jewett, 3 Wend. 314.

[i] Com. *v.* Lippard, 6 S. & R. 395.

[j] Com. *v.* Tucker, 8 Mass. 286.

[k] Baldwin's case, 2 Tyler, 473.

[l] 2 R. S. 724, s. 27, 28.

wards indicted by the same grand jury, is not sufficient to show that he was entitled to make the motion.[m]

§ 471. In Alabama the grand jury cannot be required to expurgate themselves of any supposed interest or bias, at the instance of one in jail, who is expecting an indictment to be preferred against him. Objections to the grand jury must be taken by plea in abatement at the term at which the indictment is found.[n]

§ 472. Much difference of opinion has existed on the question whether, after bill found, the defendant can take advantage of the incompetency of any of the grand jury who found it. In Massachusetts it was said, generally, that objections to the personal qualifications of a grand juror, or to the legality of the returns, cannot affect any indictments found by them, after they have been received by the court and filed;[o] and, though the doctrine was doubted in a subsequent case, it cannot be said to have been overruled.[p] The New York practice at common law, was, as has been stated, substantially the same.[q] In that State, after an issue has been joined upon an indictment on a plea of not guilty, and a petit jury has been impanelled, and the case on the part of the people has been gone through with, it is too late for the defendant to raise the objection of informality in the organization of the grand jury.[r] In New Jersey, it is said that it is not a good plea in abatement, that a member or members of the grand jury were interested in the conviction of the defendant, and had pre-judged his case.[s] In Alabama, it was said, originally, that after an indictment has been found against the prisoner, and the same has been filed and accepted in court, he cannot except to the personal qualifications of the persons selected and sworn on the grand jury, or plead in bar or avoidance of the indictment, that one of the jurors who preferred it is an alien;[t] but the point appears, as has just been seen, afterwards to have been determined otherwise.[u] On the other hand, it was ruled in Virginia, at an early period, that where a bill of indictment is found by a grand jury, one of whom is an alien, or otherwise disqualified by law, the bill or presentment may be avoided by plea.[v] So where, in a prosecution for a misdemeanor at the instance of a voluntary prosecutor, the defendant filed a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder, and the issue made upon that plea was found for the defendant, and the indictment quashed, it was held, the court should give judgment for the costs against the prosecutor.[w] In Ohio an indictment found by a grand jury composed of less than fifteen persons, having the qualifications required by the statute, is not sufficient to put the accused on trial, and a plea to the indictment, that one of the grand jurors had not the

[m] Thayer *v.* People, 2 Doug. 417.
[n] State *v.* Clarissa, 11 Ala. 57.
[o] Com. *v.* Smith, 9 Mass. 107.
[p] Com. *v.* Parker, 2 Pick. 563.
[q] People *v.* Jewett, 3 Wend. 314.
[r] People *v.* Griffin, 2 Barbour, 427; post, § 3223.
[s] State *v.* Rickey, 5 Halsted, R. 83.
[t] Boyington *v.* State, 2 Porter, 100.
[u] State *v.* Middleton, 5 Porter, 484; State *v.* Segar, 7 Porter, 167; State *v.* Clarissa, 11 Ala. 57.
[v] Com. *v.* Cherry, 2 Virg. C. 20.
[w] Com. *v.* St. Clair, 1 Grat. 556.

requisite statutory qualifications, is a good plea in bar.[x] In Maine, Tennessee, Alabama, Texas, and Mississippi, it has been determined that the disqualifications of one of the grand jurors finding an indictment may be taken advantage of by motion to quash or plea in abatement, before the general issue is pleaded.[y] And in North Carolina the same doctrine exists;[z] it being clear that after plea pleaded, objections are too late; and that when the objection goes to the manner of drawing, it should be taken by challenge to the array.[a]

Such is undoubtedly the English rule, as well as that existing in most part parts of the United States.[b]

It is necessary that the plea, in such case, should set forth sufficient to enable the court to give judgment on it on demurrer; thus where, upon a presentment by a grand jury for gaming, the defendant tendered a plea in abatement, that one of the grand jurors nominated himself to the sheriff to be put on the panel, and summoned him to serve, without alleging that this nomination of himself, by the grand juror, was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel; it was held, that the plea was nought.[c]

§ 473. A plea in abatement that the grand jurors who found the indictment was selected by the Board of Commissioners on the 6th of May, 1841, and that they had no authority to make the selection on that day, is bad, for not showing that the said 6th of May was not included in the May session of the Board in that year.[d]

Where the error is of record, its existence must be determined by inspection.[e]

It is not necessary, at common law, that any part of a grand jury finding a bill against an alien, should be aliens.[f] Such, it has been determined, is also the rule in Pennsylvania.[g] The doctrine, in fact, that all the grand inquest should be inhabitants of the county for which they are sworn to inquire, admits, it would seem, of no modification.[h] If the defendant, or his counsel, before trial knew of an objection to one of the grand jurors that

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[x] Doyle v. State, 17 Ohio, 222.

[y] State v. Duncan & Trott, 7 Yerger, 527; State v. Bryant, 10 Yerger, 271; State v. Brooks, 9 Ala. 10; Barney v. State, 12 S. & M. 68; M'Quillan v. State, 8 S. & M. 587; Rawle v. State, Ib. 599; State v. Symonds, 36 Maine, 128; Vanhook v. State, 12 Texas, 469; Jackson v. State, 11 Texas, 261; though see State v. Mahan, 12 Texas, 283; Wh. Prec. 1158.

[z] State v. Martin, 2 Iredell, 101; State v. Duncan, 6 Iredell, 98.

[a] Ibid.; State v. Barroune, 25 Miss. 203.

[b] 2 Hale, 155; 3 Inst. 34; Cro. Car. 134, 147; 2 Hawk. c. 25, s. 18, 26, 29, 30; Bac. Ab. Juries, A; 1 Ch. C. L. 309; People v. Griffin, 2 Barb. S. C. 427; State v. Martin, 2 Iredell, 101; State v. Lamon, 3 Hawks. 175; State v. Herndon, 5 Blackf. 75; Vattier v. State, 4 Blackf. 72; State v. Freeman, 6 Blackf. 248; State v. Seaborn, 4 Dev. 305; see for form, Wh. Prec. 1158.

[c] Com. v. Thompson, 4 Leigh, 667.

[d] State v. Newer, 7 Blackf. 307.

[e] Smith v. State, 28 Mississippi, 728.

[f] Hawk. b. 2, c. 43, sect. 36.

[g] Res. v. Mesca, 1 Dall. 73.

[h] Rol. Abr. 82; 2 Inst. 32, 33, 34; Hawk. b. 2, c. 25.

found the indictment, or to the organization or proceedings of the jury, and proceeded to trial without making the objection, it is waived, and cannot be insisted on after verdict.[hh]

V. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY.

§ 474. It is essential to the validity of an indictment that it should be submitted to the grand jury by the prosecuting officer of the State,[i] and it is even said that his signature is necessary before such submission,[j] though the point has been doubted;[k] and in Arkansas, Indiana, Alabama, Missouri, and Mississippi, it has been expressly decided that an indictment need not be so signed.[l] In Tennessee, an indictment signed "Nathaniel Baxter, Attorney General," was held to be sufficiently signed, without adding the name of the district of which he was attorney general;[m] but an indictment signed by a person styling himself solicitor general, is invalid, there being no such officer known in that State[n] It is not a valid objection to an indictment that it is signed by one as district attorney *pro tem.*, rather than by the district attorney.[nn]

The proceedings in bringing an indictment before the court must be conducted by the prosecuting attorney in person, but the actual trial before the court and jury may be conducted by other counsel.[o] The attorney general may properly assist the circuit attorney at a trial for murder, whether ordered by the Governor to do so or not, and the prisoner cannot take just exception.[oo] The indictment being signed and preferred by the attorney general, it will be presumed, in the absence of anything to the contrary, that an attorney general *pro tem.*, who conducted the trial, was properly appointed.[p]

§ 475. In Pennsylvania, by the 1st section of the act of May 3d, 1850, providing for the election of district attorney, it is provided that the officer so elected shall sign all bills of indictment, and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected.[pp]

[hh] State *v.* Rand. 33, N. H. 216; People *v.* Griffin, 2 Barbour, 427; State *v.* Clarissa, 11 Alab. 57; State *v.* Martin, 2 Iredell, 101; State *v.* Bowman, 25 Miss. 203; McGuillen *v.* State, 8 Sm. and M. 587; post, § 3223.

[i] Fort *v.* State, 3 Haywood, 98; Hite *v.* State, 9 Yerger, 198.

[j] Ibid. Teas *v.* State, 7 Humph. 174.

[k] State *v.* Vincent, 1 Car. Law R. 493; Anderson *v.* State, 5 Pike, 444.

[l] Anderson *v.* State, 5 Pike, 444; McGregg *v.* State, 4 Blackf. 101; Thomas *v.* State, 6 Mis. 457; Keithler *v.* State, 10 S. & M. M. 192; Ward *v.* State, 22 Alab. 16; Harrall *v.* State, 26 Alab. 53.

[m] State *v.* Brown, 8 Humph. 89; State *v.* Evans, 8 Humph. 110.

[n] Teas *v.* State, 7 Humph. 174.

[nn] Reynolds *v.* State, 11 Texas, 120.

[o] Byrd *v.* State, 1 How. Mis. 247; Rush *v.* Cavenaugh, 2 Barr, 1807; Jarnagin *v.* State, 10 Yerg. 529. See Bemis' Webster case.

[oo] State *v.* Hays, 23 Mis. (2 Jones) 287.

[p] Isham *v.* State, 1 Sneed (Tenn.) 112. (A capital case.)

[pp] Pamph. 1850, 654.

VI. SUMMONING OF WITNESSES, AND INDORSEMENT OF THEIR NAMES ON BILL.

§ 476. In every case where there has been a previous examination and binding over, which, as has been seen, is the regular, and, with a few settled exceptions, the sole way of putting an offender on his trial, the prosecutor, if there be any, and the witnesses, are under recognizance to appear and testify. The practice is, immediately at the opening of the court, to call their names; and, in case of non-appearance, to secure their attendance by process. At common law, a justice of the peace, at the hearing of a criminal case, has power to bind over the witnesses, as well as the defendant, to appear at the next court, and in default of bail to commit them.[q]

§ 477. the presence of witnesses not under recognizance to attend, is obtained by the ordinary means of a subpœna.

§ 478. The practice is, for the attorney general, or, in England, the clerk of the assizes, to mark on the back of each bill the witnesses belonging to it; though it has been held that the omission is not fatal.[qq]

§ 479. In Massachusetts, such does not appear to be the course, it being usual for the grand jury to return generally the names of all the witnesses examined by them, without specifying the bills; but in a leading case, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J., that such a request had never been refused.[r]

§ 480. In Pennsylvania, the act of 1705 provides that no person or persons shall be obliged to answer to any indictment or presentment, unless the prosecutor's name be indorsed thereupon;[s] and though it has been held by the Supreme Court, that the act does not go so far as to require that a prosecutor should be indorsed in cases where no prosecutor exists,[t] yet, undoubtedly, the spirit of the common law requires that the bill itself should afford the defendant the means of knowing who are the witnesses on whose evidence the accusation against him is based.[u] If the grand jury act irregularly in introducing witnesses without the action of the attorney general, the proper course is to move to quash. The irregularity cannot be pleaded in bar.[uu]

The revised act, 1860, provides: No person shall be required to answer to any indictment for any offence whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon, and if no person shall avow himself the prosecutor, the court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment.[v]

In Ohio, it is provided, that no bill of indictment for any offence specified in the act entitled "An act for the punishment of crimes," passed March 8, 1831, shall be found a true bill by any grand jury, unless the name of the

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[q] 2 Hale, P. C. 52, 282; 3 M. & S. 1.
[qq] 4 M. & S. 9.
[r] Com. v. Knapp, 9 Pick. 498.
[s] 1 Smith's Laws, 56.
[t] R. v. Lukens, 1 Dallas, 5.
[u] Arch. C. P. by Jervis, 13; Barbour's Cr. Treatise, 272.
[uu] Jillard v. Com. 2 Casey, 169.
[v] § 27, Bright. Supp. 1376.

prosecutor be indorsed thereon, except such bill be found upon testimony sworn and sent to the grand jury by order of the court, at the request of the prosecuting attorney, or the foreman of the grand jury, in which cases the fact that the bill was found upon testimony sworn and sent to the grand jury by order of the court, shall be indorsed on the bill instead of the name of the prosecutor.[vv]

The same act provides, that in all cases where the prosecutor's name is indorsed on the bill, and the same is found a true bill by the grand jury, and upon trial the defendant is acquitted, the prosecutor shall be liable for costs; and the court at the term at which such acquittal shall take place, or at any subsequent term, shall render judgment against such prosecutor for such costs unless the court shall be of opinion that there were reasonable grounds for instituting the prosecution.[w]

§ 481. In Mississippi, though the want of the name of the prosecutor indorsed on the back of the bill is fatal,[ww] it is not necessary that the grand jury should return, with the indictment, the names of the witnesses examined, or the evidence.[x]

§ 482. In Missouri, the name of the prosecutor is required to be indorsed upon an indictment for any trespass not amounting to a felony,[y] and under this statute the prosecutor's name must be indorsed upon an indictment for petty larceny,[z] or riot,[a] but it need not be indorsed upon an indictment against a slave for arson,[b] nor on an indictment for a disturbance by making loud noises;[c] and it is a sufficient indorsement if the prosecutor's name be written on the face of the bill.[d] In Tennessee, the name of the prosecutor must be marked on the back of the bill,[e] and an omission to do so need not be pleaded in abatement, but may be taken advantage of at any time.[f] But if the indictment be founded on a presentment, the name of the prosecutor need not be indorsed on the bill.[g]

§ 483. In Arkansas, the name of the prosecutor need not be indorsed on a bill for passing counterfeit coin, that offence not being a trespass upon the person or property of another less than felony.[h]

It is not the practice, it is said, in the courts of the United States, that the name of the prosecutor should be written at the foot of the indictment.[i]

§ 484. In Virginia, the rule is the contrary.[j] It is not there essential, however, in an indictment for a trespass or misdemeanor, to insert the name of a prosecutor, if it appears that the indictment was found on the evidence of a witness sent to the grand jury, either at their request, or by direction of the court; and that whether there was a previous presentment or not.[k]

[vv] Act of Ap. 11, 1857, § 6.
[w] Ibid. § 7.
[ww] Peter *v.* State, 3 How. Mis. 433.
[x] King *v.* State, 5 Howard Mis. R. 730.
[y] Rev. Code, 1835, § 451.
[z] State *v.* Heart, 7 Mo. 321.
[a] State *v.* McCourtney, 6 Mo. 649; McWaters *v.* State, 10 Mo. 134.
[b] Lucy *v.* State, 8 Mo. 134.
[c] State *v.* Moles, 9 Mo. 270.
[d] Williams *v.* State, 9 Mo. 270.
[e] Act 1801, c. 30, § 1.
[f] Medaris *v.* State, 10 Yerger, 239.
[g] State *v.* McCann, 1 Meigs, 91.
[h] Gabe *v.* State, 1 Eng. 519.
[i] U. S. *v.* Mundell, 6 Gall. 245.
[j] Hunt *v.* Com. 2 Va. Cases, 3; Com. *v.* Dove, ib. 29.
[k] Worthington *v.* Com. 5 Randolph, 669.

§ 485. In Kentucky, it is held that the omission of the name of the prosecutor, his addition and residence, in cases of trespass, is fatal.[l]

§ 486. In Missouri, it is said that it is a sufficient indorsement of an indictment by the prosecutor, that his name is written on the face of the indictment.[m]

§ 487. In Iowa, it is said that although the names of the witnesses should be indorsed on the indictment, they need not be made a part of the record.[n]

VII. Examination of testimony.

1st. How witnesses are to be sworn, § 488.
2d. How defects in this respect may be excepted to, § 489.
3d. Evidence confined to the prosecution, § 490.
4th. Probable cause enough, § 491.
5th. Legal proof only to be received, § 493.
6th. Attendance of prosecuting attorney, § 495.
7th. Defendant and others not entitled to attend, § 496.

1st. How witnesses are to be sworn.

§ 488. By the ancient practice, witnesses to be sent to the grand jury, were previously sworn in open court. If a witness who is sent to a grand jury be thus sworn, though not in the immediate presence of the judge, or even in his temporary absence from the bench, it is good.[o] In Connecticut, witnesses before a grand jury, according to settled and uniform practice, are sworn by a magistrate, in the grand jury room, and not in court; and this is pronounced a lawful mode of administering the oath.[p] In the U. S. Circuit Court, for the Eastern District of Pennsylvania, the practice was, it is said, to summon a justice of the peace as one of the grand jury, and to permit him to swear the witnesses in the jury room;[q] but, at present, the witnesses are sworn in court by the clerk. In many of the States, however, express power is given to the foreman to swear witnesses whose names are given to him for the prosecution. Such an authority is given in Massachusetts, by the statute of 1807, c. 140; in New York, by the Revised Statutes, part ii., title 4, c. 2, act 1, sect. 29. In Pennsylvania, by the act of April 5, 1826, the foreman of the grand jury or *any member* thereof is authorized to administer the oath to witnesses. It will be observed, however, that in the latter State, the authority is expressly limited to such witnesses "*whose names are marked by the Attorney General on the bill of indictment;*" and consequently, all others must be sworn in open court.[qq]

The Revised Act, 1860, provides as follows:—

"*Grand jurors may administer oaths.*—The foreman of any grand jury, or any member thereof, is hereby authorized and empowered to administer

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[l] Com. *v.* Gore, 3 Dana, 474; Bartlett *v.* Humphreys, Hardin, 513.
[m] Williams *v.* State, 9 Mo. 270.
[n] Harriman *v.* State, 2 Greene (Iowa), 270.
[o] Jetton *v.* State, I Meigs, 192.
[p] State *v.* Fassett, 16 Conn. R. 457.
[q] 7 Smith's Laws, 686.
[qq] See Jillard *v.* Com. 2 Casey, 169.

the requisite oaths or affirmations to any witness whose name may be marked by the district attorney on the bill of indictment."[r]

2d. HOW DEFECTS IN THIS RESPECT MAY BE EXCEPTED TO.

§ 489. Unless the witnesses were regularly sworn, it would seem the bill found on their unsupported evidence will be quashed. In England, it has been held that a *conviction* could not be shaken, although the bill was found on illegal testimony, if on the trial the evidence against the prisoner was sufficient; and in a case where it appeared the witnesses before the grand jury had not been sworn at all, the twelve judges held that the objection, as raised in arrest of judgment, should be overruled,[rr] but at the same time unanimously made application for a pardon, recognizing, in fact, their regularity of the finding, though regarding the plea as a waiver of the technical error. In this country it has been several times determined that a motion in arrest of judgment cannot be sustained, on the ground that it does not appear from the indorsement on the indictment that the witnesses were sworn before they were sent to the grand jury; for the judgment can be arrested only for matter appearing, or for the omission of some matter which ought to appear on the record, and such indorsements form no part of the bill.[t] But where the objection is taken before plea, on motion to quash, it would seem to be good.[u] It is true that the English practice has varied, and that afterwards it was declared that it would be improper for a court to inquire whether the witnesses were regularly sworn, as the grand jury, supposing such may not have been the case, were competent to have found the bill on their own knowledge;[v] but this limitation has not been recognized in this country, and in England it has not been always applied.[w] Thus, where an irregularity was shown in the swearing, Story, J., exclaimed with great emphasis, that if such irregularities were allowed to creep into the practice of grand juries, the great object of their institution was destroyed.[x] And in a case in North Carolina, the law was pushed still further, it being held that where a bill was found on the information of one of their own body, it was essential that the prosecuting juror should be regularly sworn, and so noted.[y] In the same State it was laid down generally, that an indictment found on the testimony of interested or incompetent witnesses will be quashed.[z] But such a case is incompatible with the common law principle that the court will not inquire into the question whether the degree of evidence was such as should properly have led to a finding; and in several cases courts have refused to inquire as to the character of the testimony by which the grand jury was influenced.[a]

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[r] Rev. Act, 1860, pamp. 433. [rr] R. *v.* Dickinson, R. & R. Crown Cases, 401.
[t] State *v.* Roberts, 2 Dever. & Bat. 540; State *v.* McEntire, Car. L. R. 287; King *v.* State, 5 How. & Mis. R. 730; Gillman *v.* State, 1 Humph. 59; see Jillard *v.* Com. 2 Casey, 169. [u] 6 C. & P. 90. [v] R. *v.* Russel, 1 C. & M. 247.
[w] R. *v.* Dickinson R. & R. 401; see 6 C. & P. 90.
[x] U. S. *v.* Coolidge, 2 Gallison, 364.
[y] State *v.* Camm, 1 Hawks, 352. [z] State *v.* Fellows, 2 Hayw. R. 340.
[a] State *v.* Boyd, 2 Hill's S. C. R. 288; Turk *v.* State, 2 Hammond, part 2, 240; People *v.* Hubbard, 4 Denio, 133.

3d. EVIDENCE CONFINED TO THE PROSECUTION.

§ 490. The evidence to be produced before the grand jury relates solely to the case of the prosecution, and the general rnle is that they should hear no other evidence but that adduced by the government.[b] But it has been doubted whether, as they are sworn to "inquire," they may not, if the case of the prosecution appear imperfect, call for such witnesses as the evidence they have already heard indicates as necessary to make out the charge.[c] Under such a suggestion, it would become the duty of the prosecuting officer to cause the requisite witnesses to be summoned; provided, in his discretion, he considers them as properly forming part of the commonwealth's case. But it is clear that, under no circumstances, should witnesses for the defence be introduced into the grand jury room unless their testimony becomes incidentally necessary to the prosecution.[d]

4th. PROBABLE CAUSE ENOUGH.

§ 491. The question was in former times much considered whether the sole inqniry of a grand juror should not be whether sufficient ground has been adduced by the prosecution to require a defendant to account for himself on a public trial. On the one hand, it has been laid down by high authority, that the inquest, as far as in them lies, should be satisfied of the guilt of a defendant;[e] and Judge Wilson, in examining the position that a *prima facie* case is all that is necessary for a grand juror's purpose, remarked, "It is a doctrine which may be applied to countenance and promote the vilest and most oppressive purposes; it may be used, in pernicious rotation, as a snare, in which the innocent may be entrapped, and as a screen under cover of which the guilty may escape."[f] The same position is taken by Professor J. A. G. Davis, in his elaborate examination of criminal law in Virginia.[g] Sir E. Coke, far more humane in the study than on the bench, in speaking of the reign of Edward I., said, "In those days (as yet it ought to be) indictments, taken in the absence of the party, were formed on plain and direct proof, and not upon probabilities and inferences."[h] Such, also, was the standard adopted by the first learned editor of the laws of Pennsylvania;[i] of Mr. Daniel Davis, for many years solicitor general of Massachusetts, to whose excellent treatise on grand juries, allusion has more than

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[b] 2 Hawk. c. 25, s. 145; 2 Hale, 257; 4 Bla. Com. 303; U. S. *v.* Palmar, 2 Cranch, C. C. R. 11; U. S. *v.* Lawrence, 4 Ibid. 514.

[c] 1 Chitty, C. L. 318; See Dickenson's Quar. Ses. 174, 175.

[d] Resp. *v.* Schæffer, 1 Dallas, 236; 1 B. & C. 37, 51; 3 B. & A. 432; 1 Chit. Rep. 214; Addison's Charges, 42; U. S. *v.* White, 2 Wash. C. C. 29; U. S. *v.* Palmer, 2 Cranch. C. C. R. 11; post, § 491–2.

[e] Sir John Hawles, 4 St. Tr. 183; 4 Bl. Com. 303; Lord Somers on Grand Juries, &c.; People *v.* Hyler, 2 Parker C. R. (N. Y.) 570.

[f] Wilson's Works, ii. 365.

[g] Davis' C. L. in Va. 426.

[h] 2 Inst. 384. For a specimen of the style in which Coke procured convictions by smuggling in hearsay and declarations of third parties, see Amos' "Great Oyer," and post, § 697, *note.*

[i] Smith's Laws, vol. 7, p. 687.

once been made;[j] and of the first Judge Hopkinson, so far as a tract published by him anonymously, but afterwards avowed, may be taken as an index of his views.[k]

§ 492. On the other hand, it is said by Sir Matthew Hale, that "in case there be *probable* evidence, the grand jury ought to find the bill, because it is but an accusation, and the party is put on his trial afterwards."[l] The arguments which lead to such a position were recapitulated with great force by M'Kean, C. J., in an early charge to a grand jury in Pennsylvania. "The bills or presentments found by a grand jury," he said, "amount to nothing more than an official accusation, in order to put the party accused upon his trial; till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here then is the just line of discrimination. It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petty jury to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the defendant is or is not guilty, on the whole evidence, for and against him. You will therefore readily perceive that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared that no man shall be twice put in jeopardy for the same offence; and yet it is certain that the inquiry now proposed by the grand jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely on the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the indorsement of the grand jury has conferred upon it. But, on the other hand, would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient? which would then be the natural inference from every true bill? Upon the whole, the court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the defendant, while the charge against him lies before the grand jury." Upon one of the grand inquest remarking, that "there was a clause in the qualification of the jurors, upon which he and some of his brethren wished to hear the interpretation of the judges, to wit: What is the legal acceptation of the words 'diligently inquire?'" the chief justice replied, that "the expression meant, diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole, to judge whether the person accused

[j] Davis' Prec. 25; see also 1 Ch. C. L. 318.

[k] 1 Hopkinson's Works, 194.

[l] 2 Hale, P. C. 157.

ought to be put upon his trial." "For," he added, "though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds, by a diligent inquiry, that there is a probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defence."[m] This view derives much countenance from the English rule that a grand jury have no authority by law to ignore a bill for murder on the ground of insanity, though it appear plainly from the testimony of the witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane, but that if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill.[n]

5th. Legal proof only to be received.

§ 493. A grand jury, it has been said, is bound to take the best legal proof of which the case admits; and it is the duty of the prosecuting officer of the State to take care that no evidence is received by them which would not be admissible at trial.[o] But an accomplice, even though uncorroborated, is adequate to the finding of a bill, though he may have been taken from prison by an order altogether surreptitious and illegal.[p] It seems, however, that if a bill is found on the sole evidence of a person rendered incompetent by conviction of an infamous crime, it will be quashed before plea, though the objection will be too late after conviction.[q]

On the other hand, the fact that one of several witnesses who testified to an offence, before the grand jury, was incompetent, is not sufficient to sustain a plea in abatement to the indictment, since it is impossible to show that an indictment was found on the testimony of one witness alone.[qq]

§ 494. The grand jury, if they have any doubts as to the propriety of admitting any part of the evidence submitted to them, may pray the advice of the court to which they are attached;[r] though it is usual to apply to the counsel of the State, who is bound to be at hand, and ready to communicate to them any information that may be required.[s]

6th. Attendance of prosecuting attorney.

§ 495. In New York, it seems to have been considered that the functions of the *district* attorney, so far as the grand jury are concerned, are exhausted at the moment of the bill reaching their hands, unless revived by a subse-

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[m] Resp. *v.* Schæffer, 1 Dallas, 237; see also remarks of Judge Addison, Addison's Charges, 39.

[n] R. *v.* McNaughton, 8 C. & P. 195.

[o] 1 Leach, 514; 2 Hawk, c. 25, s. 138, 139; Davis' Precedents, 25.

[p] 1 Leach, 155.

[q] 2 Hawk. c. 25, s. 145, in notis; State *v.* Fellows, 2 Hayw. 340.

[qq] Bloomer *v.* State, 3 Sneed (Tenn.), 66; see § 480.

[r] Dalton, J., c. 185, s. 9; 4 Bla. Com. 303, n. 1; 2 Hale, 159, 160. As to their sitting in open court, under direction of the judges, see 5 St. Tr. 771; 3 Camp. 337.

[s] Davis' Precedents, 21; 7 Cowen, 563; Davis' Virg. Crim. Law, 425; Lung's case, 1 Conn. 428; Kel. 8; 1 Ch. C. L. 816.

quent call for information; and that he has no right to be present at their sessions and assist in the examination of witnesses.[t] What are the rights of the attorney general in the premises, is not there determined. In England, in the King's Bench, the clerk of the assizes sits constantly with the grand jury, and is expected not only to direct them in their examinations, but to place before them each several item of business as it successively arises. In the other courts, as is stated by Mr. Chitty, it is not unusual to permit the prosecutor to be present to conduct the evidence on the part of the crown,[u] though this appears to be at the grand jury's option, to be exercised where a case of difficulty requires the marshalling of evidence or the leading of unwilling witnesses.[v] And one case is on record where the grand jury refused to allow this privilege.[w] The practice in Massachusetts, as stated by Mr. Davis, is, for the officer having charge of the preparation of the indictments, to attend the grand jury—to open each particular case as it arises—to commence the examination of each witness—and to meet any question as to the law of the case which may be given to him. But it is his duty, "during the discussion of the question, to remain perfectly silent, unless his advice or opinion in a matter of law is requested. The least attempt to influence the grand jury in their decision, upon the effect of the evidence, is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for some one of the grand jury to request the opinion of the public prosecutor, as to the propriety of finding the bill. But it is his duty to decline giving it, or even any intimation on the subject; but in all cases to leave the grand jury to decide independently for themselves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury are selected; and that is, that they almost universally decide correctly."[x]

7th. Defendant and others not entitled to attend.

§ 496. In England, and in the courts of each of the several States, with one exception, neither the defendant, nor any person representing him, is permitted to attend the examination of the grand jury.[y] And Judge King, in an opinion marked with his usual learning and good sense, has held, that the sending of an unofficial volunteer communication to the grand jury, inviting them to start on their own authority a prosecution, is a misdemeanor at common law.[z] In Connecticut, however, it was held by the nine judges

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[t] 7 Cowen, 563.

[u] 1 Ch. C. L. 816.

[v] 4 Blac. C. 126, note by Christian; Dick. Q. S. 6th ed. 1837.

[w] Crossfield's case, 8 St. Tr. 773.

[x] Davis' Precedents, 21; see, also, M'Lellan *v.* Richardson, 1 Shep. 82, where it appears that the same usage exists in Maine.

[y] 1 B. & C. 37, 51; 3 B. & A. 432; 1 Ch. R. 217; 1 Ch. C. L. 317.

[z] Com. *v.* Crans, 3 P. L. J. 463.

that a prisoner was entitled to be present during the examination in his particular case, and might ask the witnesses such questions as he thought proper.[a]

VIII. Finding and attesting of bill.

§ 497. The examination being over, it becomes the duty of the grand jury to pass upon the bill; and unless *twelve* of their number agree to find a true bill,[b] the return is "ignoramus," or, as is more commonly the case, "ignored," or "not found." The usual practice is for the foreman to sign the return; and the words "true bill," with his name attached, have been frequently considered a good finding,[c] though it was held not an error where the indorsement was simply "a bill," omitting the word true.[d] And in some States it has been held sufficient to omit the words "a true bill" altogether, where the signature of the foreman is given.[e] The weight of authority, however, is that the omission of the words "true bill," if excepted to before verdict, will be fatal.[f] An indorsement on the envelop (though not on the bill itself) has been held good after verdict.[g]

§ 498. A bill of indictment, indorsed a true bill, where, to the subscription of A. B. the foreman, the letters of F. G. J. were added, was held sufficient to indicate that he acted as foreman, when it appears from the record that A. B. was in fact the foreman of the grand jury when the bill was found. It was also said that if no letters had been added after his name, his subscription to the indorsement could only be referred to his official acts as foreman, and would therefore be sufficient.[h]

In Massachusetts, the signing the name of the foreman to the indorsement "a true bill," on a bill of indictment, is essential to its validity;[i] but although this is a judicious check, it is not everywhere essential. Thus, in North Carolina, South Carolina, Georgia, Florida, New Hampshire, and Kentucky, it is even said his name may be omitted altogether.[j] And so, too, a variance between the name of the foreman, as appearing upon the record of his ap-

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[a] Lung's case, 1 Conn. 428; State *v.* Fassett, 16 Conn. 458.

[b] Sayer's case, 8 Leigh, 722.

[c] State *v.* Davidson, 12 Ver. 300; State *v.* Elkins, 1 Meigs, R. 109; Bennett *v.* State, 8 Humph. 118; 1 Ch. C. L. 324; Arch. C. P. by Jervis, 39; Spratt *v.* State, 8 Mo. 247; M'Donald *v.* State, 8 Mo. 283; Gardner *v.* People, 3 Scam. 83; Harriman *v.* State, 2 Greene (Iowa), 270; State *v.* Ohnmaoht, 20 La. R. 198.

[d] Sparks *v.* Com. 9 Barr, 354.

[e] Com. *v.* Smith, 6 Bost. Law Rep. N. S. 489; State *v.* Freeman, 13 N. H. 202; State *v.* Axt, 6 Iowa (Clarke), 511; Com. *v.* Smyth, 11 Cush. (Mass.) 473.

[f] Harriman *v.* State, 2 Greene (Iowa), 270; Gardner *v.* People, 3 Scam. 83; Spratt *v.* State, 8 Mo. 247; State *v.* Webster, 5 Greene, 373; Normague *v.* People, Breese, 109; McDonald *v.* State, 8 Mo. 283; Com. *v.* Walters, 6 Dana, 290; Bennett *v.* State, 8 Humph. 118; State *v.* Mertens, 14 Mo. 94; Jillard *v.* Com. 2 Casey, 169; Smith *v.* State, 28 Missis. 728; Wan-kon-chaw-neck-kaw *v.* U. S. 1 Morris, 332.

[g] Burgess *v.* Com. 2 Va. Cases, 483; see Com. *v.* Betton, 5 Cushing, 427.

[h] State *v.* Chandler, 2 Hawks. 439; McGuffie *v.* State, 17 Geo. 497.

[i] Com. *v.* Sargent, Thach. Crim. Cases, 116.

[j] State *v.* Freeman, 13 N. Hamp. 488; State *v.* Coe, 6 Iredell, 440; Com. *v.* Walters, 6 Dana, 290; State *v.* Creighton, 1 Nott & M. 256; McGuffie *v.* State, 17 Geo. 497; Cherry *v.* State, 6 Florida, 679.

pointment, and his signature upon the bill, is immaterial, for his identity must necessarily be known to the court, and the receiving and recording the bill with his indorsement, establishes it.[k] Nor is it material in what part of the indictment the signature of the foreman is placed.[l] An indorsement by the foreman of the grand jury, of the initial letter of his first name, where the record of the appointment states his name at length, is not a material variance.[m]

§ 499. Where it appeared by the record that A. B. was sworn as foreman, such was held sufficient evidence of appointment.[n]

When the finding is in writing, and publicly announced by the clerk, in the presence of the grand jury, it would seem to be sufficient, without the signature of the foreman.[o]

It would seem not to be necessary that the indictment should show when it was found.[p] The indorsement of the name of the offence on the indictment, is no part of the finding of the grand jury.[pp]

§ 500. When the jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the court calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk of the peace, or assize, asks the jury whether they have agreed upon any bills, and bids them present them to the court;[q] and then the foreman of the jury hands the indictments to the clerk, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent.[r] This form is necessary, in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, without the consent of the accusers.[s] The finding should then be recorded by the clerk, and an omission in that respect cannot be supplied by the indorsement of the foreman, nor by the recital in the record, that the defendant stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury, it is said, is as essential as the recording of the verdict of the petit jury.[t]

§ 501. Where the record did not show that the grand jury returned the

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[k] State *v.* Calhoun, 1 Dev. & Bat. 374; State *v.* Collins, 3 Devereux, 117.

[l] Overshiner *v.* Com. 2 B. Monroe, 244.

[m] State *v.* Collins, 3 Dev. 117; State *v.* Taggart, 38 Maine (3 Heath), 298. Where Alexander R. Hutcheson was appointed foreman of the grand jury, and a bill of indictment was indorsed "Alexander R. Hutchinson," it was held, that if necessary, the court would intend the two names to indicate the same person; State *v.* Stedman, 7 Port. 496. The fact that the appointment of the foreman of the grand jury was not entered on the minutes of the court is not material, where the indictment is not indorsed by the foreman and returned to court; People *v.* Roberts, 6 Cal. 214.

[n] Woodsides *v.* State, 2 How. Miss. R. 655.

[o] State *v.* Creighton, 1 N. & M'Cord, 256; Com. *v.* Walters, 6 Dana, 290.

[p] Burgess *v.* Com. 2 Virg. Cases, 483. [pp] State *v.* Rohfrischt, 12 La. An. 382.

[q] 4 Bla. Com. 366; Cro. C. C. 7; see form, Cro. C. C. 7.

[r] Cro. C. C. 7; Dick. Sess. 158; see form, Cro. C. C. 7; Dick. Sess. 158, last vol. London edition.

[s] R. T. H. 203; 2 Stra. 1026; 1 Ch. C. L. 324.

[t] Com. *v.* Cawood, 2 Virg. Cas. 527; State *v.* Glover, 3 Iowa, 249.

indictment into court, it was held, that the judgment was erroneous, and should be reversed.[u]

§ 502. An indictment indorsed as a true bill, and returned by the authority of the whole grand jury, is sufficient, without the special appointment of a foreman.[v]

§ 503. It seems that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed, to the grand jury, who again return "true bill" thereon, such informality will not destroy the indictment.[w] The practice, in such cases, however, is for a new and more regular bill to be framed and sent to the grand jury for their finding.[x]

§ 504. The jury cannot find one part of the same charge to be true, and another false, but they must either pass or reject the whole; and, therefore, if they ignore one part, and find another, the finding is bad.[y] Where there are several counts, however, the practice is different, as they can find any one count and ignore the others.[z] So in an indictment against several, they can distinguish among the defendants, and find as to some, and reject as to the rest.[a]

§ 505. If the finding be incomplete or insensible, it is bad.[b]

Where the grand jury returned a bill of indictment which contained ten counts for forging and uttering the acceptance of a bill of exchange, with an indorsement, "a true bill on both counts," and the prisoner pleaded to the whole ten counts, and after the case for the prosecution had concluded, the prisoner's counsel pointed this out, the finding was held bad, and the grand jury being discharged, the judge would not allow one of the grand jurors to be called as a witness to explain their finding.[c]

§ 506. When the grand jury are in session, they are completely under the control of the court, and the court may at any time re-commit an imperfect finding to them,[d] or may poll them, or take any other method, on the suggestion of a defendant, of determining whether twelve assented to the bill.[e]

IX. Misconduct of grand juror.

§ 507. In case of misconduct or neglect of duty on the part of any of the grand jurors, when on duty, an indictment will be maintained against him by the court.[f] So also it has been held a misdemeanor and a high contempt

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[u] Rainey *v.* People, 3 Gilman, 71; Chappel *v.* State, 8 Yerger, 166; Brown *v.* State, 7 Hump. 155.

[v] Friar *v.* State, 3 How. Mis. 422; Peters *v.* State, 3 How. Mis. 433.

[w] State *v.* Allen, Charlton's Geo. R. 518.

[x] 1 Ch. C. L. 335.

[y] State *v.* Wilburne, 2 Brevard, 296; 2 Hale, 162; Bac. Ab. Indictment, D. 3; Bulst. 206; 2 Hawk. c. 25, s. 2; 5 East. 304; 2 Camp. 134, 584; 2 Leach, 708. See as to practice in murder indictments, Wharton on Homicide, 282.

[z] 1 Chit. C. Law, 323.

[a] 2 Hale, 158; 1 Ch. C. L. 323.

[b] 2 Hawk. c. 25, s. 2; 1 Ch. C. L. 323.

[c] R. *v.* Cooke, 8 Car. & P. 582; see People *v.* Hubbard, 4 Denio, 133.

[d] State *v.* Squire, 10 N. Hamp. 558.

[e] Lewis' case, 4 Greenleaf, 448; State *v.* Symonds, 36 Maine, 128; *contra*, State *v.* Baker, 20 Mo. 238.

[f] Penn. *v.* Keffer, Addison, 29.

in any individual acting as a volunteer, to approach or communicate with the grand jury in reference to any matter which either is or may come before them.[g]

X. How far grand jurors may be compelled to testify.

§ 508. At common law, a member of the grand jury was held incompetent to testify as to what had been the evidence of witnesses examined before them. The principle was first invaded, it is said by Mr. Christian, in his notes to Blackstone, as follows: "A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held, that the object of the concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of persons against whom the bills were found. This is a privilege, which may be waived by the crown."[h] A witness, it is said, may now be indicted for perjury on account of false testimony before a grand jury,[i] and grand jurors are competent witnesses to prove the facts.[j] In New Jersey, however, it is said, a grand juror is not admissible to prove that a witness who had been examined swore differently in the grand jury room,[k] though the contrary is held in North Carolina.[l]

§ 509. The better opinion is that an affidavit of a grand juror will not be received to impeach or affect the finding of his fellows,[m] even for the purpose of showing how many were present when the bill was found, or how many voted in its favor.[mm] But where a grand juror was guilty of gross intoxication while in the discharge of his duty as such, the court, on a presentment of such fact by the rest of the grand jury, ordered a bill to be preferred against him.[n]

In Massachusetts, it is provided by statute, "that no grand juror or officer of a court shall disclose the fact that an indictment for a felony has been

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[g] Com. *v.* Crans, 3 Penn. Law Jour. 442. See 1 Greenleaf on Ev. s. 252; U. S. Dig. Jurors, 157, 162; Ibid. Perjury, 24, 29.

[h] 4 Blackstone, 126, note; Sykes *v.* Dunbar, 2 Selw. N. P. 1059.

[i] State *v.* Fassett, 16 Conn. 457; 1 Ch. C. L. 322; Thomas *v.* Com. 2 Robinson, 795; State *v.* Offutt, 4 Blackf. 355; Huidekoper *v.* Cotton, 3 Watts, 56.

[j] Ibid.; Crocker *v.* State, Meigs, 127; see R. *v.* Hughes, 1 Car. & K. 519; U. S. *v.* Charles, 2 Cranch, C. C. 739; Com. *v.* Hill, 11 Cush. (Mass.) 137.

[k] Imlay *v.* Harris, 2 Halsted, 347; State *v.* Baker, 20 Mo. 338.

[l] State *v.* Broughton, 7 Iredell, 96.

[m] R. *v.* Marsh, 6 Ad. & El. 236; 1 N. & R. 187; State *v.* Doon, R. M. Charl. 1; State, *v.* McLeod, 1 Hawks. 344; State *v.* Baker, 20 Mis. (5 Bennett) 538. As to jurors generally, see post, § 3153-7.

[mm] State *v.* Fassett, 16 Conn. 457; State *v.* Baker, 20 Mo. 238; People *v.* Hubbard, 4 Denio, 133; Contra, Low's case, 4 Greenleaf, 439.

[n] Penn. *v.* Keffe, Addison, 290.

found against any person, not in custody or under recognizance, until such person is arrested; and that no grand juror shall be allowed to state, or testify in any court, in what manner he, or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question.[o] In New York, members of the grand jury may be required by any court, to testify whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence: but in no case can a member of a grand jury be obliged or allowed to testify or declare, in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.[p]

The common law rule, as above given, has been construed to make it inadmissible for grand juries to show that an indictment presented by them was found by an insufficient number[q] or without testimony or upon insufficient testimony;[r] and therefore, where, on the trial of an indictment for selling liquor without a license, which charged five offences in separate counts, the defendant, in order to limit the proof to a single count, offered to show, by one of the grand jury, that only one offence was sworn to before that body; it was held that the evidence was inadmissible.[s]

§ 510. In Missouri, it is provided by statute, that no grand juror shall disclose any evidence given before the grand jury.[t] But it has been held that a grand juror is not prohibited by the statute from stating that a certain person, naming him, testified before the grand jury, and the subject-matter upon which he testified.[u]

§ 511. In Indiana it has been decided that the oath of grand jurors to keep their proceedings secret, does not prevent the public or an individual from proving by one of them, in a court of justice, what passed before the grand jury.[v] And so, too, where grand jurors are not required to take an oath of secrecy, they are competent witnesses to prove general facts which came to their knowledge while acting as grand jurors.[w]

§ 512. As a grand juror ought not to be received to testify to any fact which may invalidate the finding of his fellows, an attorney general is incompetent to anything to the same effect.[x]

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[o] Rev. Stat. Mass. ch. 136, s. 13, 14.
[p] Rev. Stat. part iv. c. 2, tit. 4, art. 2, sect. 31.
[q] State *v.* Baker, 20 Mo. 338; though see contra, Low's case, 4 Greenl. Rep. 439.
[r] People *v.* Hubbard, 4 Denio, 133; State *v.* Boyd, 2 Hill S. C. 288; Turk *v.* State, 2 Hammond, part 2, 240.
[s] People *v.* Hubbard, 4 Denio, 133; see R. *v.* Cooke, 8 Car. & P. 582.
[t] See State *v.* Baker, 20 Mo. 338.
[u] State *v.* Brewer, 8 Mo. 373.
[v] Burnham *v.* Hatfield, 5 Blackf. 21.
[w] Granger *v.* Warrington, 1 Gilman, 299.
[x] 1 Bost. Law. Rep. 4.

CHAPTER VII.

NOLLE PROSEQUI, MOTION TO QUASH, DEMURRER AND PLEAS.

I. NOLLE PROSEQUI.

§ 513. A nolle prosequi is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill. At common law it may be at any time retracted, and is not only no bar to a subsequent prosecution on an other indictment, but may be so far cancelled as to permit a revival of proceedings on the original bill.[a] It may be entered at any time before judgment;[b] and the practice is usual, after conviction, to enter it on objectionable counts, so as to confine the verdict to those which are good.[c] The courts have, it is true, more than once held that the prerogative is one subject to their control while the case is on trial, and that the attorney general has no right, after the jury is impanelled, and witnesses called, to withdraw the case without their sanction.[d] Be this as it may, it is clear that if the case be thus withdrawn when on trial this now operates as an acquittal.[e]

In Massachusetts, a *nolle prosequi* may be entered after the impanelling of the jury, against the objection of the defendant, if he does not demand a verdict.[ee]

In Pennsylvania, by the act of 1860:—

"*Nolle Prosequi.*—No district attorney shall, in any criminal case whatsoever, enter a *nolle prosequi*, either before or after bill found, without the assent of the proper court in writing first had and obtained."[f]

"*Settlement of Cases.*—In all cases where a person shall, on the complaint of another, be bound by recognizance to appear, or shall, for want of se-

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[a] State *v.* M'Neill, 3 Hawks. 183; Com. *v.* Wheeler, 2 Mass. 172; Com. *v.* Tuck, 20 Pick. 756; State *v.* Blackwell, 9 Alab. 79; Wortham *v.* Com. 5 Rand. 669; Com. *v.* Lindsay, 2 Virg. Cases, 345; Clark *v.* State, 23 Missis. 261; State *v.* Hasket, 3 Hill, S. C. R. 95; U. S. *v.* Shoemaker, 2 McLean, 114; Com. *v.* Miller, 2 Ash. 61.

[b] East, 307, Com. *v.* Briggs, 7 Pick. 179; State *v.* Burke, 38 Maine, 574; Com. *v.* Jenks, 1 Gray, 490; Com. *v.* Tuck, 20 Pick. 356; State *v.* Roe, 12 Verm. 75.

[c] U. S. *v.* Peterson, 1 W. & M. 305; Anonymous, 31 Maine, 592; State *v.* Fleming, 7 Humph. 152; R. *v.* Rowlands, 2 Den. C. C. 367; 17 Q. B. 671; R. *v.* Hempstead, R. & R. 344; R. *v.* Butterworth, R. & R. 520; Com. *v.* Gillespie, 7 S. & R. 469, though see Agnew *v.* Commissioners, 12 S. & R. 94; State *v.* Burke, 39 Maine (4 Heath), 359.

[d] State *v.* J. S. 1 Tyler, 178; State *v.* M'Kee, 1 Bailey, 631; Com. *v.* Goodenough, Thach. C. C. 432; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Briggs, 7 Pick. 179; U. S. *v.* Shoemaker, 2 M'Lean, 114; U. S. *v.* Stowell, 2 Curtis, C. C. 153; see State *v.* Krops, 8 Alab. 951.

[e] Ibid.; People *v.* Barrett, 2 Caines, 304; People *v.* Van Horne, 8 Barbour, 160; U. S. *v.* Farring, 4 Cranch, C. C. R. 465; Reynolds *v.* State, 3 Kelly, 53; Mount *v.* State, 14 Ohio, 295; Harker *v.* State, 8 Blackf. 540; Wright *v.* State, 5 Ind. 290; post, § 544–9.

[ee] Com. *v.* Kimball, 7 Gray, Mass. 328.

[f] Rev. Act, 1860, pamph. 437.

curity, be committed, or shall be indicted for an assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy, by action, if the party complaining shall appear before the magistrate who may have taken recognizance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognizance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion, to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs: *Provided*, That this act shall not extend to any assault and battery, or other misdemeanor, committed by or on any officer or minister of justice."[ff]

§ 514. No personal agreement by the attorney general will make a *nolle prosequi* a bar. A circuit attorney, in open court, agreed with a defendant, against whom several indictments were pending, that, if he would plead guilty as to some, he should be discharged from the others. The defendant accordingly pleaded guilty to four of the indictments, and a *nolle prosequi* in the ordinary form was entered on the record as to the remainder. It was held, that the entry of a *nolle prosequi* could not have the legal effect of a *retraxit*, by reason of the agreement.[g]

[ff] Rev. Act of 1860, pamp. 432.

[g] State *v.* Lopez, 19 Mo. R. 254. In this case, Gamble, J., delivering the opinion of the court, said: "We have been asked to express an opinion on the plea in bar of the defendant, in which he sets up an agreement made by him with the circuit attorney, at a term of the criminal court, when there were ten indictments pending against him for embezzlement, by which agreement it was stipulated that the defendant should plead guilty upon four of the indictments, and that the State should enter a *nolle prosequi* on the other, and discharge him from all liability to answer them. Under this agreement he pleaded guilty on the four, was sentenced and pardoned, and a *nolle prosequi* was entered on each of the other six. The plea alleges that the offence charged in the present indictment is the same with that charged in the four on which he pleaded guilty, was sentenced and pardoned, and alleges his identity. The State demurred to the plea, and the demurrer was sustained.

We recognize no authority in the circuit attorney to make an agreement by which any criminal shall be discharged from the claims of justice. The chief executive of the State alone can exercise the power of pardon. If a record was made in the Criminal Court, which would have the legal effect of discharging the defendant from responsibility for the six offences for which the indictments were found, upon which a *nol. pros.* was entered, such record would have its effect here; as if there had been a plea of guilty, and the smallest punishment allowed by law had been imposed; but if no entry of record has the effect of discharging the defendant, he cannot plead the agreement between himself and the circuit attorney as a discharge. If such agreement can be recognized anywhere, it must be by the executive, on an application for pardon, and with the executive it might very properly, in many cases, have very great weight.

It has been said that the *nolle prosequi* entered in the cases should be regarded as a *retraxit*. But we do not feel authorized to say that the entry on the record can have any greater legal effect in discharging the defendant from future prosecution, because of the supposed agreement, than it would have without such agreement. In other words, the operation of the entry made on the record can only be determined by its own terms. In the present case, the plea states nothing more than a *nolle prosequi* in the ordinary form." State *v.* Lopez, 19 Mo. R. 255, 256.

§ 515. In the English practice the usual occasion of granting a *nolle prosequi* is either where in cases of misdemeanor a civil action is depending for the same cause;[gg] or where any improper or vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence;[h] or if it be clear that an indictment be not sustainable against the defendant.[i] Where an indictment is preferred against a defendant for an assault, and at the same time an action of trespass is commenced in one of the civil courts for identically the same assault, upon affidavit of the facts, and hearing the parties, the attorney general will, if he sees fit, order a *nolle prosequi* to be entered to the indictment, or compel the prosecutor to elect whether he will pursue the criminal or civil remedy.[j]

§ 516. The following is the form of the affidavit in such a case:—

I, A. B., of the county of ——, etc., make oath and say that I did see the clerk of the peace of the county of —— sign a certificate hereto annexed, on the —— day of ——, at ——, and that since (or before) the time of preferring the indictment, on the said certificate mentioned, I was served with a copy of a writ of summons, issuing out of —— Court —— at the suit of C. D., the prosecutor of the said indictment, requiring me within eight days to cause an appearance to be entered for me in the Court of ——, in an action of trespass, at the suit of the said C. D., and that on the —— day of ——, I, this deponent, did receive notice of a declaration being filed against me at the suit of the said C. D., the prosecutor of the said indictment in the —— office of the ——, for assaulting him, the said C. D., which said declaration and indictment, I say, are for the same assault, and not for different offences.

A certificate from the clerk of the peace stating the substance of the indictment, and the time when it was preferred, must be annexed to this affidavit.[k] And if the attorney general think the case a proper one for his interference, he will sign a warrant under his hand and seal, directed to the clerk of the peace, and if the indictment has been found at sessions, directing him to enter a *stet processus*.[l] If the cause of the application be the vexatious conduct of the prosecutor, the attorney general may direct the proceedings to be removed into the Queen's Bench, where the counsel will be heard in support of the *nolle prosequi*.[m]

§ 517. The following is the form of entering a *nolle prosequi* on record:—

And now, that is to say, on ——, in this said term, before ——, cometh the said C. F. R., Attorney General (as the case may be), who for the said State in this behalf prosecuteth and saith that the said C. F. R. will not further prosecute the said A. B. on behalf of the said State on the said indictment (or information). Therefore, let all further proceedings be altogether stayed here in court against him, the said A. B., upon the indictment aforesaid.[n]

[gg] Burr. 720; 1 Bos. & Pul. 191.
[h] 1 Bla. Rep. 545.
[i] Com. Rep. 312; 1 Chitty's Crim. Law, 479.
[j] 2 Burr. 270; 1 Chitty's Crim. Law, 479.
[k] Cro. C. C. 25.
[l] R. *v.* Fielding, 2 Burr. 719; Jones *v.* Clay, 1 Bos. & P. 191.
[m] 1 Bla. Rep. 545; Archbold's C. P. (13th ed.) 92-3.
[n] Archbold's C. P. 13th ed. 92; see as to practice in Massachusetts, post, § 549.

The statute regulations on the subject of *nolle prosequi* it is not consistent with the compass of this work to consider.

II. Motion to quash.

§ 518. The court will quash an indictment when it is plain no judgment can be rendered in case of conviction, as in a case when the day, on which the offence was committed, is not laid in the indictment.[o] An indictment found in a court having no jurisdiction, will be quashed in a superior court;[p] and so, where the bill is irregularly found,[pp] or on its face charges an offence excluded by a statute of limitation.[q] The same course will be taken where the offence is charged to have been committed on a day which is yet to come; such an error being as fatal as if there were no day laid;[r] and so of indictments alleging time as "on or about."[rr] Where there is no Christian name given in the complaint, and no allegation that there is none, or that it is unknown, the defect may be availed of by a motion to quash, as well as by a plea in abatement.[s] So the improper joinder of counts for separate felonies, in an indictment, is a good cause for quashing the indictment, on motion made before pleading to the issue.[ss] There are several instances, also, where indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law;[t] as, for instance, an indictment for contemptuous words spoken to a justice of the peace, not stating that they were spoken to him whilst in the execution of his office.[u]

§ 519. It is in the discretion of the court to quash an indictment for insufficiency, or put the party to a motion in arrest; but where the question is doubtful, the first remedy must be refused.[v] The court will not quash an indictment, except in a very clear case.[w] Where the application is made upon the part of the defendant, the English courts have almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason, felony,[x] forgery, perjury, or subornation.[y] They have also refused to quash indictments for cheats,[z] for selling flour by false weights,[a]

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[o] State *v.* Roach, 2 Hay, 352; State *v.* Williams, 5 Gill, 82; State *v.* Robinson, 9 Foster (N. H.), 274.

[p] R. *v.* Bainton, 2 Str. 1088; R. *v.* Hewitt, R. & R. 158.

[pp] Ante, § 472, &c.

[q] State *v.* J. P. 1 Tyler's R. 283; State *v.* Robinson, 9 Foster (N. H.), 274; ante, § 415, &c.

[r] State *v.* Sexton, 3 Hawks, 184; ante, § 273.

[rr] U. S. *v.* Crittenden, 1 Hemp. 61.

[s] Gardner *v.* State, 4 Ind. 632.

[ss] Weinzorpflin *v.* State, 7 Blackf. 186; ante, § 414, &c.

[t] R. *v.* Burkett, Andr. 230; R. *v.* Sermon, 1 Bur. 516, 543; Huff's case, 14 Gratt. 648.

[u] R. *v.* Leafe, Andr. 226.

[v] Lambert *v.* People, 7 Cowen, 166; People *v.* Eckford, 7 Cowen, 535; State *v.* Rickey, 4 Halsted, 293; State *v.* Hagaonen, 1 Green, 314; Com. *v.* Eastman, 1 Cush. 189; State *v.* Dayton, 3 Zab. 49; Click *v.* State, 3 Texas, 282; State *v.* Wishon, 15 Mis. 503; State *v.* Burke, 38 Maine, 574; State *v.* Putnam, Ibid. 296; U. S. *v.* Stowell, 2 Curtis C. C. 153; State *v.* Beard, 1 Dutch (N. J.), 384.

[w] Resp. *v.* Cleaver, 4 Yeates, 69; Resp. *v.* Buffington, 1 Dallas; State *v.* Mathis, 3 Pike's Ark. 84; State *v.* Baldwin, 1 Dev. & Bat. 198; Bell *v.* Com. 8 Gratt. 600.

[x] Com. Dig. Indictment (H.); and see R. *v.* Johnson, 1 Wils. 325.

[y] R. *v.* Belton, 1 Salk. 372; 1 Sid. 54; 1 Vent. 370; R. *v.* Thomas, 3 D. & C. 621.

[z] R. *v.* Orbell, 6 Mod. 42.

[a] R. *v.* Crookes, 3 Bur. 1841.

for extortion,[b] for not executing a magistrate's warrant,[c] against overseers for not paying money over to their successors,[d] and the like. An indictment for not repairing highways or bridges, or for other public nuisances, will not be quashed,[e] unless there be a certificate that the nuisance is removed.[f] The same rule applies to indictments for a forcible entry,[g] unless, perhaps, where the possession has been afterwards given up.[h] In Massachusetts, it is provided by statute that no indictment shall be quashed, or otherwise affected, by reason of the omission or misstatement of the title, occupation, estate, or degree of the defendant, or of the name of the city, town, county, or place of residence; nor by reason of the omission of the words "force and arms," or the words "against the statute," &c.[i]

In New York, as has already been stated, a similar statute is in force.[j] As quashing is a discretionary act, error does not lie on its refusal.[k]

§ 520. On a prosecution for an offence which must be commenced within a given time after its commission, if the first indictment be quashed, and the second one, in order to prevent the bar of the statute of limitations, set out the proceedings under the first, they must be stated with the precision and certainty required in original criminal proceedings.[kk]

It is error to quash an indictment for matter which is not apparent in the body of it or in the caption; extrinsic matter being proper for defence only on trial by jury.[l] The illegal selection of the grand jurors is no cause for quashing an indictment on motion.[m] An indictment will not be quashed, upon the ground that the indorsement on its back, stating that the witnesses were sworn and sent to the grand jury, is not signed by the clerk.[n]

The provision of Massachusetts, the Rev. Sts. c. 136, § 9, that a list of all witnesses, sworn before the grand jury during the term, shall be returned to the court, under the hand of the foreman, is directory merely; and a non-compliance therewith is no ground for quashing an indictment.[nn]

An unnecessary averment which renders an indictment ungrammatical, does not vitiate it, although it should be carefully avoided.[o]

Quashing an indictment as to one of several defendants, quashes it as to all.[p]

§ 521. If two indictments for the same offence be found in the same court,

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[b] R. *v.* Wadsworth, 5 Mod. 13.

[c] R. *v.* Bailey, 2 Str. 1211.

[d] R. *v.* King, 2 Str. 1268.

[e] R. *v.* Belton, 1 Salk. 372; 1 Vent. 370; R. *v.* Bishop, Andr. 220.

[f] R. *v.* Layton, Cro. Car. 584; R. *v.* Wigg, 2 Salk. 460; 1 Ld. Raymond, 1165.

[g] R. *v.* Dyer, 6 Mod. 96.

[h] R. *v.* Brotherton, 1 Str. 702; see Com. Dig. Indictment (H.); 3 Bac. Abr. 116.

[i] Rev. Stat. c. 138, sect. 14.

[j] See ante, § 63.

[k] Com. *v.* Eastman, 1 Cush. 189; State *v.* Conrad, 21 Mis. (6 Bennett) 271; State *v.* Putnam, 38 Maine (4 Heath), 296.

[kk] State *v.* English, 2 Missouri, R. 147.

[l] Com. *v.* Church, 1 Penn. State R. 105; U. S. *v.* Pond, 2 Curtis, C. C. 265; State *v.* Forster, 9 Texas.

[m] State *v.* Hensley, 7 Blackf. 324; but see ante, § 287, &c.

[n] Bennet *v.* State, 2 Yerger, 472; ante, § 287, &c.

[nn] Com. *v.* Edwards, 4 Gray (Mass.)

[o] State *v.* Haney, 2 Dev. & Bat. 390; ante, § 205.

[p] Lambert *v.* People, 7 Cowen, 166; People *v.* Eckford, 7 Cowen, 535.

the course is to quash one before the party is put to plead on the other.[q] If in different courts, the defendant may abate the latter, by plea that another court has cognizance of the case by a prior bill.[r] It is said, however, that the finding of a bill does not confine the State to that single bill; another may be preferred and the party put to trial on it, although the first remains undetermined.[s]

§ 522. After a motion to quash an indictment containing two counts, one of which is defective, the officer prosecuting for the State may enter a *nolle prosequi* as to the defective count, which will remove the grounds for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count.[t]

In Tennessee, it is said that a judge may, at his discretion, quash a defective count in an indictment, without quashing the entire indictment.[u]

If there be one good count, the motion to quash, as a general thing, will not be sustained.[v]

§ 523. The practice is to prefer a new bill for the same offence against the same defendant, before an application to quash is made on the part of the prosecution.[w] An when the court, upon such an application, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment;[x] that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have stood if it were not quashed,[y] and particularly where there has been any vexatious delay upon the part of the prosecutor,[z] that the prosecutor be put on terms.[a]

§ 524. The application, if made upon the part of the defendant, must be made before plea pleaded;[b] and where the indictment had already, upon application of the defendant, been moved into the Court of King's Bench by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment, after a forfeiture of his recognizance, by not having carried the record down for trial.[c] Should the application be made upon the part of the prosecution, it would seem that it may be made at any time before the

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[q] In New York, if there be at any time pending against the same defendant, two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed. Rev. Stat. Part IV. Chap. II.; Tit. 4, Art. II. Sec. 42; see post, § 547.

[r] State *v.* Tisdale, 2 Dev. & Bat. 159.

[s] Ibid.; Com. *v.* Drew, 3 Cush, 379; Dutton *v.* State, 5 Indiana, 533; post, § 547.

[t] State *v.* Buchanan, Iredell, 59.

[u] Jones *v.* State, 6 Hump. 435.

[v] State *v.* Wishon, 15 Mis. 503; State *v.* Woodward, 21 Mis. (5 Bennett) 265; State *v.* Mathis, 3 Pike, 84; Com. *v.* Hawkins, 3 Gray (Mass.) 463; State *v.* Rutherford, 13 Texas, 24; State *v.* Staker, 3 Ind. 570.

[w] R. *v.* Wynn, 2 East, 226.

[x] R. *v.* Webb, 3 Bur. 1469.

[y] R. *v.* Glen, 5 B. & Ald. 373; R. *v.* Webb, 3 Bur. 1468; 1 W. Bl. 460.

[z] 3 Bur. 1468, 1 W. Bl. 460.

[a] R. *v.* Glen, 5 B. & Ald. 372.

[b] Fost. 261; R. *v.* Rookwood, Holt, 684; 4 St. T. R. 677; Thomasson *v.* State, 22 Geo. 499; Weinzorpflin *v.* State, 7 Blackf. 186; though see Com. *v.* Chapman, 11 Cush. (Mass.) 422.

[c] Anon. 1 Salk. 380.

defendant has been actually tried upon the indictment;[d] and in Mississippi, the right has been declared to exist until after arraignment and the impanelling of the jury.[e]

III. Demurrer.

§ 525. Demurrer, from *demorare*, is a mode by which a defendant may object to an indictment, as insufficient in point of law.[f] Wherever an indictment is defective in substance or in form, it may be thus met;[g] but as at common law all errors which can be thus taken advantage of, are equally fatal in arrest of judgment, demurrers, as a means of testing indictments, were, in England, but rarely used until the 7 Geo. IV., c. 64, sects. 20, 21, by which all defects, purely technical, must be taken advantage of before verdict.[h] In this country demurrers, except under similar statutes, are in but little use.[i]

In Pennsylvania, by the revised act it is provided as follows:—

Objections to indictment to be made before the jury is sworn.—Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of the assembly prohibiting the crime, and prescribing the punishment, if any such there be, or if at common law, so plainly that the nature of the offence charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer, or on motion to quash such indictment, before the jury shall be sworn, and not afterward; and every court, before whom any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared.[ii]

§ 526. A demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record, and, therefore, in an indictment removed from an inferior court, if it appear from the caption that the court before which it was taken had no jurisdiction over it, it will be adjudged to be invalid.[j]

§ 527. In England, it was formerly doubted whether, if the defendant demur generally in case of felony, and the indictment be held to be valid, final judgment shall not be immediately given, and execution awarded against him.[k] But this doubt existed only in the case of a general demurrer concluding in bar; for it was said to be clear that if the demurrer prayed judg-

[d] See R. v. Webb, 3 Burr. 1468.
[e] Clark v. State, 23 Miss. 1 Cush. 261.
[f] Co. Lit. 71 b.; 4 Bla. Com. 333; Burn's Just., ed. 29th, tit. Demurrer; Ch. C. L. 439.
[g] Lazier v. Com. 10 Grattan, 708.
[h] Archbold's C. P. 9th ed. 78; ante, § 215, see as to Maryland practice, 6 Maryland, 410.
[i] See ante, § 215.
[ii] Rev. act. 1860, pamp. 433.
[j] 1 T. R. 316; 1 Leach, 425; Andr. 137–8.
[k] Burn's Jus. 29th ed. tit. Demurrer; 2 Hale, 315, 257; 2 Inst. 178; 2 Hawk. c. 31, s. 5; 2 Hale, 225; 4 Bla. Com. 334; Starkie's C. P. 297; 2 Leach, 603; Ch. C. L. 439.

ment of the indictment, and that it might be quashed, the prisoner could never be concluded from pleading over to the felony, either at the same time, or after the determination of the legal exceptions.[l] A class of cases then followed where judges at *nisi prius* held that the defendant was entitled to have judgment of *respondeat ouster*, in every case of felony where his demurrer was adjudged against him; for it was said that where he unwarily discloses to the court the facts of his case, and demands their advice whether it amounts to felony, they will not record or notice the confession;[m] and a demurrer was said to rest on the same principle.[n] In 1850, however, the question was finally put to rest by a solemn judgment of the Court of Criminal Appeal, that a judgment for the crown on a demurrer under such circumstances is final.[o] At the same time it is within the discretion of the court to permit the defendant to withdraw his demurrer, and to plead as it were *de novo* to the indictment.[p]

§ 528. A distinction has been frequently taken in this respect, between felonies and misdemeanors; for in the latter, if the defendant demur to the indictment, whether in abatement or otherwise, and fail on the argument, he shall not have judgment to answer over, but the decision will operate as a conviction.[q] In Massachusetts, Pennsylvania, and Missouri, the practice has been, in all cases, where there is, on the face of the pleading, no admission of criminality on part of the defendant, to give judgment *quod respondeat ouster*, and the English distinction does not seem to be recognized.[r] In Maine, Connecticut, Vermont, and Tennessee, however, it has been held, that when a demurrer to an indictment for a misdemeanor has been overruled, the defendant will not be permitted to plead to the indictment, as a matter of right; he must lay a sufficient ground before the permission will be granted.[s] In New York where the defendant demurred to an indictment for a misdemeanor in the court below, and judgment was there given *against the people*, which was in the Supreme Court reversed on error, it was held that the court in error must render a final judgment for the people on the demurrer,

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[l] 1 Salk. 59; Cro. Eliz. 196; Dyer, 38, 39; Hawk. b. 2, c. 31, s. 6; Foster *v.* Com. 8 Watts & Ser. 77.

[m] Archbold by Jarvis, 9 ed. 429; 2 Hale, 225, 257; 4 Bla. Com. 334.

[n] R. *v.* Duffy, 4 Cox, C. C. 326; R. *v.* Phelps, 1 C. & M. 180; R. *v.* Purchase, 1 C. & M. 617; Fost. 21; 4 Bla. Com. 334; 8 East, 112; 2 Leach, 603; 2 Hale, 225, 257; 1 M. & S. 184; Burn, J., Demurrer; Williams, J., Demurrer; but see Starkie's C. P. 297, 8; and in R. *v.* Odgers, 2 M. & Rob. 429, and the cases there cited in note, it would seem that it is within the discretion of the court, even in felonies, to refuse a *respondeat ouster*.

[o] R. *v.* Faderman, 4 Cox, C. C. R. 359.

[p] R. *v.* Smith, 4 Cox, C. C. 42; R. *v.* Birmingham, R. R. 3 Q. B. 223; see 1 Bennet & Heard's Lead. Cas. 336.

[q] 8 East, 112; Hawk. b. 2, c. 31; though see R. *v.* Birmingham R. R. 3 Q. B. 223, where the defendant was allowed to withdraw the demurrer.

[r] Com. *v.* Barge, 3 Pa. R. 262; Foster *v.* Com. 8 Watts & Serg. 77; Com. *v.* Goddard, 13 Mass. 456; Ross *v.* State, 9 Mo. 696; see Evans *v.* Com. 3 Met. 413; Maeder *v.* State, 11 Mo. 363; Austin *v.* State, Ibid. 366; Lewis *v.* State, Ibid. 366.

[s] State *v.* Merrill, 37 Maine (2 Heath), 329; Wickwire *v.* State, 19 Connect. 478; Bennet *v.* State, 2 Yerger, 472; State *v.* Wilkins, 17 Vermont, 151; State *v.* Rutledge, 8 Humph. 32.

and pass sentence on the defendant; and that he could not be permitted to withdraw the demurrer and plead.[t]

It seems, however, that even where the disposition is to treat the judgment on the demurrer as final, the courts in this country generally agree with those of England in reserving the right to permit the demurrer to be withdrawn at their discretion.[u]

Where the State demurs to the plea of *autrefois convict* to an indictment for a capital felony, and the demurrer is overruled, the defendant is not entitled to be discharged, and the State may rejoin.[v]

In Mississippi, where the defendant pleads in abatement to an indictment, and the plea is demurred to, and the demurrer overruled, the judgment of the court is that the prosecution abate.[w]

§ 529. In Pennsylvania, Virginia, and Alabama, the defendant may demur to the evidence, though it is optional for the prosecutor to join or not.[x] The object is to ascertain the law on an admitted state of facts, the demurrer admitting every fact which the evidence legitimately tends to establish.[y]

Judgment against the prosecution, on a demurrer, is not final, but a new bill may be sent in, with the defect cured.[z]

After an erroneous judgment for the defendant on a demurrer is reversed, the defendant may be put on his trial before a jury.[a]

In New York, it seems no writ of error lies after a judgment for defendant on a demurrer.[b]

IV. Pleas.[c]

1st. Guilty and not guilty, § 530.
2d. Plea to the jurisdiction, § 534.
3d. Plea in abatement, § 536.
4th. Special pleas generally, § 538.
5th. Autrefois acquit or convict, § 539.
(*a*) When judgment on former acquittal or conviction is necessary, § 540.
(*b*) Former acquittal should have been regular, § 541.
(*c*) Proceedings for contempt, § 542.
(*d*) Habeas corpus, 543.
(*e*) Ignoramus, or Nolle Prosequi, § 544.
(*f*) Discharge under Limitation Statute, § 545.
(*g*) Fraud, § 546.
(*h*) Pendency of other indictment, § 547.
(*i*) Acquittal on prior nuisance, § 548.
(*j*) Pendency of civil proceedings, § 549.
(*k*) New trial after conviction for minor offence, § 550.
(*l*) Insufficiency of former indictment, § 551.

[t] People *v.* Taylor, 3 Denio, 9.

[u] State *v.* Wilkins, 17 Vermont, 152; Bennett *v.* State, 2 Yerger, 472; Evans *v.* Com. 3 Metc. 453.

[v] State *v.* Nelson, 7 Ala. 610.

[w] Rawle *v.* State, 8 S. & M. 529.

[x] Com. *v.* Parr, 5 W. & S. 345; Doss *v.* Com. 1 Gratt. 558; Brister *v.* State, 26 Alab. 108.

[y] Bryan *v.* State, 26 Alabama, 65.

[z] U. S. *v.* Watkyns, 3 Cranch, C. C. R. 441; though see ante, § 528.

[a] R. *v.* Houston, 2 Crawf. & Dix, 310.

[b] People *v.* Corning, 2 Comstock; see post, § 3050.

[c] For forms of pleas, &c., see Wh. Prec. 1128, &c.

(m) Acquittal as accessary or principal, § 552.
(n) Acquittal on one of several counts, § 553.
(o) Erroneous acquittal unreversed, § 554.
(p) Acquittal in wrong county, § 555.
(q) Acquittal from misnomer, § 556.
(r) " " variance as to intent, § 558.
(s) " " " " time, § 559.
(t) Acquittal on an indictment for a greater offence, no bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less, § 560.
(u) Acquittal on minor offence generally no bar to greater, § 563.
(v) Acquittal from a supposed merger, § 564.
(w) When two offences are committed by the same act, 565.
(x) Practice under plea of autrefois acquit, § 568.
(y) Judgment on plea of autrefois acquit, § 572.

6th. ONCE IN JEOPARDY, § 573.
(a) Constitutional provision, § 573.
(b) Construction given by the several courts, § 574.
(1.) Pennsylvania, § 575.
(2.) Virginia, § 576.
(3.) North Carolina, § 577.
(4.) Tennessee, § 578.
(5.) Indiana, § 579.
(6.) Federal Courts, § 580.
(7.) Massachusetts, § 581.
(8.) New York, § 582.
(9.) Mississippi, § 583.
(10.) Illinois, § 584.
(11.) Kentucky, § 585.
(12.) Missouri, § 586.
(c) No jeopardy on defective indictment, § 587.
(d) Generally speaking, death or illness of juror, form a sufficient ground for discharge, § 588.
(e) Until jury are "charged," jeopardy does not begin, § 590.
(f) Consent of prisoner to discharge, § 591.
(g) In misdemeanors, the jury may be allowed to separate at any period.

1st. GUILTY AND NOT GUILTY.

IN PENNSYLVANIA.

"In all cases of felony the prisoner shall be arraigned, and where any person on being so arraigned shall plead not guilty, every such person shall be deemed and taken to put himself upon the inquest or country for trial, without any question being asked of him how he will be tried, and the inquest shall be charged only to inquire whether he be guilty or not guilty of the crime charged against him, and no more. And that wherever a person shall be indicted for treason or felony, the jury impanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

"If any prisoner shall, upon his arraignment for any offence with which he is indicted, stand mute, or not answer directly, or shall peremptorily challenge above the number of persons summoned as jurors for his trial to which he is by law entitled, the plea of not guilty shall be entered for him on the record, the supernumerary challenges shall be disregarded, and the trial shall

proceed in the same manner as if he had plead not guilty, and for his trial had put himself upon the country."[cc]

§ 530. When brought to the bar, in capital cases, and at strict practice in all offences whatever, the defendant is formally arraigned, by the reading of the indictment, and the calling on him for a plea. The clerk, immediately after the reading asks, "How say you, A. B., are you guilty or not guilty?"[d] Upon this, if the prisoner confess to the charge, the confession is recorded, and nothing is done till judgment.[e] But if he deny it, he answers, "Not guilty," upon which the clerk of assize, or clerk of the arraigns, replies, that the prisoner is guilty, and that he is ready to prove the accusation.[f] After issue is thus joined, the clerk usually proceeds to ask the prisoner, "How will you be tried?" to which the prisoner replies, "By God and my country;" to which the clerk rejoins, "God send you a good deliverance."[g] Though the prisoner persists in saying he will be tried by his King and his country, and refuses to put himself on his trial in the ordinary way, it will not invalidate a conviction.[h] When, however, the clerk of the court, upon the arraignment of the prisoners, did not further proceed, upon their pleading not guilty, to ask them how they would be tried, so that they did not make the usual reply, "By God and their country," it was held, that, under the laws of the United States, the plea of "Not guilty" put the prisoners upon the country, by a sufficient issue, without any further express words.[i]

The right of arraignment on a criminal trial may, in some cases, be waived, but a plea is always essential. The court cannot supply an issue after verdict where there has been neither arraignment nor plea, notwithstanding that the defendant consented to go to trial.[ii]

An omission to insert the similiter in joining issue in criminal cases, may be corrected, as in point of fact it is only added when the record is made up.[j]

A plea by an attorney of a party indicted for a felonious assault committed with intent to rob, is a nullity; the defendant must plead in person.[k] It is otherwise, however, in misdemeanors.[l]

Defendants in an indictment have a right to plead severally not guilty; but a general plea of not guilty by all the defendants, is, in law, a several plea.[m]

Double pleading is not allowable, and if *autrefois acquit* be pleaded with not guilty, the latter will be struck off.[n]

[cc] Rev. Laws, 1860, Pamp. 436.
[d] 2 Hale, 119; R. *v.* Hensey, 1 Burr. 643; Cro. C. C. 7.
[e] 4 Harg. St. Trials, 779; Dalt. C. 185.
[f] 4 Bla. Com. 339; 4 Harg. St. Trials, 779; Wh. Prec. 1138.
[g] 2 Hale, 219; 4 Bla. Com. 341; Cro. C. C. 7.
[h] R. *v.* Davis, Gow, C. N. P. 219, and notes there.
[i] U. S. *v.* Gilbert, 2 Sumner's U. S. R. 20.
[ii] Douglass *v.* State, 3 Wis. 820.
[j] 1 Berrian *v.* The State, 2 Zab. (New Jer.) 9.
[k] McQuillen *v.* State, 8 S. & M. 587.
[l] U. S. *v.* Mayo, 1 Curtis, C. C. 433.
[m] State *v.* Smith, 2 Iredell, 402; ante, § 435.
[n] State *v.* Copeland, 2 Swan, 626; Hill *v.* State, 2 Yerg. 248; R. *v.* Strahan, 7 Cox, C. C. 85.

§ 531. In an English case, a person deaf and dumb was to be tried for a felony; the judge ordered a jury to be impanelled, to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then ordered the jury to be impanelled to try whether the defendant was now sane or not, and on this question directed them to say, whether the defendant had sufficient intellect to understand the course of the proceedings, to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that if they thought he had not, they should find him of non-sane mind.[p] In Massachusetts, a deaf and dumb prisoner was arraigned through a sworn interpreter, his incapacity having first been suggested to the court by the solicitor general, and the trial then proceeded as on a plea of not guilty.[q]

By a plea of guilty, defendant first confesses himself guilty in manner and form as charged in the indictment: and if the indictment charges no offence against the law, none is confessed.[r]

The court may, at its discretion, allow a plea of guilty to be withdrawn, even after the overruling of a motion in arrest of judgment.[s]

A defendant, against whom several indictments had been found, intending to plead guilty to one, by mistake pleaded guilty to another. It was held that the error could be corrected after entry of the plea on the minutes of the court.[ss]

When there is a plea of guilty, the court may ascertain by witnesses the degree of the offence.[t]

§ 532. At common law, when a prisoner stood mute on arraignment, a jury was called to inquire whether he did so from dumbness, *ex visitatione Dei*, or from malice; and unless the former was the case, he was sentenced as on conviction.[u] In England, and in each of the United States, however, statutes now exist, enabling the court, where the prisoner stands mute, to direct a plea of not guilty to be entered, whereupon the trial proceeds as if he had regularly pleaded not guilty in person.[v]

§ 533. The plea of *nolo contendere* has the same effect as a plea of guilty, so far as regards the proceedings on the indictment; and a defendant who is sentenced upon such a plea to pay a fine is convicted of the offence for which he is indicted. The advantage, however, which may attend this plea, is that when accompanied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment.[w]

In Massachusetts, under St. 1855, c. 215, § 35, a defendant in a prosecu-

[p] R. *v.* Pritchard, 7 C. & P. 303.
[q] Com. *v.* Hill, 14 Mass. 207.
[r] Fletcher *v.* State, 7 Eng. 169.
[s] State *v.* Cotton, 4 Foster (N. H.), 143.
[ss] Davis *v.* State, 20 Geo. 674.
[t] Dick *v.* State, 3 Ohio, 89.
[u] 1 Ch. C. L. 425; Turner's case, 5 Ohio, 542; Com. *v.* Moore, 8 Mass. R. 402.
[v] Rev. Stat. Mass. c. 126, s. 28; see U. S. *v.* Hare, 2 Wheel. C. C. 299.
[w] Com. *v.* Horton, 9 Pick. 206.

tion on that statute cannot be adjudged guilty on a plea of *nolo contendere*, unless it appears by the record that the plea was received with the consent of the prosecutor.[ww]

2d. Plea to the jurisdiction.

§ 534. Where an indictment is taken before a court that has no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged;[x] as, if a man be indicted for treason at the quarter sessions, or for rape at the sheriff's tourn, or the like;[y] or, if another court have exclusive jurisdiction of the offence.[z] Such pleas are not common, the easier and simpler course being writ of error or arrest of judgment.

§ 535. A. was indicted in the city of New York, for obtaining money from a firm of commission merchants in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce, for the use of, and subject to the order of the firm. The defendant pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been within the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New York by an innocent agent of the defendant, employed by him, while he was a resident of, and actually within the State of Ohio. It was held, that the plea was bad, and that the defendant was properly indicted in the city of New York.[a]

3d. Plea in abatement.

§ 536. When the indictment assigns to the defendant a wrong Christian name or surname, or a wrong addition, the better opinion is that he can only take advantage of the error by plea in abatement,[aa] though when there is a blank in name or addition a motion to quash is equally good. Such a plea should be verified by affidavit, and should expose the defendant's proper name.[b] What particularity is necessary in setting forth the name and addition of the defendant has been considered in another place.[bb] Any misnomer, in general, is matter for abatement;[c] thus, where the indictment charged the defendant as George Lyons, it was held, he could well abate it by showing his true name was George Lymes.[d] Want of addition is generally ground for abatement,[e] though the proper course is motion to quash.[f]

[ww] Com. *v.* Adams, 6 Gray, Mass. 359. [x] 2 Hale, 286. [y] Ibid.

[z] 4 Bla. Com. 383; see Wh. Prec. 1145, for forms.

[a] Adams *v.* People, 1 Coms. 173; S. C. 1 Denio, 190; see Com. *v.* Gillespie, 7 Serg. & Rawle, 469; ante, § 154.

[aa] Com. *v.* Dedham, 16 Mass. 146; Turns *v.* Com. 6 Metcalf, 225; Lynes *v.* States, 5 Porter, 236; see ante, § 75.

[b] Com. *v.* Sayres, 9 Leigh, 722; R. *v.* Granger, 3 Bur. 1617; Rev. S. Mass. c. 136, s. 31; see Wh. Prec. 1141-2, for forms.

[bb] See ante, § 233-59. [c] State *v.* Lorey, 2 Brevard, 395.

[d] Lymes *v.* State, 5 Porter, 236.

[e] State *v.* Hughes, 2 Har. & McHen. 479; 1 Chit. C. L. 204; see, per contra, State *v.* Newman, 2 Car. Law Rep. 74. [f] Ante, § 245, 518.

A wrong addition is to be met by plea in abatement. Thus, in an indictment on the statute of Maine, prohibiting the sale of lottery tickets, giving the accused the name of lottery vendor, when his proper addition was broker, furnishes good cause for abating the indictment.[g]

§ 537. If a plea of misnomer be put in, the usual course is to reindict the defendant by the new name, without pushing the old bill further.[h] The prosecutor may, however, if he think fit, deny the plea, or reply that the defendant is known as well by one Christian name or surname as another, and, if he succeed, judgment will be given for the State,[i] or the prosecutor may demur to the plea, and in cases of felony, the demurrer and joinder may be *ore tenus*.[j] When the issue is joined upon a plea in abatement or replication thereto, the venire may be returned, and the trial of the point by a jury of the same county proceed instanter.[k]

It is not a good replication that the defendant is the same person mentioned in the indictment.[l]

Two pleas in abatement, it is said, may be pleaded at the same time.[m]

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness.[n]

In all pleas in abatement of an indictment, it is essential that the facts should be stated out of which the defence arises, or a negative of the facts which are presumed from the existence of a record.[o] On a trial of fact in a plea in abatement of misnomer, the fact that to an indictment by a particular name the defendant had pleaded not guilty, is proper for the consideration of the jury.[oo]

In England, the rule is that on a plea of abatement on ground of misnomer, the judgment, if for the crown, is final, and that the defendant cannot plead over.[p] It seems otherwise, however, where the plea is to matter of law.[q]

How far errors in the grand jury can be thus noticed has already been considered.[qq]

4th. Special pleas generally.

§ 538. Special pleas, with one or two exceptions, which will be noticed in full, but rarely occur in practice, as in general they amount in character to the general issue. Thus, the plea of non-identity, which is pleaded *ore tenus*,

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[g] State *v.* Bishop, 15 Maine (3 Shepley), 122.

[h] 2 Hale, 176, 238; Burn, Indictment, ix.; Williams, J., Misnomer and Addition, ii.; Dick. Sess. 167.

[i] 2 Leach, 476; 2 Hale, 237, 238; Cro. C. C. 21; see form, 2 Hale, 237.

[j] Foster, 105; 1 Leach, 476.

[k] 2 Leach, 478; 2 Hale, 238; 22 Hen. viii. c. 14; 28 Hen. viii. c. 1; 32 Hen. viii. c. 3; 3 Inst. 27; Starkie, 296.

[l] Com. *v.* Dockham, Thatch. C. C. 238.

[m] Com. *v.* Long, 2 Va. Cases, 318.

[n] O'Connell *v.* R. 11 Cl. & Fin. 155; 9 Jurist, 25.

[o] State *v.* Brooks, 9 Ala. 10.

[oo] State *v.* Homer, 40 Maine, 438.

[p] R. *v.* Gibson, 8 East, 107.

[q] R. *v.* Duffy, 4 Cox, C. C. 190; R. *v.* Johnson, 6 East, 583; 1 Bennett & Heard's Lead. Cases, 340; see ante, § 527-8-9; see Wh. Prec. 1147, for forms.

[qq] Ante, §§ 464, 468, 474, 476, 488.

is never allowed, except in cases where the prisoner has escaped after verdict and before judgment, or after judgment and before execution. On review, to render the plea valid, the record must show an escape.[r] So, when upon a presentment for gaming, the defendant pleaded in abatement, that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, was not clerk *de jure* at the time, it was held the plea was bad.[s] How far error in the constitution of the grand jury may be pleaded specially to an indictment, has been already considered.[t]

The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause.[u]

A special plea cannot be pleaded in addition to the general issue.[v]

5th. Autrefois acquit or convict.

§ 539. It remains to examine what, in this country, form the most important of special pleas, those of *autrefois convict*, *autrefois acquit*, and *once in jeopardy*. The first two may be considered together, the same law applicable to *autrefois convict* being generally applicable to *autrefois acquit*.[w]

In Massachusetts, it is provided by statute that no man shall be held to answer on a second indictment for any offence, of which he has been acquitted by the jury, upon the facts and merits, on a former trial; and the former acquittal, unless produced by a variance between the indictment and proof, or by a technical exception, may be pleaded in bar.[x]

§ 540. (*a*.) *When judgment on former acquittal or conviction is necessary.*—An acquittal even without the judgment of the court thereon, is a bar;[y] but such is not necessarily the case with a conviction on which there is no judgment;[z] as where a prosecuting officer, after conviction, conceded the badness of an indictment and proceeded to trial upon a second;[a] and when an indictment was stolen after verdict of guilty but before judgment.[b]

In Maine, however, it has been held that the plea of *autrefois convict* is good although it appear that after verdict at the former trial the indictment was dismissed, and the defendant discharged without day.[bb] In England the rule is that both after acquittal and conviction there must be a judgment to make the plea good.[c]

A conviction on one of several counts in an indictment for the same offence,

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[r] Thomas *v.* State, 5 How. Mis. R. 20.

[s] Hord *v.* Com. 4 Leigh, 674.

[t] See ante, § 287, &c.

[u] Com. *v.* Drew, 3 Cush. 279; State *v.* Tisdale, 2 Dev. & Bat. 149; post, § 547.

[v] R. *v.* Strahan, 7 Cox, C. C. 85; State *v.* Copeland, 2 Swan. 626; Hill *v.* State, 2 Yerg. 248.

[w] See, for forms of pleas of *autrefois acquit*, &c. Wh. Prec. 1150, &c.

[x] Rev. Stat. ch. 123, sect. 4, 5; 13 Pick. 496.

[y] West *v.* State, 2 Zab. 212; R. *v.* Read, 1 Den. C. C. 85, &c.; S. C. 1 Eng. R. 595.

[z] Penn. *v.* Huffman, Addis. 140; Brennan *v.* People, 15 Illinois, 511; State *v.* Norvell, 2 Yerger, 24; State *v.* Mount, 14 Ohio, 295; U. S. *v.* Herbert, 5 Cranch, C. C. R. 87; West *v.* State, 2 Zab. (New Jer.) 212; though see Preston *v.* State, 25 Mis. 383.

[a] Penn. *v.* Huffman, Addis. 140.

[b] State *v.* Mount, 14 Ohio, 295.

[bb] State *v.* Elden, 41 Maine, 165.

[c] R. *v.* Reed, 2 Den. C. C. 85.

and a discontinuance as to the residue, is a bar to a subsequent indictment for the same charges.[d]

§ 541. (*b.*) *Former acquittal should have been regular.*—A legal acquittal in any court whatsoever of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court.[dd] To avail himself of the plea, the defendant should produce an exemplification of the record of his acquittal under the public seal of the State, or kingdom, where he has been tried and acquitted, the rule being that an acquittal in a foreign jurisdiction is equally effective for this purpose with one at home.[e]

The court, however, must have been competent, having jurisdiction,[f] and the proceedings regular. Thus, a conviction of a breach of the peace before a magistrate, on the confession or information of the offender himself, is no bar to an indictment by the grand jury for the same offence.[g] Again, an acquittal by a jury, in a court of the United States, of a defendant who is there indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him for the same offence in a State court.[h] So a conviction for an assault and battery by the city court of Little Rock, Arkansas, under the act of 1840, which was held to be void, was adjudged to be *coram non judice*, and absolutely void, and to constitute no bar to a prosecution in the Circuit Court for the same offence.[i] It is no bar to an indictment, that the defendant has before been convicted of the same offence before a justice of the peace, where the offence is one of which the justice has not jurisdiction.[j] Thus, a former examination before a magistrate, and a discharge upon a complaint under the New Hampshire bastardy act, does not bar further proceedings, as the magistrate has strictly no power to try, but only to examine and discharge or to bind over.[k] But where a justice has final jurisdiction, a conviction or acquittal before him is a bar, although the proceedings before the justice were defective or so erroneous that they might have been reversed for error.[l] Thus, a judgment rendered by a justice of the peace, under the Kentucky act of 1802, upon a warrant for a breach of the peace, committed by an assault and battery, is a bar to an indictment for the same assault and battery.[m]

In Virginia, a discharge by an examining court of a prisoner committed

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[d] State *v.* Keen, 1 McLean, 429.

[dd] Archbold, C. P. 82; 1 Chitty & Bere's Burn's Justice, 29th ed. 312; State *v.* Cooper, 1 Green, 381; State *v.* Brown, 12 Conn. 54; Stevens *v.* Fassett, 27 Maine, 266; Bailey's case, 1 Virg. Cases, 258; Ibid. 188, 248; Com. *v.* Goddard, 13 Mass. 457; Wortham *v.* Com. 5 Rand, 699; Com. *v.* Cunningham, 13 Mass. 245; 1 Leach. 135; Lev. 118; 2 Hawk. c. 35, s. 10.

[e] Hutchinson's case, 3 Keb. 785; and see Beak *v.* Thyrwhit, 3 Mod. 194; 1 Show. 6; Bull. N. P. 245; R. *v.* Roche, 1 Leach, 134.

[f] Com. *v.* Myers, 1 Va. Cases, 188; Com. *v.* Peters, 12 Met. 387; State *v.* Odell, 4 Blackf. 156; Norton *v.* State, 14 Texas, 260.

[g] Com. *v.* Alderman, 4 Mass. R. 477.

[h] Com. *v.* Peters, 12 Met. 387.

[i] Rector *v.* State, 1 Eng. 187.

[j] State *v.* Payne, 4 Mis. 376; State *v.* Odell, 4 Blackf. 156.

[k] Marston *v.* Jenness, 11 N. Hamp. 156.

[l] Stevens *v.* Fassett, 27 Maine (14 Shep.), 266; Com. *v.* Loud, 3 Met. 328.

[m] Com. *v.* Miller, 5 Dana, 320.

on a charge of felony, is not a bar to another prosecution for the same offence, except when the record shows that the discharge was upon an examination of the facts charged.[n]

A person tried before a judge sitting at an unauthorized special term of his court, cannot be said to be put in jeopardy, as the proceedings are *coram non judice*, and void.[o]

In a case of concurrent jurisdiction in different tribunals, the one first exercising jurisdiction rightfully acquires the control to the exclusion of the other; therefore, where after indictment and before trial, a justice of the peace took jurisdiction of the same offence, before whom the offender was tried and sentenced, the court held that the conviction and sentence was no bar to the indictment.[oo]

If a prisoner, put on trial for felony, is not present when the verdict is returned, nor when judgment is rendered, the judgment is void and may be vacated; and it cannot be pleaded in defence on a subsequent trial.[p]

§ 542. (*c.*) *Proceedings for contempt.*—A person may be indicted for an assault committed in view of the court, though previously fined for the contempt.[pp] The plea of "autrefois convict" shall not avail him, because the same act constitutes two offences; one violates the law which protects courts of justice, and stamps an efficient character on their proceedings, the other is levelled against the general law which maintains the public order and tranquillity.[q] So, where General Houston had been punished by the House of Representatives for a contempt and breach of privilege, it was held that the action of the House was no bar to an indictment for an assault and battery growing out of the same transaction.[r]

§ 543. (*d.*) *Habeas corpus.*—A person discharged under the *habeas corpus* act of South Carolina, from prison, having been committed on a charge of murder, was held to be protected thereby from a subsequent prosecution on the same charge, as in case of a formal acquittal.[s] This is, however, not the general rule.[ss]

§ 544. (*e.*) *Ignoramus or nolle prosequi.*—If a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted.[t] So even the entry of a *nolle prosequi* by the competent authority does not put an end to the case, and is no bar to a subsequent indictment for the same offence,[u] unless, it is said, the jury has been actually impa-

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[n] McCann's case, 14 Gratt. 570.

[o] Dunn *v.* State, 2 Pike, 229; R. *v.* Bowman, 6 C. & P. 337.

[oo] Burdett *v.* State, 9 Texas, 43.

[p] Andrews *v.* State, 2 Sneed (Tenn.), 550.

[pp] R. *v.* Lord Osulston, 2 Stra. 1107.

[q] State *v.* Yancey, 1 Car. L. R. 519.

[r] See opinion of Mr. Butler, attorney general of the U. States; Opinions of the Att'y Gen. ii. 958.

[s] State *v.* Fley, 2 Brevard, 338.

[ss] See ante, 455.

[t] 2 Hale, 243–246; 2 Hawk. c. 35. s. 6; Com. *v.* Miller, 2 Ash. 61.

[u] State *v.* McNeil, 3 Hawks, 183; Com. *v.* Wheeler, 2 Mass. 172; Com. *v.* Tuck. 20 Pick. 356; Clarke *v.* State, 23 Misis. 261; State *v.* McKee, 1 Bailey, 651; State *v.* Blackwell, 9 Alab. 79; Wortham *v.* Com. 5 Rand. 699; see R. *v.* Roper, 1 Crawf. & Dix, C. C. 185; Com. *v.* Lindsay, 2 Virg. Cases, 345; State *v.* Haskett, 3 Hill, S. C. R. 95; U. S. *v.* Shoemaker, 2 McLean, 114; Com. *v.* Miller, 2 Ash. 61; though see R. *v.*

nelled, in which case the entry operates as an acquittal.[v] And so, too, a discharge from a former indictment upon payment of costs, in consequence of the refusal of the prosecutor to prosecute farther is no bar.[w] But if, after a prisoner has pleaded to an indictment, and after the jury has been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, and without order of court, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment, and if he be tried and convicted, judgment will be arrested.[x] It is otherwise, however, when the case was withdrawn from the jury by the order of the court.[y]

In Massachusetts, under the Revised Statutes, an acknowledgment of reparation, by the prosecutor in a misdemeanor, and a stay of proceedings by the court, is, under certain circumstances, a bar.[z]

§ 545. (*f.*) *Discharge under limitation statutes.*—When a defendant is discharged from an indictment for want of prosecution, by virtue of the first section of the New Jersey act relative to indictments, he is discharged only from his imprisonment or recognizance, but is not acquitted of the crime, or discharged from its penalty.[a] It was intimated, however, by the Supreme Court, that if a defendant be "discharged" for want of prosecution upon an indictment, he cannot be afterwards arraigned or tried under that indictment.[b] But such discharge, it was said, is no bar to a subsequent indictment for the same offence, or to the trial upon it; and a plea of such former indictment and discharge is bad upon demurrer.[c]

Where a party was indicted for murder, but found guilty of manslaughter, and the indictment was afterwards quashed; the statute of limitations afterwards becoming a bar to the indictment for manslaughter, the defendant was discharged.[d]

Under the Virginia three term law, it is ruled that the exceptions or excuses for failure to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or in pari ratione; but only that if the commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses fairly implicable by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.[e] The same rule exists generally.[f]

[f] Ante, § 450.

Mitchell, 3 Cox, C. C. 93; People *v.* Van Horne, 8 Barbour, 160; Com. *v.* Drew, 3 Cush. 279; State *v.* Tisdale, 2 Dev. & Bat. 159; State *v.* Colvin, 11 Humph. 599; State *v.* Thompson, 13 Iredell, 277; Walton *v.* State, 3 Sneed (Tenn.) 687; ante, § 513.

[v] Reynolds *v.* State, 3 Kelly, 53; Mount, *v.* State, 14 Ohio, 295; Weinzorpflin *v.* State, 7 Blackf. 186; U. S. *v.* Shoemaker, 2 M'Lean, 14; Harker *v.* State, 8 Blackf. 540; Wright *v.* State, 5 Ind. 290; State *v.* M'Kee, 1 Bailey, 651; Cobia *v.* State, 16 Alab. 781; Spier's case, 1 Dev. 491; M'Fadden *v.* Com. 11 Harris, 12; ante, § 513; post, § 590.

[w] State *v.* Blackwell, 9 Ala. 79.

[x] People *v.* Barrett, 2 Caines, 304; Reynolds *v.* State, 3 Kelly, 53.

[y] U. S. *v.* Morris, 1 Curtis, C. C. 23.

[z] Rev. Stat. ch. 136, § 27; ch. 198, § 1; Sup. Rev. Stat. 387.

[a] State *v.* Garthwaite, 3 Zab. (N. Jer.) 143.

[b] Ibid.

[c] State *v.* Garthwaite, 3 Zab. (N. Jer.) 143.

[d] Hunt *v.* State 25 Mis. 378.

[e] Adcock's case, 8 Grattan, 662. It was here ruled, that though an offence committed before the code of 1849 went into operation, must, so far as the question of guilt,

The subject of the limitation statutes has been already noticed.[ff]

§ 546. (*g.*) *Fraud.*—A former conviction or acquittal procured by the fraud of the defendant is no bar to a subsequent prosecution.[g] In a case in

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degree of crime, quantum of punishment, and rules of evidence are concerned, be governed by the law in force at the time the offence was committed—yet, upon the question of the prisoner's right to be discharged, from the failure to try him, arising after the code went into operation, it must be governed by the law in the code. See ante § 450.

The various Acts of Assembly bearing upon this question, are as follows:—

1 Rev. Code of 1819, p. 607, ch. 169, s. 28: "Every person charged with such crime, (treason or felony,) who shall not be indicted before, or at, the second time after he shall have been committed, unless the attendance of the witnesses against him appears to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict."

Session Acts of 1847–8, p. 144, ch. 20, s. 12: "Any person held in prison on any charge of having committed crime, shall be discharged from his imprisonment, if he be not indicted before the end of the second term of the court at which he is held to answer, unless it shall appear to the satisfaction of the court, that the witnesses on the part of the commonwealth have been enticed or kept away, or are detained or prevented from attending the court by sickness, or some inevitable accident, and except in the case provided for in the following section." The case provided for in the next section is the insanity of the prisoner.

Page 52, ch. 21, s. 45: "Every person charged with felony, and remanded by the examining court to a superior court for trial, shall be forever discharged from the crime, whenever there shall have been three terms after his examination, at which the failure to try the case was not caused by his insanity, or the witnesses for the commonwealth having been enticed or kept away, or detained or prevented from attending court by sickness, or some inevitable accident, or did not proceed from a continuance granted on his own motion, or from inability of the jury to agree in their verdict."

Page 122, ch. 11, s. 10: "No person shall be held to answer on a second indictment, or other accusation, for any offence of which he has been acquitted by the jury, upon the facts and merits, upon a former trial; but such acquittal may be pleaded by him, in bar of any prosecution for the same offence, notwithstanding any defect in the form, or in the substance of the indictment or other accusation on which he is acquitted."

Section 11: "Any person indicted, or otherwise accused of an offence, who, on his trial, shall be acquitted upon the ground of a variance between the allegations and the proof, or upon any exception to the form of the substance of the indictment, or other accusation, may be arraigned again on a new indictment, or other proper accusation and tried and convicted for the same offence notwithstanding such former acquittal."

Code of 1849, p. 770, ch. 207, s. 13: "A person in jail, on a criminal charge, shall be discharged from imprisonment, if he be not indicted before the end of the second term of the court at which he is held to answer, unless it appear to the court that material witnesses for the commonwealth have been enticed or kept away, or are prevented from attending by sickness or inevitable accident, and except also in the case provided in the following section." The case provided for in the next section is the insanity of the prisoner.

Page 778, ch. 208, s. 36: "Every person charged with felony, and remanded to a superior court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such court after his examination, without a trial, unless the failure to try him was caused by his insanity, or by the witnesses for the commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on motion of the accused, or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict."

Page 751, ch. 199, s. 15: "A person acquitted by the jury, upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted."

[ff] Ante, § 436.

[g] Strange, R. 707; State *v.* Little, 1 N. Hamp. 268, per Woodbury, J.; State *v.* Brown, 12 Conn. 54; R. *v.* Furser, Say. 90; R. *v.* Davis, 12 Mod. 9; State *v.* Jones, 7 Georg.

Virginia, where a person charged with an assault and battery was recognized to appear at the then next Superior Court, to answer an indictment, to be then and there preferred against him for the said offence, but in the meantime fraudulently procured himself to be indicted for the same offence in the County Court, and there confessed his guilt, and a small amercement was thereupon assessed against him, such fraudulent prosecution and conviction was held to present no bar to the indictment preferred against him in the Superior Court.[gg] There must be some fraud, however, in the procurement of the intermediate trial, as otherwise it will be a bar.[h]

§ 547. (*h.*) *Pendency of other indictment.*—Where the defendant, at a previous term, had pleaded to another indictment for the same offence, it was held that the fact of the former indictment being still pending, was no bar to a trial on the second.[i]

§ 548. (*i.*) *Acquittal on prior nuisance.*—An acquittal of nuisance, some years back, is not a conclusive bar to an indictment for a nuisance at the present time, though the offences on the record are identically the same, each day's continuation of the nuisance being a repetition of the offence.[j]

§ 549. (*j.*) *Pendency of civil proceedings.*—As is well known, the pendency of civil proceedings for the same offence forms no bar to a criminal prosecution.[k] How far it is cause for a *nolle prosequi* has been already considered.[l]

422; State *v.* Davis, 4 Blackf. 345; State *v.* Atkinson, 9 Humph. 677; Com. *v.* Alderman, 4 Mass. 477; see 3 Sm. & M. 751; State *v.* Lowry, 1 Swan (Tenn.), 34.

[gg] Com. *v.* Jackson, 2 Virg. Cases, 501, and see State *v.* Colvin, 11 Humph. 599.

[h] State *v.* Casey, 1 Busbee, 209; see State *v.* Tisdale, 2 Dev. & Bat. 159.

[i] Com. *v.* Dunham, *per* Thacher, J., 1 Boston Law Reporter, 145; Thacher's C. C. 513; Com. *v.* Drew, 3 Cush. 279; State *v.* Tisdale, 2 Dev. & Bat. 159; Dutton *v.* State, 5 Indiana, 532; Com. *v.* Murphy, 11 Cush. (Mass.) 472; Com. *v.* Berry, 5 Gray (Mass.), 93; U. S. *v.* Herbert, 5 Cranch, C. C. R. 87; see People *v.* Vanhorne, 8 Barbour, 160, and remarks of Paige, J., who said in delivering the judgment in this last case, "The habit of sending up a second bill, of a different grade, when the first is outstanding, is thus commented on by the Supreme Court of New York, in a recent case: "In passing, we cannot forbear the remark," says Paige, J., "that the practice of renewing a complaint before a subsequent grand jury, after a previous grand jury have fully examined into the facts of the case, and have presented an indictment founded thereon, is not to be commended. The accuser and accused ought, as a general rule, to abide by the decision of the first grand jury who act upon the complaint, and find a bill against the accused. To countenance these successive complaints founded on the same charge, where the accuser, or friends of the accused, believe that the first grand jury have mistaken the degree of the offence of which the accused is guilty, would lead to a disgraceful scramble between the enemies and friends of the accused—the former struggling to procure an indictment for the highest, and the latter for the lowest degree of the offence charged—which would be fatal to a firm, steady, and impartial administration of criminal justice. And we regard it as the duty of the court, to discountenance the practice of finding two or more indictments for different degrees of the same offence, or for different offences, founded on the same matter." See ante, § 521.

[j] People *v.* Townsend, 3 Hill's R. 479; though see U. S. *v.* M'Cormick, 4 Cranch, C. C. R. 104.

[k] Balleu *v.* Alexander, 6 Hump. 433; Robinson *v.* Calf, 1 Const. R. 231, see 6 Law Rep. N. S. 312; State *v.* Blennerhasset, 1 Walk. 7; Buckner *v.* Beek, Dudley, S. C. 168; Jones *v.* Clay, 1 B. & P. 191; State *v.* Frost, 1 Brev. 385; though see State *v.* Blyth, 1 Bay, 166; R. *v.* Rhodes, 2 Stra. 703.

[l] Ante, § 544. In Massachusetts, under certain circumstances, reparation acknowledged in open court by the prosecutor in a misdemeanor, and a consequent staying of proceedings by the court, bar a civil action. Rev. Stat. Mass. ch. 136, § 27. Ibid. ch. 198, § 1.

§ 550. (*k.*) *New trial after conviction of minor offence.*—Where, after conviction of manslaughter, a new trial was granted on the prisoner's application, it was held in Tennessee;[m] in California;[n] in Georgia;[nn] in Illinois;[o] in Missouri;[oo] and Mississippi;[p] that on the second trial, he was discharged from the charge of the murder; but such has not been the uniform understanding in practice.[q] Of this a striking illustration is given in the address of Mr. Justice Grier, of the Supreme Court of the United States, to a party of prisoners who applied for a new trial after having been convicted of manslaughter in the Circuit Court of the United States, in Philadelphia, in 1848. "But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and again to put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the conrt will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."[r]

Where a prisoner has once been convicted of murder in the second degree, he cannot, if he obtains a new trial, be convicted of murder in the first degree.[rr]

In burglary and larceny, where, after acquittal of the greater offence, but conviction of the less, a new trial is granted, the whole case has been said to be reopened, and the defendant exposed on the second trial to the double charge.[s]

§ 551. (*l.*) *Insufficiency of former indictment.*—The rule is, that if the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not.[t]

An acquittal on a defective indictment is no bar.[tt] On the other hand, a *conviction* on such an indictment, followed by judgment and a performance of the sentence, is a bar, if the proceedings were *bona fide*.[a]

Where judgment has been arrested, or reversed,[b] for any defect in the in-

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[m] Slaughter *v.* State, 5 Humph. 410.
[n] People *v.* Gilmore, 4 Califor. 376.
[nn] Jordan *v.* State, 22 Geo. 545.
[o] Brennon *v.* People, 15 Illinois, 511.
[oo] State *v.* Bull, 6 Jones, 324.
[p] Hunt *v.* State, 25 Miss. 378.
[q] See post, § 3233.
[r] 6 Penna. L. J. 22; see also Livingston's case, 14 Gratt. 592.
[rr] Jones *v.* State, 13 Texas, 168.
[s] State *v.* Morris, 1 Blackf. 37; Morris *v.* State, 8 S. & M. 762; Esmon *v.* State, 1 Swan. Tennes. 14; State *v.* Kittle, 2 Tyler, 471; post, § 3056-7-8.
[t] R. *v.* Sheen, 2 C. & P. 634; R. *v.* Claude, 1 Brod. & B. 473; R. *v.* Emden, 9 East, 437; Heikes *v.* Com. 26 Penn. St. R. (2 Casey) 513; R. *v.* Vandercomb, 2 Leach, C. C. 908.
[tt] Vaux's case, 4 Coke R. 44; People *v.* Barrett, 1 Johnson, 66; State *v.* McGraw, 1 Walker, 208; Com. *v.* Somerville, 1 Virginia cases, 164; State *v.* Ray, 1 Rice, 1.
[a] Com. *v.* Lond. 3 Metc. 328; Com. *v.* Keith, 8 Metc. 531.
[b] R. *v.* Drury, Cox C. C. 544.

dictment, a new one may be preferred, correcting the error, and the former cannot be pleaded in bar.[u] And so where a prisoner demurs to an indictment, and the indictment thereupon is quashed, and the prisoner set at liberty, he may be again arrested, and held to answer on a new indictment for the same offence,[uu] and this though the judgment were arrested for an insufficient cause.[v]

§ 552. (*m.*) *Acquittal as accessary or principal.*—An acquittal as an accessary is a bar to an indictment as principal, and *e converso.*[vv]

§ 553. (*n.*) *Acquittal on one of several counts.*—A defendant who has been acquitted upon one of several counts in an indictment, is entirely discharged therefrom, nor can he a second time be put upon his trial upon that count. The new trial can only be had on the count as to which there was a conviction.[w]

§ 554. (*o.*) *Erroneous acquittal unreversed.*—Even an erroneous acquittal is conclusive, until the judgment be reversed, so that if a judge direct a jury to acquit the prisoner on any ground, however fallacious, he is entitled to the benefit of the verdict, supposing the indictment to be good.[x]

§ 555. (*p.*) *Acquittal in wrong county.*—An acquittal upon an indictment in a wrong county, cannot be pleaded to a subsequent indictment for the offence in another county.[y]

§ 556. (*q.*) *Acquittal from misnomer.*—As a general rule an acquittal on a former indictment on account of a misnomer is no bar.[yy]

In a case where the prisoner was on his trial for burning the barn of Josiah Thompson, the prosecutor was asked his name, who replied Josias Thompson, on which the prisoner was acquitted, without leaving the box; on being indicted for burning the barn of Josias Thompson, he cannot plead *autrefois acquit.*[z]

Where the defendant was formerly indicted for forging a will, which was set out in the indictment thus: "*I, John Styles,*" &c., and was acquitted for variance, the will given in evidence commencing "*John Styles,*" without the "*I,*" it was holden, that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles,*" &c.[a]

Where a defendant was acquitted on an indictment for forging an order on

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[u] People *v.* Casborus, 13 Johnson's R. 351; Com. *v.* Hatton, 3 Grattan, 623; Adcock's case, 8 Gratt. 661; Com. *v.* Zepp, 5 P. L. J. 256; Com. *v.* Durham, 1 Boston Law Rep. 145; Writhpole's case, Cro. Car. 147; State *v.* Phil, 1 Stewart, 31; State *v.* Ray, 1 Rice, 1; Lord Raymond, 922; Foster, 104-5-6; R. *v.* Wilday, 1 Maule & Sel. 188; 2 Car. & Payne, 640.

[uu] Cochrane *v.* State, 6 Mid. 400.

[v] Gerard *v.* People, 3 Scammon, 362.

[vv] 2 Hale, 244; Fost. 361; 2 Hawk. c. 35, 511; R. *v.* Plant, 7 Car. & P. 575; 7 C. & P. 836.

[w] Campbell *v.* State, 9 Yerger, 333.

[x] 2 Inst. 318; 2 Hale, 274; State *v.* Norvell, 2 Yerger, 24; State *v.* Brown, 16 Connect. 54; People *v.* Mather, 4 Wend. 229; Slaughter *v.* State, 6 Humph. 410; State *v.* Kittle, 2 Tyler, 471; State *v.* Dark, 8 Blackf. 526; State *v.* Taylor, 1 Hawks, 462; State *v.* Kanouse, Spencer, 115; R. *v.* Sutton, 5 B. & Ad. 52; R. *v.* Paed, 4 Bur. 2257; R. *v.* Mann, 4 M. & S. 337.

[y] Vaux's case, 4 Co. 45 *a*, 46 *b*; Com. Dig. Indictment, 1.

[yy] See Marsh *v.* State, 26 Alab. 72.

[z] Com. *v.* Mortimer, 2 Virg. C. 325; 2 Hale, 247; ante, § 551.

[a] R. *v.* Cogan, 2 Leach, 503.

"J. Irwin & Co.," it was held that *autrefois acquit* was a good plea in bar to a second indictment for forging an order on "John Irwin & Co."[b] The first indictment, in another case, charged the prisoner with having stolen, taken and carried away one bank note of the Planters' Bank of Tennessee, payable on demand at the Merchants' and Traders' Bank of New Orleans. Upon this he was acquitted. The second indictment charged him with having stolen, taken and carried away one bank note of the Planters' Bank of Tennessee, payable on demand at the Mechanics' and Traders Bank of New Orleans. The former acquittal was pleaded in bar, but it was held to be no bar to the prosecution of the second indictment.[c] The same result took place where the defendant had been indicted for stealing the cow of J. G., and acquitted, and was again indicted for stealing the same cow, at the same time and place, and of the same owner, but by the name of J. G. A., which was his proper name, it was held that the acquittal was no bar to the second indictment.[d]

§ 557. An acquittal on an indictment charging the defendant with setting fire to the premises of A. and B., is no bar to an indictment charging him with setting fire to the premises of A. and C.[e]

A trial and acquittal on an indictment for stealing a negro man, is no bar to a subsequent prosecution for stealing a negro man slave.[f]

An insolvent debtor, acquitted on a former indictment for omitting goods from his schedule, may be again indicted for omitting other goods not specified in the former indictment, but such a course ought not to be taken except under very peculiar circumstances.[g]

What misnomers are a variance is considered more fully under a subsequent head.[h]

§ 558. (*r.*) *Acquittal from variance as to intent.*—An acquittal upon an indictment for a rape against a person of color cannot be pleaded in bar to an indictment against the prisoner for an assault with intent to commit the rape upon a white female, under the North Carolina act,[i] because both offences are felonies created by different statutes, and the latter requires different allegations in the indictment, and different proof on the trial from the former, and because an indictment for the commission of a felonious act is not supported by the proof of an intent to do that act, and an indictment for the latter, if a felony, may be sustained after an acquittal upon an indictment for the former.[j]

§ 559. (*s.*) *Acquittal from variance as to time.*—The variance, as to time, between the two indictments must be in matter of substance to sustain the plea. If the difference be in a point immaterial to be proved, the acquittal on the first is a bar to the second.

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[b] Duckham *v.* People, 4 Scam. 172.
[c] Hite *v.* State, 9 Yerger, 357.
[d] State *v.* Risher, 1 Richardson, 219; see also U. S. *v.* Book, 2 Cranch, C. C. R. 294.
[e] Com. *v.* Wade, 17 Pick. 395.
[f] State *v.* M'Graw, 1 Walk. 208.
[g] R. *v.* Champneys, 2 M. & R. 26.
[h] Post, § 595, &c.
[i] State *v.* Jesse, 3 Dev. & Bat. 98; see State *v.* Birmingham, 1 Busbee, 120; post, § 594, 825.
[j] 1 Rev. Stat. c. 111, sect. 78.

Thus, as to the point of time, if the defendant be indicted for a murder as committed on a certain day and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar, notwithstanding this difference, for the day is not material, and this is a fact which could not be twice committed.[k] And the same rule applies to accusations of other felonies, for though it be possible for several acts of the same kind to be committed at different times by the same person, it lies in averment, and the party indicted may show that the same charge is intended.[l]

On an indictment for keeping a gaming house, *tempore* G. IV., the defendant pleaded that, at the sessions, 4 G. IV., he was indicted for keeping a gaming house on the 8th January, 47 Geo. III., and on divers other days and times between that day and the taking of the inquisition, against the peace of our lord the said king, with an averment that the offence in both indictments was the same, it was holden no bar, because the *contra pacem* tied the prosecutor to proof of an offence in the reign of G. III., the only king named in that indictment.[m]

§ 560. (*t.*) *An acquittal on an indictment for a greater offence, is a bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less.*[mm] An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods; because, upon the former indictment, the defendant might have been convicted of the larceny.[n] But, if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny;[o] because the defendant could not have been convicted of the larceny on the first indictment.[p] And if a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, under the 7th Wm. IV., and 1 Vict. c. 86, s. 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence.[q] If one be indicted for murder, and acquitted, he cannot be again indicted for manslaughter;[r] but in Pennsylvania, it is said that an acquittal for murder is no bar to an indictment for an involuntary manslaughter, which is there a misdemeanor.[s] An acquittal for *seduction* is a bar to an indictment for *fornication* with the same prose-

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[k] 2 Hale, 179, 244; 2 Haw. 35; post, § 599.

[l] Ibid.

[m] R. *v.* Taylor, 3 B. & C. 502.

[mm] See State *v.* Reed, 12 Md. 263; State *v.* Keogh, 13 La. Ann. 243.

[n] People *v.* M'Gowan, 17 Wend. 386; State *v.* Cooper, 1 Green, 361; State *v.* Lewis, 2 Hawks. 98; Johnson *v.* State, 14 Geo. 253; State *v.* Smith, 16 Miss. (1 Bennett) 550; see ante, § 383, 400; post, § 617.

[o] See 2 Hale, 245.

[p] State *v.* Standifer, 5 Porter, 523.

[q] R. *v.* Gould, 9 Car. & P. 364.

[r] State *v.* Standifer, 5 Porter, 523; 4 Co. R. 45; 2 Hale, 246; Fost. 339; 1 Ch. C. L. 455.

[s] Com. *v.* Gable, 7 Serg. & Rawle, 423.

cutrix, the law being that on the indictment for seduction the defendant could have been found guilty of fornication.[t] On the same principle, in those States where on an indictment for adultery there could be a conviction for fornication, an *acquittal* of adultery is a bar to a prosecution for fornication.[u]

§ 561. Wherever the law is that under an indictment for a felony, there can be a conviction for a misdemeanor,[v] the rule continues to hold good. Thus, where a defendant is convicted of assaulting a woman with intent to produce miscarriage, and charged also the same assault with intent to kill the child (the latter being a felony and the former a misdemeanor), the court held, that a conviction of the former offence would be a bar to an indictment for the latter.[w]

But where on the trial for felony, no conviction could have been had for the subsequently tried misdemeanor, it is clear the rule is different.[x] Thus, an acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence, charged as a false pretence.[y] So, where the defendants had been acquitted of murder, on the ground that the death was produced not by the assaults, given in evidence, but by other causes, the acquittal of murder was held not to be a good plea to a subsequent indictment for the assaults first mentioned; and this, notwithstanding the 7 Will. IV., and 1 Vic. c. 85, s. 11, which, when an assault is a constituent of a felony under trial, enables a verdict of guilty to be taken on the assault, where the felony is not proved.[z]

§ 562. Again, as has already been noticed, an acquittal upon an indictment for a rape against a person of color, cannot be pleaded in bar to an indictment against the prisoner for an assault with intent to commit a rape upon a white female, under the act of 1826,[a] because both offences are felonies, created by different statutes, and the latter requires different allegations in the indictment, and different proof on the trial from the former, and because an indictment for the commission of a felonious act, is not supported by the proof of an intent to do that act: and an indictment for the latter, if a felony, may be sustained after an acquittal upon an indictment for the former.[b] When several are jointly indicted for an offence which may be joint or several, and all are acquitted, no one can again be indicted separately for the same offence, since on the former trial any one might have been convicted, and the others acquitted.[bb] Where, however, the former joint indictment is erroneous, for joining persons for an offence which could not be committed jointly, as for perjury, an acquittal thereon will be no bar to a subsequent prosecution against each.[c]

[t] Com. *v.* Denkey, 5 Harris, 126. [u] See post, § 2657. [v] See § 400.

[w] Lohman *v.* People, 1 Comstock, 379; see ante, § 400.

[x] Hawk. b. ii. c. 25, s. 5; 1 Leach, 12; East, 415; State *v.* Wightman, 26 (Mis.) 5 Jones, 515. Where, however, an affidavit made before a justice charges an indictable offence above the grade of assault, for which the defendant is subsequently indicted and acquitted, such acquittal may be pleaded in bar of further proceedings for assault before the justice; State *v.* Wightman, 26 Mis. (5 Jones) 515.

[y] R. *v.* Henderson, 1 C. & M. 328. [z] R. *v.* Bir˘, 15 Jur. 193; 2 Eng. R. 448.

[a] 1 Rev. Stat. c. 111, sec. 78. [b] State *v.* Jesse, 3 Dev. & Bat. 98.

[bb] R. *v.* Dunn, 1 Moody, C. C. 424; R. *v.* Parry, 7 Car. & P. 836.

[c] See Com. *v.* McChord, 2 Dana, 244.

A conviction in Maine for presuming to be a common seller of intoxicating liquors, within a specified period, is not a bar to a prosecution for a single act of selling such liquor within the same period.[cc]

§ 563. (*u*.) *Acquittal for minor offence is, generally, no bar to greater.*[d]— An acquittal for manslaughter, it is true, is a bar to a future prosecution for murder, for if the defendant were innocent of the modified offence, he could not be guilty of the same fact with the addition of malice.[e] And this even obtains where the first charge is for manslaughter in the third degree.[f] But it is clear, that a conviction for an assault with intent to kill, would be no bar to an indictment for murder.[g] So an acquittal for larceny would not prevent a prosecution for burglary with intent to steal.[h] So, also, it is said, in Massachusetts that a defendant may be severally convicted for a burglary with intent to steal, and for larceny, though the two transactions formed part of the same act.[i] And in Connecticut, a conviction for larceny, on an indictment for breaking and entering with intent to steal, is not pleadable in bar against a subsequent prosecution for the breaking.[ii] This, however, has been denied in Georgia.[j]

The prisoner, a slave, was tried for robbery; the proof was, that he violently assaulted and threw down E. M., a white woman, the prosecutrix, with the intent, it is supposed, to ravish her; that to induce him to release her, she promised to give him money; and that he consented,—followed her close behind to her house near by, no one being at home except herself, where she, through fear, as she testified, gave him a dollar. The prisoner had been first tried for an assault and battery with intent to commit a rape, convicted of an assault and battery only, and sentenced to be whipped and punished accordingly. It was held that the conviction for assault and battery, under the charge of assault and battery with intent to commit a rape, was no bar to the prosecution for robbery. It was also held, that the facts and circumstances proved, taken in connection with the result of the first trial, constituted this a case of robbery.[k] It is no bar to an indictment for riot that the same party has been tried, convicted and fined for an assault and battery arising out of the same transaction.[a] *If, however, on a trial of the major offence there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major.* Thus, as has just been seen, manslaughter bars murder, and as will presently be noticed, assault bars assault and battery.[b] So in Connecticut, where the doctrine prevails that under an indictment for rape there can be a conviction for an assault with intent, a

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[cc] State *v.* Coombs, 32 Maine, 2 Red. 529.
[d] Scott *v.* U. S. 1 Morris, 142; R. *v.* Button, 11 Ad. & El. (N. S.) 929; 1 Hawk. P. C. p. 518, § 5; Wilson *v.* State, 24 Conn. 57.
[e] 4 Coke, R. 45-6; 2 Hale, 246; Fost. 329; 12 Pick. 504.
[f] Hunt *v.* State, 25 Miss. 378.
[g] Com. *v.* Roby, 12 Pick. 496; Burns *v.* People, 1 Parker, 182.
[h] See State *v.* Morris, 1 Blackf. 37.
[i] Josslyn *v.* Com. 6 Metc. 286.
[ii] Wilson *v.* State, 24 Conn. 57.
[j] Roberts *v.* State, 14 Georg. 8. See post, § 565.
[k] State *v.* Nathan, 5 Richards. 219; ante, § 382.
[a] Freland *v.* People, 16 Ill. 380.
[b] Post, § 565.

conviction of the latter was held to bar the former.[c] So, if a defendant be convicted of a larceny, he cannot be again indicted and punished for the same taking charged as a robbery; for on the last indictment, the defendant is in jeopardy of being again convicted of larceny, if the violence should not be clearly proved.[d]

§ 564. (*v.*) *Acquittals from a supposed merger.*—It has been frequently held in this country, that where, on an indictment for an assault, attempt, or conspiracy, with intent to commit a felony, it appeared that the felony was actually consummated, it was the duty of the court to charge the jury that the misdemeanor had merged, and that the defendant must be acquitted. It used to be supposed, from the casual remarks of old text writers, that the common law rule was, that whenever a lesser offence met a greater, the former sank into the latter; and hence, in a large class of prosecutions, the defendant would succeed in altogether escaping conviction by a subtle fiction having no origin either in common sense or necessity.[1] Conceiving, however, the principle to be too deeply settled to be overruled, the courts of Maine, Massachusetts, New York, Pennsylvania, New Jersey, and Michigan,[m] have held that where a felony is proved, the defendant is to be acquitted of the constituent misdemeanor, and though the notion was sturdily resisted elsewhere,[n] it has taken deep and general root. The result has been the accumulation of pleas of *autrefois acquit*, in which, through the labyrinth of subtleties thus opened, the defendant has frequently escaped. In 1848, however, under the stress of particular statutes, all the judges of England agreed that the doctrine that a misdemeanor, when a constituent part of a felony, merges, has no footing at common law; that the statutory misdemeanor of violating a young child does not merge in rape;[o] nor a common law conspiracy to commit a larceny in the consummated felony.[p] The bearing of these cases on the question of *autrefois acquit* is thus stated by Lord Denman, C. J.[q] "The same act may be part of several offences: the same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are charges of felonies; neither ought it to be when the one charge is of felony and the other of misdemeanor. If a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction."

In 1851, however, it was held that the principle of these statutes did not

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[c] State *v.* Shephard, 7 Conn. 54, post, § 566, *sed* quare.

[d] State *v.* Lewis, 2 Hawks, 98 (1822.)

[1] See post, § 229, 4, 5.

[m] Com. *v.* Kingsbury, 5 Mass. 106; State *v.* Murray, 15 Maine, 100; Com. *v.* Parr, 5 Watts & S. 345; People *v.* Mather, 4 Wend. 265; Com. *v.* M'Gowan, 2 Pars. 341; Johnson *v.* State, 2 Dutch. (N. J.), 313; People *v.* Richards, 1 Mich. 216.

[n] State *v.* Shephard, 7 Connect. 54; State *v.* Taylor, 2 Bailey, 49; Laura *v.* State, 26 Mississippi, 174.

[o] R. *v.* Neale, 1 Denison, C. C. 36.

[p] R. *v.* Button, 11 Ad. & El. N. S. 929; see R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 Mood. & R. 469.

[q] 11 Ad. & El. N. S. 946.

apply to cases where the offences were distinct, but only to those where one offence slides into and is part of the proof of another.[a]

A misdemeanor cannot merge in a misdemeanor.[b] Thus the intent to commit an injury within the statute, under which the prisoner is indicted, as a means to the accomplishment of another ultimate and unlawful object, is not taken out of the operation of the statute by the existence of such ultimate design.[c]

In Pennsylvania, by the Revised Act of 1860:—

"*Persons tried for misdemeanor not to be acquitted if the offence turn out to be felony.*—If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person 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 felony on the same facts, unless the court before whom such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.[d]

§ 565. (*w.*) *When two offences are committed by the same act.*—Cases frequently arise where two offences are committed by the same act, and where an acquittal on the one is interposed on the prosecution of the other.[r] Where the act is indivisible, as where a man is at the same time guilty of an

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[a] R. *v.* Simpson, 3 C. & K. 207; R. *v.* Shott, Ibid. 206. [b] Post, 2296.

[c] People *v.* Carmichael, 5 Mich. 10; People *v.* Adwards, ib. 22.

[d] Rev. Act, 1860, p. 442: "These sections are new, and intended to facilitate the conviction of offenders, and avoid unneoessary delay in the administration of criminal justice. By the law as it now stands, if in the trial of an indictment for felony, it appears that some circumstance is wanted to establish the complete technical offence, the prisoner must be acquitted, although the proofs are perfect of an attempt to commit the crime; and on the other hand, where the indictment charges an attempt to commit a crime, and the proof establishes that the crime has actually been oommitted, the American courts have generally held that the prisoner must be acquitted, because the misdemeanor charged is merged in the felony proved. The operation of the first of these doctrines is best exemplified by decided cases. Lord Hale, in his Pleas of the Crown, volume 1, page 508, thus recites one of these cases: 'A. hath his keys tied to the strings of his purse. B., a cut-purse, takes his purse, with the money in it, out of his pocket, but the keys which were hanged to his purse strings, hanged in his pocket. A. takes B. with his purse in his hand, but the strings hanged to his pocket by the keys. It was ruled that this was no felony, for the keys and purse strings hanged in the pocket of A., whereby A. had still in law the possession of his purse, so that *licet cepit, non asportavit.* So where a thief went into a shop, took up some goods, intending to steal them, but before he had removed them from the spot on which they lay, discovered they were tied to the counter by a cord. Upon being tried for stealing, it was held that the property never was either completely severed from the possession of the owner, nor completely in the possession of the prisoner, and he was acquitted;' Sleigh's Criminal Law, 29. In regard to the other doctrine sought to be changed by this section, viz: That a misdemeanor charged is merged in a felony proved, it has been frequently held in this country that where, on an indictment for an assault, attempt, or conspiracy, with intent to commit a felony, it appeared that the felony was actually committed, it was the duty of the court to charge the jury, that the misdemeanor had merged, and that the defendant must be acquitted; Wharton's American Criminal Law, 612, 187. In England, however, this doctrine has been shaken, if not repudiated by the oases of Rex *v.* Neale, 1 Dennison's Crown Cases, 36; and Rex *v.* Button, 11 Adolp. and Ellis, N. S. 929. The section under consideration will, if adopted, destroy the future operation of a subtle fiction, having no origin in substantial common sense."—*Revisers' Report.*

[r] State *v.* Standifer, 5 Porter, 523.

assault, and an assault and battery;[s] where there is a trial for a riot, and afterwards an assault is prosecuted, when both constitute the same breach of the peace, and the latter is put in evidence under the former;[t] where the charges are riot, and the breaking up of a religious meeting,[u] or holding, uttering, and selling forged notes, under the statute;[v] the acquittal, in one case, is a bar to the other; but where the act is separable into two distinct branches, as where a man at the same time assaults or shoots at two persons,[w] or where a man steals simultaneously two articles, *e. g.*, a horse and a saddle together, he may be convicted on separate indictments for each offence.[x] And though this is denied when the articles belong to the same owner,[y] yet a second conviction is good when the owners are distinct.[z] Thus, in Massachusetts, where, to an indictment for receiving stolen goods which were the property of A., the defendant pleads in a bar a former indictment, conviction and judgment for receiving stolen goods, the property of B., and then alleges that the two parcels were received by him of the same person, at the same time, and in the same package, and that the act of receiving them was one and the same, the plea was held insufficient.[a]

Upon this general rule, however, a qualification has been grafted which it is important to keep in mind, viz: that in cases of felony, where one of the offences is a necessary ingredient or accompaniment of the other, and where the State has selected and prosecuted the former to conviction, there can be no further prosecution on the other.[b] Thus it has been held in New Jersey

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[s] State *v.* Chaffin, 2 Swan, 492.

[t] Com. *v.* Kinney, 2 Va. Cases, 159; State *v.* Fife, 1 Bailey, 11; Smith *v.* Com. 7 Grat. 593; State *v.* Standifer, 5 Port. 523. Where a party has been tried in a county court, on an indictment for an affray, he cannot be again tried for the same act in the Superior Court on a bill for assault and battery, State *v.* Stantz, 4 Jones' Law (N. C.) 290; R. *v.* Champneys, 2 Mood. & R. 26; contra, Scott *v.* U. S. 1 Morris, 142.

[u] State *v.* Townsend, 2 Harrison, 534.

[v] State *v.* Benham, 7 Conn. 414.

[w] State *v.* Standifer, 5 Port. 523; Vaughan *v.* Com. 2 Va. Cases, 273; People *v.* Warren, 1 Harris C. C. 338; State *v.* Barham, 7 Connect. 414; contra, State *v.* Damor, 2 Tyler, 390; State *v.* Fayetteville, 2 Murphey, 371.

[x] 1 Hale, 241; R. *v.* Brettrel, Car. & M. 609; Com. *v.* Andrews, 2 Mass. R. 409; State *v.* Thurston, 2 M'Mullan, 382.

[y] State *v.* Nelson, 29 Maine, 329; State *v.* Williams, 10 Hump. 101; Lorbon *v.* State, 7 Missouri, 55.

[z] Ibid. State *v.* Thurston, 2 M'Mullan, 382; contra, Lorbon *v.* State, 7 Missouri, 55, and see post, § 1902–3.

[a] Com. *v.* Andrews, 2 Mass. Rep. 409; People *v.* Warren, 1 Parker, C. C. 338.

[b] State *v.* Cooper, 1 Green, N. J. 361; State *v.* Shephard, 7 Connect. 54; State *v.* Lewis, 2 Hawks. 98; State *v.* Risher, 1 Richardson, 219; Com. *v.* Squire, 1 Met. 258. On this point Messrs. Bennett & Head (2 Lead. Crim. Cases, 556) thus speak:—

"See other instances in State *v.* Fayetteville, 2 Murphey, 371, that a town bound to keep its streets in repair could not be separately indicted for several defective streets on the same day; and Fiddler *v.* State, 7 Humphreys, 508 (1847), that when a statute prohibited betting on, or running a horse-race, that a person who had both run a race and bet upon it, could not be convicted of two offences, because, as the court say, he could not bet unless there had been a race, and therefore the racing was a necessary part of the betting, and, having been already convicted of running the race, he had suffered for a part of the other crime, and could not be indicted for it separately; a mode of reasoning, which, if sound, would overturn many of the convictions elsewhere had.

"In State *v.* Benham, 7 Conn. 414 (1829), it was held that having forged bank notes of two separate banks in one's possession at the same time, with intent to pass them as genuine, and defraud such banks, constituted but one indivisible offence; and, if

that where a man burns a dwelling house, in which a human being is consumed, and has been convicted of arson, he cannot afterwards be convicted of murder.[c] And it has been ruled in North Carolina, that a conviction for larceny barred an indictment for robbery, the goods being the same.[d] In Connecticut, however, it is held that this is not the case with indictments for larceny, and for burglary, but that after a conviction of the former there may be a conviction of the latter, so far as concerns the breaking;[dd] and in respect to burglarious entries, this is the general rule.[e]

"Where concert," says Gibson, C. J., "is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted for the minor. If it were an integral offence, and not an integral part of one, he might otherwise be convicted of it, though he had been before convicted of the whole."[ee]

Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good,[f] *but not otherwise.*

In South Carolina, a defendant may be legally convicted of retailing without a license and of trading with a slave, though both offences arise out of the same act, because trading with a slave does not necessarily include "retailing."[g]

An acquittal for selling liquor to a "person unknown," such acquittal resting on the ground that the person *was* known, and was A. B., is no bar to a subsequent indictment for a sale to A. B.[h]

Specific sales of liquor are indictable under one statute, after the defendant had been convicted under another statute, of being at the same time a common seller.[i]

In a case in Kentucky, it was said that as an affray is a fighting by mutual consent, and an assault and battery is against the will of the party assailed, the offences are different; there is no presumption that a party has been convicted of the one, upon facts which constitute the other; and where a party

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first indicted and convicted for passing but one of such notes, the defendant could not again be indicted for the unlawful possession of the other. But it is difficult to reconcile this case with many others, especially Com. *v.* Andrews, 2 Mass. 409; R. *v.* Brettel, 1 Carrington & Marshman, 609; and R. *v.* Champneys, 2 Moody & Robinson, 26."

[c] State *v.* Cooper, 1 Green, N. J. 361.

[d] State *v.* Lewis, 2 Hawks, 98; see Roberts *v.* State, 14 Georg. 8.

[dd] Wilson *v.* State, 24 Conn. 57.

[e] Ante, § 563.

[ee] Shannon *v.* Commonwealth, 2 Harris, 227; see post, § 2657.

[f] People *v.* Barrett, 1 Johnson, 66; Com. *v.* Cunningham, 13 Mas. 245; Hite *v.* State, Yerger, 357; Com. *v.* Halstat, 2 Boston Law R. 177; Archbold's C. P. by Jervis, 82; Com. *v.* Curtis, Thacher's C. C. 202; Com. *v.* Goodenough, Thacher's C. C. 132; Gerard *v.* People, 3 Scammon, 363; State *v.* Ray, Rice 1; State *v.* Risler, 1 Richardson, 219; Com. *v.* Wade, 17 Pick. 395; Duckham *v.* People, 4 Scam. 72; Price *v.* State, 19 Ohio, 423; State *v.* Birmingham, 1 Busbee, 120; State *v.* Revels, Ibid. 201; Keeler 58; 1 Leach, 448; R. *v.* Embden, 9 East, 437; Wilson *v.* State, 24 Conn. 37; State *v.* Reed, 12 Md. 263; State *v.* Keogh, 13 La. Ann. 243.

[g] State *v.* Glargon, Dudley, S. C. 50.

[h] State *v.* Birmingham, 1 Busbee, 120; see State *v.* Revels; Ibid. 201.

[i] State *v.* Coombs, 32 Maine, 529; State *v.* Maher, 35 Maine, 225; U. S. *v.* Nickerson, 17 Howard, U. S. 204; Roberts *v.* State, 14 Georgia, 8; Morman *v.* State, 24 Miss. 54; Heikes *v.* Com. 2 Casey, 513.

indicted for an affray, pleads that he has been convicted of the same offence, upon an indictment for assault and battery parol proof is admissible to show, what the records cannot show with sufficient precision, that the two offences are, or are not identical.[j]

§ 566. Even where the first trial is for a misdemeanor and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first. Where the doctrine of merger obtains, the evidence of the consummated felony whould have secured an acquittal on the first indictment, and such acquittal would have been no bar.

Thus, it has been said, that where on an indictment for an assault to rob, murder, or ravish, the felony turned out to have been completed, the defendant's acquittal, which the court would have been bound to direct, would have been no bar to an indictment for the felony.[k] So, where the doctrine of merger is not held, the test applies equally, since as the defendant in such case could have been convicted of the attempt, on evidence of the felony, the felony cannot be prosecuted, after acquittal or conviction of the attempt. Thus in Connecticut where a defendant on evidence of rape was tried for an assault with intent to ravish, it was held that the judgment was a bar to a subsequent indictment for rape.[l]

§ 567. To bar an indictment for selling liquor without a license, it is not sufficient to prove the record of a conviction for the same offence since the date of the offence now proved: the defendant must prove the first conviction to have been for the same act of selling now complained of.[m]

Where defendants are bound to keep the streets of an incorporated town in order, and several streets are presented on the same day, and several bills are found, a conviction on one may be pleaded in bar to the others.[n]

Where a person was convicted of advising one slave to abscond, this was held not to be a bar to the prosecution for advising another slave to abscond, though the advice to both was given at the same time, and in the same words.[o]

A party cannot be prosecuted, under the act of Tennessee of 1833, c. 10, § 2, for betting on and running a horse-race, along a public road, as two distinct offences, conviction for running being a good bar to a conviction for betting on the same identical race.[p]

A convict is liable to additional punishment for a third offence, notwithstanding he has been sentenced formerly to an additional punishment for a second offence.[q]

§ 568. (*x.*) *Practice under pleas of autrefois acquit.*—A former conviction

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[j] Duncan *v.* Com. 6 Dana, 295.

[k] Com. *v.* Kingsbury, 5 Mass. 106; State *v.* Murray, 15 Maine, 100; Com. *v.* Parr, 5 Watts & Serg. 345; People *v.* Mather, 4 Wend. 265.

[l] State *v.* Shephard, 7 Conn. 54; ante, § 563.

[m] State *v.* Ainsworth, 11 Vermont R. 91; State *v.* Cassety, 1 Richardson, 90.

[n] State *v.* Fayetteville, 2 Murph. 371.

[o] Smith *v.* Com. 7 Gratt. 593.

[p] Fiddler *v.* State, 7 Humph. 508.

[q] Plumbley *v.* Com. 2 Met. 413; Com. *v.* Mott, 21 Pick. 492.

for the same offence, even though in the same court, should be specially pleaded. It cannot avail in arrest of judgment.[r]

The plea must consist of two matters, first matter of record, to wit: the former indictment and acquittal, and the circumstances; second, of matters of fact, to wit: the identity of the person acquitted, and the fact of which he was acquitted.[s] To support the first matter, it is necessary to show that the defendant was found not guilty on an indictment free from error in a court having jurisdiction.[t]

Should such be the fact, the prosecuting officer may tender an issue as to the identity of the defendant, instead of to the existence of the record.[u] The proof of the issue lies upon the defendant.[v] To prove it, he has, first, to prove the record, and secondly, to prove the averment of identity contained in his plea.[w]

Where the second indictment is preferred at the same term, the original indictment and minutes of the verdict are receivable in evidence in support of the plea of *autrefois acquit*, without a record being drawn up.[x] But where the previous acquittal was at a previous term in the same jurisdiction or in a different jurisdiction, it can only be proved by the record.[y]

§ 569. Unless the plea on its face shows that it is the same offence of which the prisoner was before acquitted, the plea may be demurred to, or advantage may be taken of it upon a replication of *nul tiel record*.[z]

Where the only issue is the identity of the offences, a technical difference between the description of property in the first indictment and the second, will be disregarded, when no proof is offered as part of the prosecution to show the offence was the same.[a]

Where a party indicted for an affray pleads that he has been convicted of the same offence upon another indictment, parole testimony is admissible to

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[r] State *v.* Barnes, 32 Maine, 2 Red. 530.

[s] 2 Hale, P. C. 241; Com. *v.* Myers, Gen. Court of Virginia, Nov. T. 1811; 3 Wheeler's C. C. 550; Hawk. b. 2, c. 35, s. 3; Burn, J., Indictment, xi., 1 M. & S. 188; 9, East, 438; 2 Leach, 712; 4 Co. Rep. 44.

[t] 4 Black. Com. 335; 2 Hawk. ch. 35, sect. 1; see for forms of replication and rejoinder, Wh. Prec. 1155, 6.

[u] Archbold by Jervis, 84; see for forms of pleas, Wh. Prec., as follows:—

(1150) Plea of autrefois acquit.
(1151) Autrefois acquit, another form.
(1152) Replication to same. (To be made ore tenus.)
(1153) Plea that defendant was duly charged, examined, and tried for the murder of the deceased before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.
(1154) Autrefois convict, plea of, where the original indictment on which the defendant was convicted, was one for arson, and the second indictment was for murder in burning a house whereby one J. H. was killed, &c.
(1155) Replication to said plea.
(1156) Rejoinder to said replication.
(1157) Plea of once in jeopardy.

[v] 2 Hale, 241.

[w] See 2 Russ. 721, n.

[x] R. *v.* Parry, 7 C. & P. 836.

[y] R. *v.* Bowman, 7 C. & P. 101, 337.

[z] Hite *v.* State, 9 Yerger, 357; McQuoid *v.* People, 3 Gilmore, 76.

[a] People *v.* M'Gowan, 17 Wendell, 386.

prove (what the records cannot sufficiently show) that the offences were or were not identical.[b] The burden of proving a prior conviction of the offence charged against a defendant is upon him and is not shifted by *primâ facie* evidence of the identity of an offence of which he has been previously convicted with that now charged upon him.[bb]

§ 570. Where four persons were tried for rape, upon an indictment containing counts charging each as principal, and the others as aiders and abettors, they were acquitted; and it being proposed on the following day to try three of them for another rape upon the same person,[c] they pleaded *autrefois acquit* to the second indictment, averring the identity of the offences, and to this plea there was a replication that the offences were different. The prisoners' counsel put in the commitment and the former indictment, and also the minutes of the former acquittal written on the indictment. On this evidence the jury found that the offences were the same; and it being referred for the opinion of the judges whether there was any evidence to justify and support the verdict, and if not, whether such verdict was final, and operated as a bar to any further proceedings by the crown upon the second indictment, the court held, that the verdict of the jury was final, and the prisoners were discharged.[d]

Wherever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported, and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct, and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel* record may conclude with a verification. In the latter case, the court, without the intervention of a jury, may decide the issue.[e]

Where the former conviction was effected by fraud, the plea of *autrefois convict*, in such case, being replied to specially, the replication, which sets forth such fraudulent prosecution and conviction being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer.[f]

§ 571. To an indictment for larceny in a dwelling-house, the defendant pleaded a former conviction of pilfering, on a complaint before a police court, averring that the articles and the stealing mentioned in the indictment were the same mentioned in said complaint, and that the police court had jurisdiction of the offence. The replication averred that the stealing

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[b] Duncan *v.* Com. 6 Dana, 295. [bb] Com. *v.* Daley, 4 Gray (Mass.) 209.

[c] The second indictment being exactly the same as the first, with the omission only of the fourth prisoner.

[d] R. *v.* Parry, 7 Car. & P. 836.

[e] Hite *v.* State, 9 Yerger, 357. It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsaid by parol evidence; therefore, the court may charge the jury that the pleas are not sustained by the proof when that is the fact. Martha *v.* State, 26 Ala. 72.

[f] Com. *v.* Jackson, 2 Virg. C. 501; State *v.* Brown, 16 Conn. 54.

charged in the said complaint was a larceny in the dwelling-house, which was a high and aggravated crime, and that the police court had not jurisdiction thereof. The rejoinder traversed the several averments in the replication. It was held, on special demurrer, that the rejoinder was good, being neither a departure, nor double, and that though the plea was defective in form, for not directly traversing the charge of larceny in a dwelling-house, yet that the defect was cured by the pleading over.[g] The proper plea would have been former conviction of the larceny, and not guilty of the residue of the charge.[h] A party being indicted for a misdemeanor, pleaded a former acquittal, but his counsel could not find the record, nor could the solicitor general find the former indictment. The court ordered the trial to proceed, and the prisoner was found guilty. Afterwards the former indictment and record of acquittal were found, the two indictments being identical, with the exception that in the former the offence was charged on the 1st of June instead of May, and the words "a wagoner" were added to the description of a negro. It was held that there could be no doubt of the identity of the offence, and a new trial must be granted notwithstanding the laches of counsel.[i] Where, to an indictment, the defendant pleaded *autrefois convict*, and not guilty, which pleas were both submitted to the jury at the same time, and the jury found a verdict of guilty, but rendered no verdict on the first plea, a judgment entered on the verdict was held erroneous.[j]

§ 572. (*y.*) *Judgment on a plea of autrefois acquit.*—When the plea of *autrefois acquit* or *convict* is determined against the defendant, in this country in most cases he is allowed to plead over, and to have his trial for the offence itself.[l] In England, however, though this is allowed in felonies, it is not in misdemeanors.[m] Of the injustice of this distinction a pregnant illustration is found in a case which, in 1850, attracted great attention in England.[n] On the plea *autrefois acquit* to an assault, issue was taken by the crown, and after verdict, judgment entered against the prisoner, who was thereupon sentenced to hard labor for two years. In pronouncing sentence, Martin, B., did not hesitate to express his compunctions at sentencing a man for an offence for which he was never tried. "I cannot but feel," he said, addressing the prisoner, "that you stand in the condition of persons whose case has not been heard. If you wish me to postpone the sentence I will do so. I feel it to be a great hardship that the prisoners should be punished without a trial, and with no opportunity given to them of answering or explaining the charge laid against them."[o] It was the hardship of a judge thus sentencing a man of whose guilt he knew nothing, that led Judge Grier and Judge Kane in the U. S. Circuit Court in Philadelphia, to decline sentencing a man who had been convicted capitally before Judge Randall, the

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[g] Com. *v.* Curtis, 11 Pick. 134. [h] Ibid.
[i] Dacy *v.* State, 17 Geo. 439. [j] Soliday *v.* Com. 28 Penn. State R. 14.
[l] Barge *v.* Com. 3 Penn. R. & Watts, 662; Com. *v.* Goddard, 13 Mass. 455; Foster *v.* Com. 8 Watts & S. 77; Hirn *v.* State, 1 Ohio St. R. 16. See ante, § 528–9.
[m] R. *v.* Gibson, 8 East, 107; R. *v.* Taylor, 3 B. & C. 502; S. C. 5, Dow & R. 422.
[n] R. *v.* Bird, 15 Jur. 193; 2 Eng. R. 448. [o] Ibid. 531.

district judge, who since the conviction and the application for sentence had died.[p] This difficulty, however, has not deterred the Supreme Court of New York from holding that where, in an inferior tribunal, judgment against the people had been entered on a demurrer, on reversing the judgment, they would not permit the defendant to withdraw his demurrer, but would sentence him themselves.[q]

Where the State demurs to the plea of *autrefois convict* to an indictment for a capital felony, and the demurrer is overruled, the defendant is not entitled to be discharged, and the State may rejoin.[r]

The judgment against the defendant, in felonies, is *respondeat ouster;* or rather, as the defendant generally pleads over to the felony at the same time with the issue in the plea of *autrefois acquit* the jury are charged again to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded.[s]

A *novel assignment* is not admissible in a criminal case, and the proper and only mode of replying to a plea of a former conviction is to traverse the alleged identity.[t]

6th. Once in jeopardy.[u]

§ 573. (*a.*) *Constitutional provision.*—By the Constitution of the United States it is provided: "Nor shall any person be subject for the same offence, to be twice put in jeopardy of life and limb;"[v] and the same restriction, taken from the Federal Constitution, exists in the constitutions of most of the States. Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit*, has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Mr. Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation.[w] It has, therefore, been generally agreed, that where a man has once been pronounced "not guilty" on a valid indictment or appeal, he cannot afterwards be indicted again upon a charge of having committed the same supposed offence.[x] At common law, as has been seen, it means nothing more than that when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot a second time be placed in jeopardy for the particular offence; and at the first glance the constitutional provision appears nothing more than a solemn asseveration of the common law maxim.[y] In the leading cases of Richard and William Vaux, reported

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[p] U. S. *v.* Harding, 6 P. L. J. 14.

[q] People *v.* Taylor, 3 Denio, 91.

[r] State *v.* Nelson, 7 Ala. 610.

[s] R. *v.* Vandercomb, 2 Leach, 708; R. *v.* Cogan, 1 Leach, 448; R. *v.* Shean, 2 C. & P. 635.

[t] Duncan *v.* Com. 6 Dana, 295.

[u] See, for plea of "Once in jeopardy," Wharton's Prec. 1157. See, also, this subject further examined, post, § 3062, &c.

[v] Const. U. S. Amend. art. 5.

[w] 4 Co. Rep. 40; 4 Bla. Com. 335; 2 Hawk. c. 35, s. 1.

[x] 2 Hawk. c. 35, s. 1; 4 Bla. Com. 335.

[y] Ned *v.* State, 7 Porter, 188; U. S. *v.* Gilbert, 2 Sumner, 41.

in 4 Coke, 44, it was held "that the reason of *autrefois acquit* was because the maxim of the common law is, that the life of a man shall not be twice in jeopardy for one and the same offence; and that is the reason and cause why autrefois acquitted or convicted of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason, he was not *legitimo modo acquietatus*," &c. "Thus we see," says Mr. Justice Story, in commenting on this case, "that the maxim is imbedded in the very elements of the common law; and has been uniformly construed to present an insurmountable bar to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment."[z]

§ 574. (*b.*) *Construction given by the several courts.*—In this country, the constitutional provision has, in some instances, been construed to mean more than the common law maxim, and in several of the States it has been held that where a jury in a capital case has been discharged without consent before verdict, after having been sworn and charged with the offence, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offence.[a] The cases may be placed in two general classes: First. Where any separation of the jury, except in case of such violent necessity as may be considered the act of God, is held a bar to all subsequent proceedings. Secondly. Where it is held that the discharge of the jury is a matter of sound discretion for the court, and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial.[b]

§ 575. The first view has been taken by the courts of Pennsylvania, Virginia, North Carolina, Tennessee, Indiana, and, to a certain extent, of Alabama.

Pennsylvania.—In 1822, the question was brought before the Supreme Court of Pennsylvania (a State whose Constitution contains a provision precisely the same as that in the Constitution of the United States), in a case where the defendant pleaded specially, that the jury had been discharged on a former trial because they were unable to agree. The court held, that the discharge of the jury, because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Chief Justice Tilghman said where a party "is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation. I grant that in case of necessity they (the jury) may be discharged; but if there be any-

[z] U. S. *v.* Gilbert, 2 Sumner, 42; see, for a learned article on this head, 4 Western Law Journal, 97.

[a] William's case, 2 Grat. 567; Com. *v.* Cook, 6 S. & R. 377; Com. *v.* Clue, 3 Rawle, 498; State *v.* Garrigues, 1 Hayw. 241; Spier's case, 1 Devereux, 491; Ned *v.* State, 7 Porter, 187.

[b] For a discussion of the general question how far a jury may be allowed to separate, see post, § 3111, &c.

thing short of absolute necessity, how can the court, without violating the Constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" Duncan, J., in the case, in commenting on the position taken in People *v.* Goodwin, hereafter to be cited, said, "I feel a strong conviction that the construction here [there] given to this provision of the Constitution of the United States, engrafted into the constitutions of Delaware, Kentucky, and Tennessee, and made an article in the bill of rights of this State, is not the true one, and that the provision, that no person can be put twice in jeopardy of life and limb, means something more than that he shall not be twice tried for the same offence. It is borrowed from the common law, and a solemn construction it had received in the courts of common law ought to be given it. This is not the signification of the words in their common use, nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas. There is a wide difference between a verdict given and a jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offence is punishable by death, and the indictment is not defective, he is in jeopardy of life." It was accordingly held, that in that case, the jury having been discharged without giving any verdict, without absolute necessity, the prisoner was not liable to be tried again.[c]

In 1831, in a case where the defendant interposed a similar plea, the doctrine was pushed by the same court still further. It was argued by Gibson, C. J., with his usual vigor, that "no discretionary power whatever exists with the court in such a case to discharge." "Why it should be thought," he said, "that the citizen has no other assurance that the arbitrary discretion of the magistrate, for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offence, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it, but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the Constitution is guarded by sanctions more imperative. But in those States where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birthright of the citizen, and consequently demandable as such. But a right which depends on the will of the magistrate is essentially no right at all; and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules. I take it on grounds of reason as well as authority, then, that a prisoner of whom a jury have been discharged before verdict given, may, by pleading the circumstances in bar of another trial, appeal from the order of the court before which he stood, to the highest tribunal in the land. Nor do I understand how he shall be said

[c] Com. *v.* Cook, 6 Serg. & Rawle, 577; but see Com. *v.* McFadden, 11 Harris, 12; post, § 590.

not to have been in jeopardy before the jury have returned a verdict of acquittal. In the legal, as well as the popular sense, he is in jeopardy the instant he is called to stand on his defence; for from that instant, every movement of the commonwealth is an attack on his life; and it is to serve him in the hour of his utmost need that the law humanely adds to the joinder of the issue, a prayer for safe deliverance. The argument must, therefore, be, that he is not put out of jeopardy unless by a verdict of acquittal; and that to try him a second time, having remained in jeopardy all along, is not to put him in jeopardy twice. In this aspect it must be obvious that the argument is an assumption of the whole ground in dispute. If the prisoner has been illegally deprived of the means of deliverance from jeopardy, every dictate of justice requires that he be placed on ground as favorable as he could possibly have attained by the most fortunate determination of the chances.[d]

In a later case (April, 1851), however, where the jury were allowed to separate by consent, *after* being sworn, but *before* the case was opened, the court, while reversing the judgment, remanded the prisoner for another trial.[e] "The law is undoubtedly settled," said Gibson, C. J., "that a prisoner's consent to the discharge of a previous jury is an answer to a plea of a former acquittal."

It has since been held that the plea of "once in jeopardy for the same offence" will not avail where the jury were discharged on account of disagreement, in a charge of burglary.[ee]

§ 576. *Virginia.*—In Virginia, mere inability to agree is not such a necessity as will justify the court in discharging a jury, and in such case the defendant cannot be again put in jeopardy;[f] though where after nine days' confinement, one of the jurors suffered materially in health, it was held the jury were properly discharged, and the second trial was regular.[g]

§ 577. *North Carolina.*—The same question came before the Supreme Court of North Carolina, in a very early case,[h] and again at a much later period,[i] where it was alleged that the jury in a capital case had been discharged without legal necessity, having given no verdict. The court held that the prisoner could not be again tried. On the last occasion the cases in the Supreme Courts of Massachusetts, New York, and Pennsylvania, were cited; and the court adopted that of the Supreme Court of Pennsylvania, and affirmed the exposition of the clause given by that court, that no man shall be twice put in jeopardy, &c., for the same offence. Hall, J., said, "When the jury were thus charged with the prisoner, he certainly stood upon his trial; his life was jeopardized." And he afterwards proceeded to the exceptions of a discharge from necessity, and when the indictment is bad. Taylor, C. J., delivered a more elaborate opinion, arguing that "twice put in jeopardy," and "twice put on trial," convey to the mind several and distinct meanings; "for we can readily understand how a person has been in jeopardy,

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[d] Com. *v.* Clue, 3 Rawle, 498.

[e] Peiffer *v.* Com. 3 Harris, 468.

[ee] McCreary *v.* Com. 24 Penn. State R. 323.

[f] Williams *v.* Com. 2 Grattan, 568.

[g] Com. *v.* Fells, 6 Leigh, 613.

[h] State *v.* Garrigues, 1 Hayw. 241.

[i] Spier's case, 1 Dever. 491.

upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are impanelled upon the trial of a person for a capital offence, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial. It was ruled that the provision of the Constitution "that no person shall be subject for the same offence to be twice put in jeopardy of life or limb," not only forbids a second trial for the same offence after an acquittal, but also where the jury have been once charged upon a perfect indictment, and were not prevented from returning a verdict by the act of God, or at the request of the prisoner; and, therefore, where a jury were charged with the trial of a prisoner for murder, and, before they returned their verdict the term of the court expired, and the jury separated, it was held, that the prisoner could not be tried again.[j] In a still later case in the same State, it was held that a jury, charged in a capital case, cannot be discharged before returning the verdict, at the discretion of the court; they cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record.[k]

§ 578. *Tennessee.*—In Tennessee, on the first examination of the subject, it appears to have been held, Peck, J., dissenting, that it was discretionary in the court, even in capital cases, to discharge the jury;[l] but that opinion was subsequently reviewed in a case of great deliberation. In the latter case,[m] the jury were impanelled on Thursday evening, at 2 o'clock; they came in once or twice during the same evening, and declared that they could not agree; they were, however, kept together all night by the court, and, at nine o'clock the next morning, upon their declaring they could not agree, the court discharged them. The term was not concluded until the next day (Saturday). It was held, that this was not such a case of necessity as authorized the court to discharge them. It was out of the power of the court, it was said, to discharge them without consent, *except in case of sickness, insanity, or exhaustion, among themselves.*

Alabama.—In Alabama, after a careful review of the subject, the following points were made: 1st. That courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given. 2d. That a jury is, *ipso facto*, discharged by the termination of the authority of the court to which it is attached. 3d. That a court does possess the power to discharge, in any case of pressing necessity, and should exercise it whenever such a case is made to appear. 4th. That sudden illness of a prisoner or a juror, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise.

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[j] Spier's case, 1 Dever. 49. On this express point the courts of South Carolina, Indiana, and Alabama, have ruled differently. Powell *v.* State, 19 Alab. 577; Wright *v.* State, 5 Ind. 290; State *v.* Lemour, 2 Hill, S. C. 680.

[k] State *v.* Ephraim, 2 Dev. & Bat. 162.

[l] State *v.* Waterhouse, M. 8 Yerger, 278.

[m] Mahala *v.* State, 10 Yerger, 532.

5th. That a court does not possess the power, in a capital case, to discharge a jury because it cannot or will not agree.[n] 6th. That therefore the unwarrantable discharge of a jury, after the evidence is closed in a capital case, is equivalent to an acquittal.[o] In the same State, where, after a trial is commenced, the judge withdraws and the trial is completed by another judge, and the judgment is reversed for that cause, the prisoner cannot be said to have been in jeopardy, and he may be tried again; and this although the judgment of reversal does not award a *venire de novo*.[p]

§ 579. *Indiana.*—In Indiana, it was held that a discharge of the jury by the court, under the mistaken impression that the term had closed, and that there was no authority to proceed with the trial, operates as a bar.[q]

A prisoner being on trial for grand larceny, and the cause submitted to the jury, they returned into court, on the last day of the term, and reported that they could not agree, and the court discharged them. It was held that the discharge of the jury was equivalent to a verdict of acquittal.[qq] In the same State, the general rule is stated to be, that the jeopardy in which a man shall not be twice placed is incurred by having been once given in charge on a legal indictment to a regular jury, which has been unnecessarily discharged without rendering a verdict.[r]

§ 580. *Courts in which the discharge of the jury, when it takes place in the exercise of a sound discretion, is no bar to a second trial.*—This is substantially the view of the Supreme Court of the United States, of Washington, J., Story, J., and M'Lean, J., sitting in their several circuits; and of the courts of Massachusetts, New York, Illinois, Kentucky, and Mississippi.

"It is contended," said Washington, J., in a case where the jury, on a homicide trial, had been discharged in consequence of the alleged insanity of one of them, "that although the court may discharge in cases of misdemeanor, they have no such authority in capital cases; and the fifth amendment to the Constitution of the United States is relied upon as justifying the distinction. We think otherwise; because we are clearly of opinion that the jeopardy spoken of in this article, can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises on the opinions of some judges, which would seem to intimate a different opinion. Upon this subject, we concur in the opinion expressed by the Supreme Court of New York, in Goodwin's case, although the opinion of the Supreme Court of this State, in Cook's case, is otherwise. We are, in short, of opinion that, the moment it is admitted that in cases of necessity, the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the Constitution, and I should consider this

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[n] Ned *v.* State, 7 Porter, 188. [o] Ibid. 187. [p] State *v.* Abram, 4 Ala. 272.
[q] Wright *v.* State, 5 Indiana, 290; see Weinzorpflin *v.* State, 7 Blackf. 194.
[qq] Reese *v.* State, 8 Ind. 416. [r] Miller *v.* State, 8 Ind. 325.

court as stepping beyond its duty in interpolating it into that instrument, if the article of the Constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction. If we are correct in this view of the subject, then there can be no difference between misdemeanors and capital cases, in respect to the discretion possessed by the court, to discharge the jury in cases of necessity; and, indeed, the reasoning before urged in relation to a plea of this kind, if sound, is equally applicable to capital cases as to misdemeanors. By reprobating this plea, we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment."[s]

In the Supreme Court of the United States, the subject was brought up in 1824, upon a certificate of division in the opinions of the judges of the Circuit Court for the Southern District of New York. The jury were discharged in the court below on account of mere disagreement. "The question arises," was the language of the court, "whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put on trial."[t]

[s] U. S. *v.* Haskill, 4 Wash. C. C. 409; see also U. S. *v.* Gilbert, 2 Sumner, 19; U. S. *v.* Coolidge, 2 Gall. 364; U. S. *v.* Shoemaker, 2 M'Lean, 114.

[t] U. S. *v.* Perez, Wheaton, 579.

§ 581. *Massachusetts.*—In Massachusetts, the practice, from an early period, was to discharge juries at the discretion of the court, in cases both capital and otherwise.[u] But, in 1823, a case came up where a jury, in a capital case, having been out eighteen hours, were discharged on account of inability to agree. The defendant was tried again, and convicted of manslaughter, and the point was argued on arrest of judgment. Parker, C. J., in delivering the opinion of the court, after maintaining that there was no jeopardy till verdict, said: "By necessity cannot be intended that which is physical only; the cases cited are not of that sort, for there is no application of force upon the court or the jury which produced the result. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained. According to the practice in England, in ancient, if not in modern times, it may be doubtful whether the mere disagreement of a jury would constitute the necessity in question; for by that law the jury, after the cause is committed to them, are to be kept without meat or drink, fire or candle, until they shall have agreed; and if this shall not be until the term of the court is closed, they may be made to follow the judge in carts to the next shire, and so until they have agreed. Under this severe coercion it will be rare that a jury withholds a verdict beyond a reasonable time, though it may well be doubted whether a verdict so obtained would do any honor to the administration of justice. It is well known that this manner of dealing with juries has not been practised in the commonwealth of late years, if it ever was. In all cases committed to them, they are made as comfortable as circumstances will admit of; are accommodated with fire and light, and are allowed reasonable refreshments, at proper intervals. This change is owing to a general change of circumstances, and, among others, to the more proper estimation of the agency of the jury in criminal trials than was formerly had. Practically, as well as theoretically, there is now a trial by jury; the members of it are deemed to be sound and intelligent men; it is supposed that their minds and faculties are to be exercised on the subjects committed to them; and that their verdict is the truth, as found by the evidence submitted to them. In this state of things, to attempt to coerce them by restraints and privations would be absurd. The jury themselves would revolt at any attempts to overpower their minds by famine or other violence; and resolute adherence to opinions, already formed, would be the sure consequence of any unreasonable effort to coerce them into a formal agreement. This change in the manners of the times, of necessity produces a change in the course of trials. If a jury cannot now be starved into a verdict; if they cannot be carried in the train of the judge, from county to county, it seems necessarily to follow, that when they have applied their minds to the case as long as attention can be useful, and have come to a settled opinion, resulting in a disagreement, the cause must be taken from them; and public justice demands that another trial should be had. But it is said, this is putting a man's life twice in jeopardy for one and the same

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[u] Com. *v.* Bowden, 9 Mass. 194.

offence. So it is, when any of the accidents happen which are acknowledged to form exceptions to the rule. So, also, when a man is acquitted on an indictment substantially bad, or convicted, but the judgment is arrested; although, in such cases, ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment. This protection, however, is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case. Another objection is, that the discretion thus claimed for the court to discharge a jury, in case of final disagreement, is dangerous, and may be exercised to the prejudice of prisoners, especially if the government, or the public, or the court itself should, for any cause, desire their conviction. And it is true, that discretionary power in a judge is not unattended with danger; but still it must be given, and the course of justice cannot be pursued without it. If not exercised in this way, it may be in many others, to the same end; for instance, by granting a continuance on the suggestion of the public prosecutor, upon plausible pretexts, when the real ground may be to postpone the trial to a season more favorable to a conviction."[v]

§ 582. *New York.*—In New York, the point arose and was elaborately argued on an indictment for manslaughter, where the jury, after the whole cause was heard, being unable to agree, were discharged by the court without the consent of the prisoner. The question was whether, under these circumstances, the defendant could be again put on his trial. On the part of the defendant it was contended, that he could not, among other reasons, because the Constitution of the United States had declared, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was, that this clause did not apply to State courts; and, if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial in which the merits had been decided on. The court inclined to the opinion, that the clause was operative upon the State courts; but, at all events, that it was a sound and fundamental principle of the common law; that the true meaning of the clause was that no man shall be twice tried for the same offence; that the true test by which to decide the point whether tried or not, is by the plea of *autrefois acquit* or *autrefois convict;* and, finally, that a "defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him, he can never be drawn in question again for the same offence." And the court accordingly held, that the discharge of the jury before giving a verdict was no bar to another trial of the defendant.[w]

§ 583. *Mississippi.*—In Mississippi, after a cursory review of the authorities, the opinion of the Supreme Court of the United States was adopted.[x]

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[v] Com. *v.* Purchase, 2 Pick. 521.

[w] People *v.* Goodwin, 18 John. R. 187; see, also, People *v.* Olcott, 2 John. 301.

[x] Moore *v.* State, 1 Walker, 134.

§ 584. *Illinois.*—In Illinois, the same view was taken, and in this State the rule laid down by the federal courts must be considered as obtaining.[v]

§ 585. *Kentucky.*—In Kentucky, the question was discussed in 1824, in a case not involving life or limb, but which served to bring up incidentally the interpretation to be given to the word "jeopardy," as it exists both in the Constitution of the United States and of Kentucky. "The only remaining ground on which the appellee could rely for his discharge," it was said, "is, that the Constitution of this State, in the 12th section of the tenth article, provides that no person shall, for the same offence, be twice put in jeopardy of his life or limb. Under this clause, it may be contended, that putting the offender on his trial before a jury who had the right of pronouncing finally on his guilt or innocence, exempts him from being again brought before another, if the former do not agree, and that the commonwealth has no right to call and swear two or more juries against him. This construction of this clause of the Constitution we think entirely too broad. If we ascertain what is necessary to constitute at common law a good plea of *autrefois acquit*, or *autrefois convict*, we shall have what constitutes a complete defence under this clause of the Constitution. It is not, therefore, possible to support the defence of a former acquittal, by anything short of a final judgment or verdict, on a second indictment for the same offence; and the accused, in this case, cannot with any propriety rely on the discharge of the former jury, without any verdict either for or against him, and the order of court, discharging the jury, did not discharge him."[w]

§ 586. *Missouri.*—In Missouri, the Constitution provides that "if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court."[x]

The same general position is taken by the late Mr. Justice Story in his treatise on the Constitution,[y] and by Judge Tucker in his notes to Blackstone.[z]

§ 587. (*c.*) *No jeopardy on defective indictment.*—Where, however, the indictment has been defective, even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can be preferred, and a new trial instituted, without violation of the constitutional limitation.[a] It is equally conceded that a verdict of acquittal or conviction, upon a good indictment, in cases affecting life or limb, will be a bar to a subsequent prosecution for the same offence, although no judgment was ever entered upon such verdict.[b]

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[v] State *v.* Stone, 2 Scam. 326.

[w] Com. *v.* Olds, 5 Little, 140.

[x] Const. Missouri, Art. 11, s. 10.

[y] 3 Story on the Const. 660.

[z] 1 Tuck. Black. App. 305.

[a] Gerard *v.* People, 3 Scam. 363; Com. *v.* Cook, 6 Serg. & Rawle, 577; Com. *v.* Clue, 3 Rawle, 498; State *v.* Garrigues, 1 Hayw. 241; Com. *v.* Purchase, 2 Pick. 521; State *v.* Woodruff, 2 Day, 504; State *v.* Ray, 1 Rice, 1; People *v.* Barrett, 1 Johns. 66; Com. *v.* Loud, 3 Met. 328; Com. *v.* Keith, 8 Met. 531; People *v.* March, 6 Cal. 543; Pritchett *v.* State, 2 Sneed (Tenn.) 285; see ante, § 540.

[b] State *v.* Norvell, 2 Yerger, 24; State *v.* Spear, 6 Mis. 654; ante, § 540.

§ 588. (*d.*) *Generally illness or death of juror forms sufficient ground for discharge.*—It is submitted in conclusion, that the two classes of opinions which have been the subject of discussion, may be reconciled, should it be conceded that the "discretion," in exercise of which a court, when intrusted with it, is justified in discharging a prisoner, must be a "legal necessity," such as would, if spread on the record, enable a court of error to say that the discharge was correct. The cases are clear that the term "legal necessity" is not confined to cases such as death, &c., when the discharge becomes inevitable. Mr. Serjeant Talfourd[c] thus states the law on this point: "Where, after the jury have been charged, a prisoner indicted for felony becomes, from sudden illness, incapable of remaining at the bar during the trial, the jury must be discharged. If he recovers during the session, he may be retried, the whole of the proceedings in his trial being commenced *de novo;*[d] if not, the recognizances must be respited till the next session."

If a juryman die during the trial or be taken so ill as to be unable to attend to the evidence or agree in the verdict, the survivors must be discharged, and the prisoner tried afresh, and even in those States where the law of "once in jeopardy" is most stringent, "serious illness" is enough.[e] The escape of a juryman;[f] sickness of the judge,[g] that of a party,[h] and the closing of the term of the court,[i] have been said to have the same effect.[j] A sick juror may be attended by another juror, or a surgeon, accompanied by a bailiff, sworn to remain constantly with him. The juror or surgeon, on his return, may be questioned on oath, to make true answer to such questions as the court shall demand of him respecting the state of the absent juror. If it appear that he will in all probability speedily recover, he may have refreshment; but if not, or if he die, the eleven jurors must be discharged from giving any verdict. Their names should then be called over again instanter, and another person on the panel of jurors called into the box. The prisoner must then be offered his challenges to all twelve, after which each of them, or of those substituted for them on challenge, must be sworn *de novo*, and be charged with the prisoner. The trial must then begin again.[k] Where the eleven were all re-sworn without challenge, the evidence which had been given was read by consent, from the judge's notes, before them and the twelfth juror; and each witness was asked whether it was true.[l]

[c] Dicken's Quar. Sess. 570.

[d] R. *v.* Stevenson, 2 Leach, C. C. 546; R. *v.* Streek, 2 C. & P. 413; see R. *v.* Fitzgerald, C. & K. 201, Cresswell, J., Foster's Crown Law, 22; Wedderburn's case.

[e] Com. *v.* Fells, 9 Leigh, 613; Mahala *v.* State, 10 Yerger, 532; State *v.* Curtis, 5 Humph. 601; Hector *v.* State, 2 Mis. 166; U. S. *v.* Haskell, 4 Wash. C. C. 402; Fletcher *v.* State, 6 Humph. 249.

[f] State *v.* Hall, 4 Halst. 256; State *v.* McKee, 1 Bailey, 651.

[g] Nugent *v.* State, 4 Stew. & Port. 72.

[h] People *v.* Goodwin, 18 Johns. 187; State *v* McKee, 1 Bailey, 651.

[i] State *v.* McLemour, 2 Hill, S. C. 680; State *v.* Battle, 7 Ald. 259; Ned *v.* State, 7 Port. 181; Wright *v.* State, 5 Ind. 290; though see Spier's case, 1 Dev. 491.

[j] Powell *v.* State, 19 Alab. 577.

[k] See, by eleven judges, in R. *v.* Edwards, 3 Camp. 207; see R. *v.* Scalbert, Leach, 706; 1 Chit. Cr. L. 1st ed. 414, 655; 2 Hale, 216; 1 Shower, 131; Howe's case, 1 Vent. 210; R *v.* Woodfall, 5 Burr. 2667; R. *v.* Beere, 2 M. & Rob. 472, Cresswell, J.

[l] See R. *v.* Edwards, R. & Ry. 224; 2 Leach, 621, n.; 3 Camp. 207, n.; 4 Taunt. 309; 1 Ch. Cr. L. 629; Foster, 31.

(*e.*) *Intermediately discovered incapacity of juror.*—Judge Curtis, on a trial for a misdemeanor (in which, however, according to the doctrine of the federal courts, the same restriction applies as in capital felonies), held that it was no bar that a jury had been withdrawn and the jury discharged on a prior trial, on the motion of the prosecuting attorney, on the ground of the then discovered evidence of the juror's bias.[a] But the general opinion is that the court has no power to discharge the jury on such grounds, and that such a discharge is a bar to a subsequent trial.[b]

(*f.*) *Sickness of prisoner.*—This has been held in England a sufficient ground, on the prisoner's request, to discharge a jury; and this consent may, it seems, be implied from sudden incapacitating illness. In such case, the first trial is no bar to the second.[c]

(*g.*) *Surprise in sudden breaking down of case of prosecution.*—In New York and North Carolina it has been said that this, in *misdemeanors*, is ground for withdrawing a juror.[d] But this is contrary to the better opinion, which is that in no criminal trial whatever can such a power be exercised.[e]

(*h.*) *Statutory close of term of court.*—Except in North Carolina[f] this has been held to justify a discharge, which is no bar to a second trial.[g]

(*i.*) *Sickness of judge.*—This, as has been already noticed, is sufficient ground, under the same limitation, as the sickness of a juror.[h]

(*j.*) *Sickness of witness.*—In Ireland, this has been held not to constitute ground to discharge the jury, even though the witness was essential to the prosecution; and when a discharge was made in such case, it was held that the prisoner could not be tried again.[i] Such sickness has been held in America ground for *postponing* a trial, but not for *discharging* the *jury*.[j]

§ 590. (*k.*) *Until jury are "charged" jeopardy does not begin.*—However conflicting the cases may be as to what legal necessity justifies a discharge, they unite in the position that until the jury are "charged" with the offence, the jeopardy does not begin. Until they are sworn, it is not necessary that they should be kept together as "impanelled." The General Court of Virginia, which adopts, as has been seen, the extreme view of the "once in

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[a] U. S. *v.* Morris, 1 Curtis, 23; see, also, People *v.* Damon, 13 Wend. 351; Stone *v.* People, 2 Scammon, 326.

[b] R. *v.* Wardle, C. & M. 647; R. *v.* Sullivan, 8 Ad. & El. 831; R. *v.* Sutton, 8 B. & C. 417; Ward *v.* State, 1 Humph. 253; Poage *v.* State, 3 Ohio St. R. 239; Com. *v.* Jones, 1 Leigh, 599; McClure *v.* State, 1 Yerger, 219.

[c] R. *v.* Stevenson, 2 Leach, 546; R. *v.* Streek, 2 C. & P. 413; see, also, Sperry *v.* Com. 9 Leigh, 623.

[d] People *v.* Ellis, 15 Wend. 371; though see Klock *v.* People, 2 Parker, C. R. 676; State *v.* Weaver, 13 Iredell, 203.

[e] R. *v.* Jeffs, 2 Strange, 984; People *v.* Barrett, 2 Caines, 305; U. S. *v.* Shoemaker, 2 McLean, 114; Klock *v.* People, 2 Parker, C. R. 676; Kinlock's case, Foster, 337.

[f] Spier's case, 1 Haywood, 241.

[g] R. *v.* Newton, 13 Q. B. 716; 3 Cox, C. C. 489; State *v.* McLemour, 2 Hill, S. C. 680; State *v.* Battle, 7 Alab. 259; People *v.* Thompson, 2 Wheeler, C. C. 472; State *v.* Moor, 1 Walker (Miss.), 134; Mahela *v.* State, 10 Yerger, 532; State *v.* Brooks, 3 Humph. 70; Ned *v.* State, 7 Porter, 181; Wright *v.* State, 5 Ind. 290.

[h] Nugent *v.* State, 4 Stewart & Porter, 72.

[i] R. *v.* Kell, 1 Crawford & Dix, 151; see R. *v.* Wade, 1 Mood. C. C. 86; R. *v.* Oulagan, Jebb's C. C. 270.

[j] U. S. *v.* Coolridge, 2 Gallison, 364; Com. *v.* Wade, 17 Pick. 397.

jeopardy" guarantee, lately held that until the oath was administered, the jury were not in the custody of the sheriff, because they were not "charged;"[m] and the Tennessee Supreme Court, also holding the same view, lately sustained a conviction where *after* a juryman was selected, but *before* he was sworn, he was withdrawn by the court because found to be a minor;[n] and in Illinois, it was held correct, in a capital case, as has just been observed, to strike off a juryman, *after* the jury was sworn, on the ground he was an alien.[o] So also it has been held in a late case in Pennsylvania,[p] where the court, after the jury had been sworn, struck off a juryman on the ground that he was incompetent from irreligion and prejudice. *A fortiori*, therefore, neither a *nolle prosequi*,[q] nor an ignoring by a grand jury,[r] nor a discharge on *habeas corpus*,[s] has the effect of relieving the defendant from further prosecution.

"Charging" the jury, is addressing the jury as follows:—

"Gentlemen of the jury, look upon the prisoner and hearken to his charge; he stands indicted by the name of A. B., late of the parish of, &c., laborer, for that he, on, &c. [*reading the indictment to the end*]. Upon this indictment he hath been arraigned; upon his arraignment he hath pleaded not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and hearken to the evidence."[t]

This does not take place until after the jury are sworn,[u] and is not usual in misdemeanors.[v]

§ 591. (*l.*) *Consent of prisoner to discharge.*—The more general opinion is that the prisoner may waive his constitutional privilege by a consent to the discharge of the jury, or to their separation,[w] by a motion in arrest or vacation of judgment,[x] or by a motion for a new trial.[y] But that such consent can be made operative in a capital case has been denied in Pennsylvania,[z] Tennessee,[a] Louisiana,[b] and California.[c]

Whether on a new trial being granted after a conviction for manslaughter the offence of murder is reopened, has been already considered.[d]

(*m.*) *In misdemeanors the jury may be allowed to separate at any time.*

This subject will be considered more fully under a future head.[e]

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[m] Epes' case, 5 Gratton, 676.
[n] Hines *v.* State, 8 Humph. 597.
[o] Stone *v.* State, 2 Scam. 326.
[p] Com. *v.* McFadden, 11 Harris, 12.
[q] Ante, § 545.
[r] Ibid.
[s] Ibid.
[t] See, for a shorter form, Trial of R. Smith, Philadelphia, 1816, Wharton on Homicide, 388, 389.
[u] 1 Ch. C. L. 555, Dicken. Q. Sess. 493.
[v] Ibid.
[w] Dye *v.* Com. 7 Gratt. 662; Williams *v.* Com. 2 Gratt. 567; Elijah *v.* State, 1 Humph. 102; R. *v.* Stokes, 6 C. & P. 151.
[x] State *v.* Arrington, 3 Murph. 571; Com. *v.* Fischblatt, 4 Met. 354; Page *v.* Com. 9 Leigh, 683.
[y] U. S. *v.* Perez, 9 Wheaton, 579; Com. *v.* Clue, 3 Rawle, 500; Com. *v.* Brown, 3 Rawle, 207; Com. *v.* Murray, 2 Ashmead, 41; State *v.* Greenwood, 1 Hayw. 141; State *v.* Jeffreys, 3 Murphey, 480; State *v.* Lipsey, 3 Dev. 485; State *v.* Sims, 2 Bailey, 29; Ball's case, 8 Leigh, 726; see post, § 3075, &c.
[z] Pieffer *v.* Com. 3 Harris, 469.
[a] Wesley *v.* State, 11 Humph. 502; Wiley *v.* State, 1 Swan, 256.
[b] State *v.* Populus, 12 La. Ann. 710.
[c] People *v.* Backus, 5 Cal. 275.
[d] Ante, § 550.
[e] See post, § 3125.

(*n.*) *Form of plea.*[f]—An allegation "that the said defendant had once before been put in jeopardy of his life for said offence, upon said indictment," is demurrable, if it does not show how or in what manner; otherwise if the facts constituting the jeopardy are alleged.[g]

[f] See forms of pleas in Wh. Prec. 1157.

[g] Atkins *v.* State, 16 Ark. 558; Wilson *v.* State, 16 Ark. 601.

BOOK II.

OF EVIDENCE ON TRIAL.

CHAPTER I.

WHAT MUST BE PROVED.

I. GENERAL DOCTRINE OF VARIANCE, § 592.
II. NAMES OF PROSECUTORS AND THIRD PERSONS, § 595.
III. TIME AND PLACE, § 599.
IV. WRITTEN INSTRUMENTS AND RECORDS, § 606.
V. GOODS, NUMBERS, AND SUMS, § 610.
VI. NEGATIVE AVERMENTS, § 614.
VII. DIVISIBLE AVERMENTS, § 616.
VIII. SURPLUSAGE, § 622.
IX. KNOWLEDGE AND INTENT, § 631.
X. CHARACTER, § 636.

I. General doctrine of variance.

§ 592. Whenever there is a plea of not guilty, every substantial affirmative allegation in the indictment, material to the constitution of the offence, must be made good by the prosecution. What evidence is necessary for the purpose in reference to particular offences, will be considered more fully hereafter, when these offences are severally examined. There are points, however, which apply to most criminal trials, which it is proposed here to treat generally, collecting for the purpose, with much brevity, the views of text writers of authority, illustrated by such cases as may serve to make the rule more intelligible.[a]

§ 593. One interesting question is to be examined at the outset. What constitutes *substantial* proof of a material allegation; or, in other words, what variance, in respect to such material allegations, is fatal?

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[a] The general inquiry is not only incompatible with the limits of this work, but is rendered unnecessary, in England, by the elaborate and thorough commentaries of Mr. Starkie and Mr. Phillips; and in this country by the admirable treatise of Mr. Greenleaf. To the latter work, I take this opportunity of expressing my acknowledgment for the assistance it has given me on several important points. As will be perceived, also, I have drawn largely on Professor Mittermaier's treatise on Criminal Law—a work which should, through the medium of a translation, be placed in the hands of the American practitioner, as the most philosophical, and the most exact treatise extant, on general criminal jurisprudence: "Das Deutsche Strafverfahren, &c., von Dr. C. J. A. Mittermaier, &c., Heidelberg, 1846."

The general rule may be thus stated: Where (except in those cases, to be presently noticed where a little setting forth is requisite), the evidence corresponds with the indictment in its general design and purport, a technical variance will not be fatal.

Of this, a very happy illustration is found in a case tried at Nisi Prius in Philadelphia, by Gibson, C. J. The first count in the indictment charged that the defendant, devising and intending to raise and create riots, &c., with the usual averments, "unlawfully, wickedly, and maliciously, incited, encouraged, and endeavored to provoke and instigate divers good citizens of the commonwealth, whose names are to said inquest unknown," &c., "to assemble and gather together and disturb the peace of the commonwealth, and to injure and annoy said citizens, &c., and for that purpose, he, the said defendant, then and there erecting and fixing a certain figure, resembling a man, but commonly called a Paddy, as and for the effigy of St. Patrick, and by these means, &c., did collect together a large number of citizens, who behaved riotously for a long space of time," &c. The remaining counts were for attempt to produce riot generally, without specifying the means. It appeared from the evidence that some time between dusk and eleven o'clock, on the 16th of March, a stuffed Paddy, with the accompaniment of a rum bottle and a string of potatoes, was suspended to a tree near the junction of Second street and Germantown road, in the district of Kensington, a neighborhood then inhabited principally by emigrants from Ireland. The figure remained in this position until the next morning, when it was removed to prevent a disturbance which seemed likely to ensue. The defendant, an inn keeper, residing in that district, was proved by several witnesses to have been in his house during the whole of the evening on which the Paddy was erected; and a great deal of conflicting evidence was produced, which made his agency in the affair very questionable. The averment in the indictment that the figure was intended as an effigy of St. Patrick, and was meant and well calculated to excite the angry feelings of the immediate population, was fully supported. It was proved also beyond contest, that the defendant was concerned in the exhibition on the 18th of March, of a female figure, commonly called a Shelah, but with several features, besides that of sex, distinguishing it from a Paddy. Some evidence was offered to show, also, that while the exhibition of a *Paddy* was resented as an insult upon the Catholic portion of the Irish, a *Shelah* was often displayed as a retaliatory emblem, and may have been so meant in the present case. A tumult ensued, the insult being spiritedly resented, and the neighborhood was thrown into confusion thereby for several succeeding weeks. The defendant, it was conceded, was clearly connected with the Shelah, though his instrumentality in the Paddy was controverted. The court having charged the jury that the indictment charged an indictable offence, after a short absence they came back with the inquiry whether the allegation in the indictment that a Paddy had been exhibited, was supported by evidence of the exhibition of a Shelah. The court answered in effect, that if the characteristics and object of the Shelah were different from those of the Paddy, the

variance was fatal; but that the question of the identity or dissimilarity of the two was for the jury. A verdict of acquittal was subsequently rendered.[b]

§ 594. So, where an indictment for murder charged that the death of the deceased was caused by a mortal wound of the head, inflicted with a swingle, it was proved that the death was caused by a blow on the head by a piece of wood, and that the external skin was not broken, but that there was extravasation of blood pressing on the brain, and a collection of blood between the scalp and the brain. The surgeon stated this to be a contused wound, with effusion of blood. It was held, by the fifteen judges, that the evidence supported the indictment.[c] But where an indictment for a conspiracy alleged that the defendants, on the 5th of January, 1850, conspired to defraud the F. Insurance Company, by removing and secreting the goods belonging to one of the defendants, and insured by said company, and then pretending that they had been destroyed by fire, and the evidence was, that the policy was issued on the 2d of January, 1850; that the goods were removed on the 3d; that the shop from which they were removed was destroyed by fire on the 7th; and that the defendants had no knowledge of any insurance of the goods by the F. Insurance Company until after the fire; it was held that this evidence did not support the allegation in the indictment.[d]

On the other hand, where an indictment charged that the defendant fed a large number of hogs with "slop, fermented grain, the offals and entrails of beasts, and other filth," by means whereof a nuisance, &c., was created, and the evidence showed that the hogs were fed exclusively on slop; Sergeant, J., held that there was no variance.[e]

To the same effect are cases where it is held that an indictment averring false pretences made to, or money obtained from a principal, is supported by evidence that the pretences were made to or money obtained from an agent.[f]

So, also, misdemeanors committed by an agent may be properly averred to have been done by the principal.[g]

The doctrine is thus illustrated by Mr. Phillips: "Where the prisoner was charged with a robbery near the highway, and the robbery was proved, but not near the highway, and where the offence of arson was stated in the indictment to have been committed in the night-time, and was proved not to have been in the night-time—in these cases all the judges were of opinion that the convictions were proper, and the prisoners were ousted of the benefit of the clergy. But where the averment in the indictment is sensible and natural, it ought to be regularly proved; as, where the prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house,

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[b] Com. v. Haines, 6 Penn. Law Journ. 239–241.

[c] R. v. Warman, 2 Car. & Kir. 195; see, also, post, § 1059.

[d] Com. v. Kellogg, 7 Cushing, 472.

[e] Com. v. Vansickle, Brightly, R. 69; 7 Penn. L. Jour. 82.

[f] Post, § 598.

[g] Com. v. Nichols, 10 Met. 259; R. v. Gutch, Mood. & Malk. 437; Com. v. Gillespie, 7 S. & R. 469; Com. v. Park, 1 Gray, 553; State v. Mathis, 1 Hill, S. C. 37; Britian v. State, 3 Hump. 203; State v. Neal, 7 Foster, 131; Com. v. Baglay, 7 Pick. 279; see ante, § 108, 153.

but that the name of J. W. was put by mistake for J. D., the judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted."[gg]

II. Names of prosecutors and third persons.

§ 595. What particularity is necessary in setting forth the names of the defendant and of third persons, has already been shown, and it has generally been said that while an error in the former is only taken advantage of by abatement, an error in the latter, when the name is material, is fatal.[h] Thus, if a burglary be alleged to have been committed in the dwelling-house of J. G., and the fact is that it is the dwelling-house of J. S., the defendant must be acquitted for the variance.[i] So, if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the dwelling-house of J. S., the defendant must be acquitted of the stealing in the dwelling-house, and can be found guilty of the simple larceny merely. So, in all other cases, a material variance between the indictment and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted.[j] Thus, a draft signed Jos. Johnson, is not admissible under a count stating it to be signed Joseph Johnson, president.[k] And thus an indictment averring a sale to M. G., is not sustained by proof of a sale to a woman whose name at the sale was M. G., but who before the indictment was found had acquired a new surname by marriage.[l]

How the ownership of property is to be averred will be more fully considered under another head.[m]

§ 596. Where a man is indicted under the gaming act, for playing cards with three certain men, the indictment will not be supported by proving that he played with a man not mentioned in the indictment.[n]

An indictment set forth that the paper writing, alleged to be forged, purported to be a warrant and order for the payment of money, and to have been drawn by one Tristam Tupper, and then set out the instrument *in haec verba*, from which it appeared that it was signed T. Tupper, and averred that the prisoner made it with the intention to defraud Tristam Tupper. It was held that there was no variance, and that the count was well framed.[o]

§ 597. On an indictment charging the stealing of the horse of Stephen Harris, the evidence proved that the man whose horse had been stolen was named Harrison. The witness stated that his name of baptism was Harrison, though his neighbors sometimes called him Harris; it was held that the owner's name was sufficiently described.[p] On a trial for felony the only evi-

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[gg] 1 Phillips on Ev. p. 207.

[h] Ante, § 233-257-8; see 2 Russ. on Cr. 789, 795.

[i] R. *v.* White, 1 Leach, 225.

[j] U. S. *v.* Howard, 3 Sumner, 12; State *v.* Owens, 10 Rich. Law (S. C.), 169; post, § 1818-1836.

[k] U. S. *v.* Keen, 1 M'Lean, 429.

[l] Com. *v.* Brown, 2 Gray, 358.

[m] Post, § 1818-37.

[n] State *v.* Russhing, 2 N. & M'Cord, 569; see, per contra, Com. *v.* Price, 8 Leigh, 757.

[o] State *v.* Jones, 1 M'Mul. 236.

[p] State *v.* France, 1 Tenn. 434.

dence of the prosecutor's Christian name was a statement by a witness that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the magistrates; that he knew from that the prosecutor's name was Thomas B., but that except from having seen him make his signature, he had no knowledge of his Christian name. It was held that this was admissible and sufficient evidence of the Christian name of the prosecutor.[pp]

Where an indictment for murder undertakes to identify the deceased by his race, the State should make some proof of the descriptive matter.[q]

Where the indictment charged the forgery of an order on "the Cashier of the Corporation of the President and Directors of the Bank of the United States," and the order was drawn on "the Cashier of the Bank of the United States," it was held this was not a fatal variance.[qq]

If the name proved be *idem sonans* with that in the indictment, and different in spelling only,[rr] the variance will be immaterial.[s] Thus, "Blankenship" for "Blackenship,"[t] "Havely" for "Haverly,"[u] "Segrave" for "Seagrave," "M'Nicole" for "M'Nicoll,"[v] "Benedetto" for "Beneditto,"[w] "Whyneard" for "Winyard," pronounced "Winnyard,"[x] "Keen" for "Keene,"[y] "Deadema" for "Diadema,"[z] "Autron" for "Autrum" or "Autrim,"[a] "Hutson" for "Hudson,"[b] form no variance. A special verdict, finding the name to be Rich'd, when in fact it was Richard, is not fatally defective.[c] But it has been decided that "M'Cann" and "M'Carn,"[d] "Shakespeare" and "Shakepeare,"[e] "Chambles" and "Chambless,"[f] "Sedbetter" and "Ledbetter,"[g] "Dougal McInnis" and "Dougal McGinnis,"[h] "Tabart" and "Tarbart,"[i] "Burrall" and "Burrill,"[j] "Shutliff" and "Shirtliff,"[k] "Prison" and "Brisson,"[l] "Donnel" and "Donald,"[m] "Melvin" and "Melville,"[n] "Ratharine" and "Catharine,"[o] are not the same in sound.

What is *idem sonans* is for the jury on an issue of fact,[p] though it is otherwise on demurrer.[q]

§ 598. Where the indictment charges A. as the principal, and B. as abetting, and the jury find B. principal, and A. as abetting, there is no variance.[r]

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pp R. *v.* Toole, 40 Eng. Law and Eq. 583.

q Reed *v.* State, 16 Ark. 499.

qq U. S. *v.* Hinman, 1 Bald. 292.

rr Williams *v.* Ogle, 2 Str. 889, see ante, § 258; State *v.* Bean, 19 Vt. 530.

s See ante, § 258.

t State *v.* Blankenship, 21 Mo. 504.

u Ibid. 498, *sed quære*.

v R. *v.* Wilson, 2 Car. & Kir. 527; 1 Den. C. C. 184.

w Abithol *v.* Beniditto, 2 Taunt. 401.

x R. *v.* Foster, R. & R. 412.

y Com. *v.* Riley, Thach. C. C. 67.

z State *v.* Patterson, 2 Iredell, 346.

a State *v.* Scurry, 3 Richard, 68.

b State *v.* Hutson, 15 Mo. 512; Chapman *v.* State, 18 Geo. 736.

c Huffman *v.* Com. 6 Randolph, 685.

d R. *v.* Tannett, R. & R. 351.

e R. *v.* Shakspeare, 10 East, 83.

f Ward *v.* State, 28 Alab. 53.

g Zellers *v.* State, 5 Ind. 639.

h Barnes *v.* People, 18 Ill. 52.

i Bingham *v.* Dickie, 5 Taunt. 514.

j Com. *v.* Gillespie, 7 S. & R. 469.

k 1 Chitty, 216.

l Addison, 141.

m Donnel *v.* U. S. 1 Morris, 141.

n State *v.* Curran, 18 Mis. (3 Bennett) 320.

o Swails *v.* State, 7 Blackf. 724.

p R. *v.* Davis, 2 Den. C. C. 231; Cotton *v.* State, 4 Texas, 260.

q State *v.* Haverly, 21 Mis. (6 Bennett) 498.

r State *v.* Mair, Coxe, 453; Foster, 351; R. *v.* Mackally, 9 Coke, 67, a; Plowden, 983; State *v.* Fley, 2 Rice's Dig. 104; see ante, § 109, 594.

In indictments for extortion, or obtaining goods by false pretences, if the evidence shows the money to have been paid *by*, and the pretences to have been made *to* an agent, the indictment is right in averring the money to have been paid by, and the pretences to have been made to the principal.[n]

Persons unknown.—On an indictment for adultery containing two counts, in one of which the offence is charged to have been committed with E. B., and in the other, with a woman whose name was not known, evidence being introduced tending to show that the person of the woman was known, and that her name was E. B., it was held, that if the jury doubted, upon the evidence, whether the true name of the woman was E. B., they might find the defendant guilty on the second count.[o]

When the allegation of the indictment is that a third person was unknown, it is enough if it appear in proof that such third person was unknown at indictment found, though he became known afterwards.[p] But a complaint for unlawfully selling intoxicating liquor to a person unknown, on which the defendant is convicted before a justice of the peace, or police court, on proof of a sale to one person, is not supported, on the trial on appeal, by proof of a sale to a different person.[pp] In an indictment for forgery, the forged note was alleged to have been passed to A. B. R. Proof at the trial that R.'s name was Alexander B. R., but that he was often called A. B. R. It was held, there being no allegation that R.'s Christian name was unknown, that the variance was fatal.[q]

In former chapters the pleading of misnomer is discussed as follows:—

Misnomer of corporations, § 233.
Alias dictus, § 237.
Middle names, § 238.
Abbreviations and initials, § 239.
Additions generally, § 243.
"Junior" and "Senior," § 249.
Averment of parties as unknown, § 242.
General practice when misnomer is alleged, § 259.
Plea in abatement, § 536.

III. Time and place.

§ 599. The time of the commission of an offence laid in the indictment is not material, and does not confine the proofs within the limits of that period; the indictment will be satisfied by proof of the offence by any day anterior to the finding.[qq] Several exceptions, however exist, which have

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[n] Com. *v.* Bagley, 7 Pick. 279; Com. *v.* Call, 21 Pick. 515; Staughton *v.* State, 2 Ohio St. R. (N. S.) 562; ante, § 594.

[o] Com. *v.* Thompson, 2 Cushing, 551; see ante, § 242, 250–9, as to averment of "person unknown."

[p] Ante, § 159–160; Com. *v.* Hendrie, 1 Gray, 503.

[pp] Com. *v.* Blood, 4 Gray (Mass.) 31.

[q] Zellers *v.* State, 7 Ind. 659.

[qq] Ante, § 261; Oliver *v.* State, 5 Howard, Miss. R. 14; Com. *v.* Alfred, 4 Dana, 496; People *v.* Van Santvoord, 9 Cowen, 660; 1 Ch. C. L. 557; State *v.* Munger, 15 Verm.

been already noticed.[r] Wherever deeds, bills of exchange, bank notes, or promissory notes of any kind whatever, are set forth, it is essential that the *date*, if stated, should correspond with the evidence.[s] Where, also, any time stated in an indictment is to be proved by a matter of record, a variance will be fatal.[t] Thus, in an indictment for perjury, the day in which the perjury was committed must be truly laid.[u] So, also, it must appear that the offence is not barred by the statute of limitations.[uu]

§ 600. Where time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed in the night time,[v] although the day on which the offence is charged to have been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment.[w] In murder, also, the death must be proven to have taken place within a year and a day from the time at which the stroke is proven to have been given.[x]

The pleading of Time is discussed elsewhere under the following heads:—

Precision necessary in statement, § 264.
Initials and numerals, § 265.
Double and obscure dates, § 266.
Historical epochs, § 269.
Hour, § 270.
Repugnant, future, or impossible dates, § 273.
Where date is material, § 275.
Limitation of prosecutions, § 436.

§ 601. *Place and venue.*—There is no necessity to prove that the facts given in evidence occurred in the parish or place therein alleged; it is suffi-

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R. 291; Com. *v.* Braynard, Thacher's C. C. 146; Johnson *v.* U. S. 3 M'Lean, 89; State *v.* Woodman, 3 Hawks, 384; Jacobs *v.* Com. 5 S. & R. 316; State *v.* Baker, 4 Redding, 52; Com. *v.* Dillane, 1 Gray, 483; U. S. *v.* M'Cormick, 4 Cranch C. C. R. 104; Com. *v.* Kelly, 10 Cush. (Mass.) 69; State *v.* Newsom, Jones' Law (N. C.) 173; Medlock *v.* State, 18 Ark. 363; People *v.* Littlefield, 5 Cal. 355; State *v.* Porter, 10 Rich. Law. (S. C.) 145. Mr. Amos ("Great Oyer," &c., 247) animadverts with great sharpness on that "prudery" which makes the law strain at the variance of a letter in a proper name, and yet swallows what is a great deal more material, a variance in a date. To this the only answer is, that the "prudishness," bad as it is, would be much worse, if a man was to be acquitted, if the days of the month, or even the month of the year—the most volatile of all items of recollection—escaped the witness' memory. It is said, however, that while under an indictment for the single commission of a crime, time is not a material allegation, the prosecution must solicit some one commission of the alleged crime, before evidence is produced, which then becomes the offence charged and the only one to be tried. People *v.* Jenness, 5 Mich. 305.

[r] Ante, § 271–5; 2 Russ. on Crimes, 802.

[s] Coxon *v.* Lyon, 2 Campb. 307; Freeman *v.* Jacob, 4 Campb. 209; Archb. C. P. 9th edit. 90; 3 B. & C. 45; 1 Greenl. on Ev. sec. 56; see ante, § 275.

[t] Grey *v.* Bennet, 1 T. R. 656; Pope *v.* Foster, 4 T. R. 590; Woodford *v.* Abbey, 11 East, 508; Restall *v.* Stratton, 1 H. Bl. 49; 2 Saund. 291; 1 Archb. C. P. 9th ed. 90, post, § 609.

[u] U. S. *v.* M'Neal, 1 Gal. 387; U. S. *v.* Bowman, 2 Wash. C. C. R. 282; ante, § 559.

[uu] Ante, § 445.

[v] What the "night time" is, is in Massachusetts defined by statute; post, § 1592, &c.

[w] See ante, § 270.

[x] 2 Hawk. c. 23, s. 90; Archb. C. P. 9th ed. 90, a; 1 Dev. 139; post, § 1070.

cient to prove that they occurred within the county or other extent of the court's jurisdiction,[y] otherwise the defendant must be acquitted. If the evidence raises a violent presumption that the offence for which the prisoner is indicted, was committed in the county where he is tried, it is sufficient.[z] Thus on a trial for forgery, if an instrument from its face purports to be made in Charleston, S. C., and it is proved that the prisoner at its date was there, and had the same in his possession, it is sufficient evidence to show that it was made there.[a] But where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived at Somersetshire, on an indictment against him for forgery of the bill in Wiltshire, this was holden not to be sufficient evidence of the offence having been committed in that county.[b] And where a deed, charged to be forged, and purporting to be made in the county of Harris, represented the grantor to be a resident of Galveston, and the grantee (the indicted forger), of the county of Milam, and there was no evidence of the residence of the latter elsewhere, the court held that the evidence given was not sufficient to authorize the jury to find that the forgery was committed in Anderson County, where the venue was laid.[bb]

§ 602. When the offence is brought home to the proper county, the acts of the prisoner, connected with the charge against him, are admissible in evidence.[c]

If there be no such minor locality as that stated, it is immaterial.[d] Where, however, the place is stated as matter of local description, and not as venue, it becomes necessary to prove it as laid.[e] Thus, for instance, in an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like, if there be the slightest variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted.[f] So in an action for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water, called T., the error is material.[g] So where, in an indictment for arson, the tenement was avowed to be in the sixth ward of the city of New York, whereas it was in the fifth, the indictment was held bad.[h] But where an indictment for larceny charged that the offence was committed in a vessel in the *first* ward of the city of New York, and it appeared that the vessel was

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[y] Ante, § 277; 2 Hawk. c. 25, s. 84; 2 Russ. on Crimes, 799.
[z] State *v.* Calvin, Charlton, 152.
[a] State *v.* Jones, 1 M'Mul. 236.
[b] R. *v.* Crocker, 2 New Rep. 87; see R. & R. 99, n.
[bb] Anderson *v.* State, 14 Texas, 533.
[c] 1 Phil. Ev. 206; Moody *v.* State, 7 Blackf. 424.
[d] R. *v.* Woodward, 1 Mood. C. C. 323.
[e] R. *v.* Cranage, Salk. 385; 2 Stark. Ev. 1571; State *v.* Colton, 4 Foster (N. H.) 143; 2 Russ. on Crimes, 801.
[f] Archb. C. P. 9th ed. 91; Wilson *v.* Gilbert, 2 B. & P. 281; post, § 1555–65, 1608.
[g] Shaw *v.* Wrigley, 2 East, 500.
[h] People *v.* Slater, 5 Hill, 501.

lying in the river at a wharf of the *third* ward, it was held not to be a material variance.[1]

Poisoning in one county and death in another.—In Pennsylvania the Revised Act (1860), provides as follows: If any person hereafter shall be feloniously stricken, poisoned, or receive other cause of death in one county, and die of the same stroke, poisoning or other cause of death in another county, then an indictment found therefor by jurors of the county where the death shall happen, shall be as good and effectual in law, as well against the principal in such murder as against the accessary thereto, as if the stroke, poisoning or other cause of death had been given, done or committed in the same county where such indictment shall be found; and the proper courts having jurisdiction of the offence shall proceed upon the same as they might or could do in case such felonious stroke, poisoning or other cause of death, and the death itself thereby ensuing, had been committed and happened all in one and the same county.[a]

Poisoning in the State and death out of the State.—If any person shall be feloniously stricken, poisoned, or receive other cause of death within the jurisdiction of this State, and shall die of such stroke, poisoning or other cause of death at any place out of the jurisdiction of this State, an indictment therefor found by the jurors of the county in which such stroke, poisoning or other cause of death shall happen as aforesaid, shall be as good and effectual, as well against the principal in any such murder, as against the accessary thereto, as if such felonious stroke, poisoning or other cause of death, and the death thereby ensuing, and the offence of such accessary, had happened in the same county where such indictment shall be found; and the courts having jurisdiction of the offence shall proceed upon the same, as well against principal as accessary, as they could in case such felonious stroke, poisoning or other cause of death, and the death thereby ensuing, and the offence of such accessary, had both happened in the same county where such indictment shall be found.[b]

Of proof of offences committed near county lines.—That in order to obviate the difficulty of proof as to all offences committed near the boundaries of counties, in any indictment for felony or misdemeanor committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, it shall be sufficient to allege that such felony or misdemeanor was committed in any of the said counties; and every such felony or misdemeanor shall and may be inquired of, tried, determined and punished in the county within which the same shall be so alleged to have been committed, in the same manner as if it had been actually committed therein.[c]

Offences on journeys.—That in order to obviate the difficulty of proof as to offences committed during journeys from place to place, in any indictment for felony or misdemeanor committed on any person or on any property,

[1] People *v.* Honeyman, 3 Denio, 121.

[a] Rev. Act, 1860, pamp. 443. [b] Ibid. [c] Ibid.

upon any stage coach, stage, wagon, railway car or other such carriage whatever employed in any journey, it shall be sufficient to allege that such felony or misdemeanor was committed within any county or place through any part whereof such coach, wagon, cart, car or other carriage shall have passed in the course of the journey during which such felony or misdemeanor shall have been committed; and in all cases where the centre or other part of any highway shall constitute the boundaries of any two counties, it shall be sufficient to allege that the felony or misdemeanor was committed in either of the said counties through, or adjoining to, or by the boundaries of any part whereof such coach, wagon, cart, car, or other carriage shall have passed in the course of the journey during which such felony or misdemeanor shall have been committed; and in any indictment for any felony or misdemeanor, commited on any person or on any property on board any vessel whatsoever, employed on any voyage or journey on any navigable river, canal or inland navigation, it shall be sufficient to allege that such felony or misdemeanor was committed in any county or place through any part whereof such vessel shall have passed in the course of the voyage or journey during which such felony or misdemeanor shall have been committed; and in all cases where the side or bank of any navigable river or creek, canal or inland navigation, or the centre or other part thereof, shall constitute the boundary of any two counties, it shall be sufficient to allege that such felony or misdemeanor was committed in either of the said counties through, or adjoining to, or by the boundary of any part thereof, such vessel shall have passed in the course of the voyage or journey during which such felony or misdemeanor shall have been committed; and every such felony or misdemeanor committed in any of the cases aforesaid, shall and may be inquired of, tried, determined and punished in the county or place within which the same shall be so alleged to have been committed, in the same manner as if it had actually been committed therein.

§ 603. The venue in homicide is the county where the blow was struck, nor does it now matter that the deceased died in another county.[j]

When any portion of an offence is committed within a particular county, that county has jurisdiction over the whole case; as when an offer was made of a bribe, in a letter directed to New York, and put in the Philadelphia post-office, it was held that the district of Pennsylvania had jurisdiction.[k]

In cases of larceny and of conspiracy, as will be seen hereafter, the venue may be laid, in the first, in any county through which the stolen property was carried, in the second, wherever any overt act was committed, or any actual combination is proved to have taken place.[l]

§ 604. A. was indicted in the city of New York for obtaining money from a firm of commission merchants in that city, by exhibiting to them a fictitious receipt, signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce, for the use of and subject to the order of, the

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[j] Riley *v.* State, 9 Humph. 646; R. *v.* Burdett, 4 B. & Ald. 95, 173; though see Com. *v.* Linton, 2 Va. Cases, 205; post, § 1052.

[k] U. S. *v.* Worrall, 2 Dall. 388; Whart. St. Tr. 189.

[l] See post, § 1815, &c.

firm. The defendant pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been within the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by being presented to the firm in New York by an innocent agent of the defendant, employed by him while he was a resident of and actually within the State of Ohio. It was held that the plea was bad, and that the defendant was properly indicted in the city of New York.[m]

§ 605. Where threatening letters, or libels, or forged instruments, are written in one county, and sent by mail into another, and there received by the person to whom addressed, an indictment therefor should be found in the latter,[n] though it seems an indictment lies also in the county where the letter was mailed.[nn]

When the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, 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 prisoner's address in Kent, it was held that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the post-master in Middlesex his agent to receive it there for him; and that consequently there was a receipt of the money order by the prisoner.[o] A challenge to fight a duel in another State is as indictable as a challenge to fight a duel in the State where the challenge is sent.[p]

IV. WRITTEN INSTRUMENTS AND RECORDS.[q]

§ 606. The mere variance of a letter, where a written instrument is required to be set forth, will not be fatal, if the variance does not make a word different in sense and grammar, or a different name.[r] In matter of inducement, a substantial description will suffice, and a technical and formal variance will not be fatal,[s] as an indictment for perjury, committed upon the trial of an indictment for an assault, if the latter proceeding is set forth, and the word *depaired* used for *despaired*, the mistake will not be material.[t] In New York, as has been noticed, "an," in a perjury indictment, was held no variance from "the."[u] Even under the word "*tenor*," in an assignment of perjury, the term *undertood*, instead of *understood*, is not a fatal mistake,[v] because it does not alter the sense, by changing one word for another. In

[m] Adams v. People, 1 Const. 173; S. C. 3 Denio, 190; see, also, Com. v. Gillespie, 7 Serg. & R. 469; ante, § 278.
[n] People v. Griffin, 2 Barb. Sup. Ct. R. 427; Com. v. Blanding, 3 Pick. 304; R. v. Girdwood, 1 Leach, 142; People v. Rathburn, 21 Wend. 533.
[nn] Post, § 2556.
[o] R. v. Jones, 14 Jur. 533; 1 Eng. R. 533.
[p] State v. Farrier, 1 Hawks. 487; State v. Taylor, 1 Const. R. 107, 3 Brev. 243.
[q] See ante, § 305–6–9.
[r] U. S. v. Hinman, 1 Bald. 292; ante, § 309, § 591.
[s] 1 Greenleaf on Ev. s. 70; § 305–6–7–8–9, 405–6–7.
[t] 1 Leach, 192; Dougl. 193, 194.
[u] People v. Warner, 5 Wend. 271; ante, § 407.
[v] 1 Leach, 134; Dougl. 193, 194.

the same way "Keen" for "Keene," and "promise" for "promised," have been held immaterial.[w] But the omission of "evening" after the word "Tuesday," was held fatal.[x]

§ 607. It was held a variance where the instrument alleged to be forged was set out as an acquittance, or discharge for forty-eight dollars, and the paper on its face showed an order for forty-eight dollars, but contained on its back a further order for one dollar.[y]

Where an indictment charged that an alleged counterfeit bill was a note purporting to be a note of the P. & M. Bank of South Carolina, which was the name given by the charter, but the tenor of the note as set forth, was "the President, Directors & Co." as in the note, it was held that the statement in the note was a mere designation of the persons composing the corporation, who made themselves liable for the payment of the note, and that there was no variance or repugnancy between the tenor and purport.[z] But an indictment for forging a writing, describing the same as purporting to be signed by the President and Directors of a bank, and setting out the forged writing verbatim, but upon the face of it not appearing to have been by order of the President and Directors, is bad.[a]

In an indictment for forging a railroad ticket, expressed on its face to be "good for this day only," a description of the ticket as signifying to the holder that it must be used continuously, and without stopping at intermediate stations, after once entering the cars, is a fatal variance.[aa]

Where a forged paper is passed by a prisoner, bearing date in 1828, and immediately after, with the knowledge of the holder, the prisoner alters the date to 1827, and the indictment sets forth its tenor and describes it as dated in 1827, it was held that the paper was proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828 when passed.[b]

On the trial of an indictment for passing a counterfeit bank note, the prisoner moved to exclude the note produced from going in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, did not appear on the note produced; the attorney for the commonwealth proved that when he drew the indictment, he had been able to make out the name on the note from his knowledge that one of the firm of engravers bore that name, though he could not say he would have been able to do so without the knowledge of the fact, but that the word had since become indistinct, he supposed by handling the note; the court below thereupon overruled the motion to exclude, and permitted evidence to be given of the note thus produced. It was held by the Court of Errors that it was right for the court below to do so.[c]

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[w] Com. *v.* Riley, Thach. C. C. 67; Com. *v.* Parmenter, 5 Pick. 279; see ante, § 305, 6, 405, 6, 7.

[x] Com. *v.* Buckingham, Thach. C. C. 29.

[y] State *v.* Handy, 20 Maine, 81.

[z] State *v.* Calvin, Charlton, 151.

[a] State *v.* Showley, 5 Hayw. 256.

[aa] Com. *v.* Ray, 3 Gray (Mass.) 441.

[b] Hoffmann *v.* Com. 9 Randolph, 685.

[c] Buckland *v.* Com. 8 Leigh, 732; ante, § 306.

It has been ruled in Alabama, that a demurrer to an indictment for forgery, on account of a variance between the instrument described therein, and that offered in evidence at the trial, cannot be considered by the court, unless oyer of the instrument is craved.[d] But the proper course is not to demur, but to take advantage of the variance under the plea of not guilty.

§ 608. Where the instrument on which the indictment is founded is destroyed, lost, or in the possession of the defendant before bill found, it will be sufficient, as has been already seen, to set forth the substance and effect of the instrument, averring at the same time, as an excuse for its non-publication, its loss, destruction, or detention, as the case may be. In such case it will be admissible on trial to give parole evidence of the instrument, and such evidence, if there be no substantial variance, will sustain the indictment.[e] In England, the practice is to give notice to the prisoner to produce the writing at the assize, so that it may be brought before the grand jury. Such notice, however, it would appear from the cases in this country, is not considered necessary wherever the indictment in itself is a notice.[f] Thus, on a trial of an indictment for stealing a bank bill, where the bill is in the defendant's possession, it is not necessary to account for the non-production, the fact of the indictment being found being sufficient notice to the defendant to produce.[g] So though an indictment for passing counterfeit money purport to set forth the counterfeit note according to its tenor, and contain no averment of its loss or destruction, the production of the note may be dispensed with, upon proof that the same has been mutilated and destroyed by the defendant, and other evidence of its contents may be admitted.[h]

§ 609. In the setting forth of records great care is necessary, as any variance will be fatal.[i] The rule in criminal cases, in this respect, is the same as in civil actions. Thus, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th of February, 1791, came on to be tried, and by the record, when produced, the trial appeared to have been on a different day, the plaintiff was nonsuited, although the day was laid under a *videlicet.*[j] So, where in an indictment for perjury, a variance appeared between the day on which the false oath was averred to have been taken and the day as proved by the record, the variance was held fatal.[k] So, an allegation that the plaintiff was acquitted by a jury in the court of our lord the King, before the King himself at Westminster, before the Chief Justice, and discharged thereupon by the court, was holden

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[d] Butler *v.* State, 22 Ala. 42.

[e] R. *v.* Haworth, 4 C. & P. 254; R. *v.* Hunter, 4 C. & P. 128; People *v.* Kingsley, 6 Cow. 522; 8 Mass. 110; People *v.* Badgeley, 16 Wend. 53; State *v.* Parker, 1 Chipman, 298; State *v.* Potts, 4 Halsted, 293; Pendleton *v.* Com. 4 Leigh, 694; U. S. *v.* Britton, 2 Mason, 468; Bucler *v.* Jarrett, 5 Bos. & Pull. 145; Howe *v.* Hall, 14 East, 275; Thompson *v.* State, 30 Alab. 28; see ante, § 311; post, § 657.

[f] People *v.* Kingsley, 6 Cowen, 522; People *v.* Badgeley, 16 Wend. 522; State *v.* Potts, 4 Halst. 293; Pendleton *v.* Com. 4 Leigh, 694.

[g] People *v.* Holbrook, 13 Johns. 90; Com. *v.* Messinger, 1 Binney, 274.

[h] State *v.* Potts, 4 Halsted, 26.

[i] See ante, § 308; post, § 2269.

[j] Pope *v.* Foster, 4 T. R. 590; Woodford *v.* Ashley, 11 East, 508; 2 Saund. 291, b.

[k] U. S. *v.* Bowman, 4 Wash. C. C. R. 382; U. S. *v.* M'Neal, 1 Gallison, 387.

not to be proved by a record stating the trial to have been at *nisi prius*, and the plaintiff to have been discharged by the court in banc.[1]

The subject of the pleading of written instruments and records has been already considered under the following heads :—

1st. Where the instrument, as in forgery and libel, must be set out in full, § 305.
  (*a*) In such case literal exactness is necessary, § 306.
  (*b*) "Tenor" "Purport," and "Substance," § 307.
  (*c*) What variance is fatal, § 309.
  (*d*) Quotation marks, § 310.
  (*e*) Lost, destroyed, obscene, or suppressed writings, § 311.
  (*f*) When any part may be omitted, § 312.
  (*g*) Where the instrument is in a foreign language, or is on its face insensible, § 313.
2d. Where the instrument, as in larceny, &c., may be described merely by general designation, § 314.
  (*a*) U. S. Courts, § 316.
  (*b*) Massachusetts, § 319.
  (*c*) Connecticut, § 320.
  (*d*) New York, § 321.
  (*e*) Pennsylvania, § 325.
  (*f*) New Jersey, § 331.
  (*g*) Maryland, § 332.
  (*h*) North Carolina, § 333.
  (*i*) Georgia, § 335.
  (*j*) Alabama, § 336.
  (*k*) Mississippi, § 337.
  (*l*) Missouri, § 338.
  (*m*) Tennessee, § 339.
  (*n*) Ohio, § 340.
3d. What general legal designation will suffice, § 341.
  (*a*) "Purporting to be," § 342.
  (*b*) "Receipt," § 343.
  (*c*) "Bill of Exchange," § 344.
  (*d*) "Promissory note," § 345.
  (*e*) "Bank note," § 346.
  (*f*) "Money," § 347.
  (*g*) "Goods and chattels," § 348.
  (*h*) Warrant order or request for the payment of money, § 349.

V. Goods, numbers, and sums.[m]

§ 610. In an indictment for an offence relating to personal property the evidence must correspond with the description of the goods in the indictment; as, in larceny, an indictment for stealing a pair of shoes, cannot be supported by evidence of a larceny of a pair of boots.[n] And this will be the case even when the goods are described in the indictment with unnecessary particularity, unless the unnecessary part of the description can be rejected as surplusage.[o]

An indictment for an assault with a "basket knife," with intent to kill, is supported by evidence of a "basket iron."[p]

§ 611. In another case, defendant was indicted for stealing "a shovel

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[1] Woodford *v.* Ashley, 2 Camp. 193; 11 East, 508.

[m] See ante, § 254–8.

[n] Archb. C. P. 66; People *v.* Jackson, 8 Barbary, S. C. 657; Com. *v.* Wentz, 1 Ashmead, 269; Com. *v.* James, 1 Pick. 376; ante, § 355.

[o] R. *v.* Edwards, R. &. R. 497; as to surplusage, see post, § 622, 628.

[p] State *v.* Dame, 11 N. Hamp. 271.

plough," but it was proved that he only stole the iron part of what is called a shovel plough; and, although the judge below was of opinion that the evidence did not support the indictment, the jury, by his recommendation, found the prisoner guilty, that the point might be decided by the Court of Appeals. That court granted a new trial, on the ground, that the Circuit judge should have left it to the jury to determine whether the thing stolen was, according to common understanding, a shovel plough, as charged in the indictment.[q]

Where a person was indicted for uttering counterfeit coin intended to resemble and pass for "a groat," and all the witnesses for the prosecution, except the inspector of coin at the mint, called it a fourpenny piece, but the inspector called it a groat, and said he believed that it had had that name from the earliest period, and added, that the original groat of Edw. III.d's reign was larger and heavier than the coin in question; and that, in the queen's proclamation, these coins were called both groats and fourpenny pieces, but the proclamation was not produced, and the inscription on the coin itself was "fourpence;" it was held, that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and fourpenny piece were the same, the prisoner was rightly indicted, and might be convicted.[r]

An indictment charging a stealing, of one or more specific thing or things, is not supported, except by proof of some one or more of the specific things so charged. Therefore an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns, of the value of 70*l.*, 140 pieces, &c., called half sovereigns, &c., 500 pieces, &c., called crowns, &c., is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins charged to have been stolen.[s]

A. supplied the materials and superintended the building of some houses on his own freehold estate, with the object of letting or selling the houses; he also erected a building about twenty-four feet square, with slated roof, wooden sides, and glass windows. This was used as a store-house for seasoned timber, as a place of deposit for tools, and as a workshop, where timber was worked up into its proper form, and prepared for use. The prisoner wilfully set fire to this building—it was held that in the indictment the building was correctly described as a shed.[t]

A defendant cannot be convicted under a statute of stealing bonds, if the instrument stolen prove to be simple contracts.[u]

An indictment in 15 Geo. II. c. 34, and 14 Geo. II. c. 6 (which made it a felony to steal any ox, cow, or heifer), charging the defendant with stealing a cow, proof of its being a heifer will not suffice; for the statute having men-

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[q] State *v.* Sansom, 3 Brev. 5.
[r] R. *v.* Connell, 1 C. & K. 190.
[s] R. *v.* Bond, 1 Den. C. C. 517; ante, § 354.
[t] R. *v.* Amos, 1 Eng. R. 592. S. C. Den. C. C. 85.
[u] People *v.* Wiley, 3 Hill, 194.

tioned both cow and heifer, proved that the words were not considered by the legislature as synonymous.[v]

An indictment for stealing a sheep is supported by proof of the stealing of any sex or variety of that animal, for the term is nomen generalissimum.[w]

On an indictment for stealing a horse, proof that it was a gelding is a fatal variance, the statute making a distinction between horses and geldings.[x] In Delaware, it is said that evidence of stealing a lamb, will support an indictment for stealing a sheep.[y] And in south Carolina, *horses* was construed to contain *mares*;[z] though in the same State it was ruled that under the statute against *hog* stealing, an indictment for stealing a *pig* could not be sustained.[a]

§ 612. A variance in the number of the goods, if the precise number stated does not constitute the essence of the offence, is immaterial. The proof of any one of several articles duly pleaded will sustain a verdict.[b] At the same time where a series of special coins are averred, and the jury find the defendant guilty of stealing *some* of the coins averred, but declaring that they are not able to specify which, the conviction cannot be sustained.[c]

§ 613. It is in general unnecessary to prove the value laid in the indictment, unless the precise sum forms the essence of the offence, or is stated as a matter of description.[d] Thus, in an indictment for extortion, or taking a greater brokerage than is allowed by the act of Parliament, it is not necessary to prove the taking of the precise sum laid.[e] But if the value of the property is essential to constitute an offence, it must be proved to have been sufficient for that purpose. In larceny, the value may be inferred from the general testimony, without precise proof.[f]

On an indictment charging the larceny of several articles collectively, with only a gross value assigned, no judgment can be entered on a conviction for stealing a part.[g]

In an indictment under the Rev. Sts. c. 126, § 14, it was alleged that the defendant broke and entered "the city hall of the city of Charleston;" this is a sufficient averment that the property of the building alleged to be broken and entered is in the city of Charleston.[h]

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[v] R. *v.* Cooke, 2 East, P. C. 617; Leach, 123; see ante, § 377.

[w] 1 Greenleaf on Evid. sec. 65; M'Cully's case, 2 Lewin, C. C. 272; R. *v.* Spicer, 1 Dennis, C. C. 82; 1 Car. & K. 699.

[x] Hooker *v.* State, 4 Ohio, 350; Turley *v.* State, 3 Hump. 323; see ante, § 377.

[y] State *v.* Tootle, 2 Harrington, 541; see R. *v.* Spicer, 1 Car. & K. 609.

[z] State *v.* Dunnanent, 2 Brevard, 9.

[a] State *v.* M'Lain, 2 Brevard, 443; ante, § 353, &c.; and see R. *v.* Loom, M. C. C. 160; R. *v.* Ruddifoot, R. & M. 247; R. *v.* Beaney, R. & R. 416; R. *v.* Welland, R. & R. 494.

[b] See ante, § 361, 391; post, § 619–628; Burn's Justice, 29th ed. by Ch. & Bears, title, Evidence.

[c] R. *v.* Bond, 4 Cox, C. C. 231; 1 Den. C. C. 517.

[d] Com. *v.* Morrill, 8 Cush. 571; ante, § 362.

[e] R. *v.* Gilham, 6 T. R. 265; Grimwood *v.* Baritt, Id. 462; Pope *v.* Foster, 4 T. R. 590.

[f] Post, § 1837.

[g] Hope *v.* Com. 9 Met. 134; see O'Connel *v.* Com. 7 Met. 460; see ante, § 354–362.

[h] Com. *v.* Williams, 2 Cushing, 583.

The questions of pleading falling under this head, have already been considered as follows:—

1st. Indefinite, insensible, and lumping descriptions, § 354.
2d. Value, § 362.
3d. Money or coin, § 363.

VI. Negative Averments.[i]

§ 614. Where, in a statute, an exception or proviso qualifies the description of the offence, the general rule is, as has been seen, that the indictment should negative the exception or proviso.[j] In such cases, when the subject of the exception relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence;[jj] but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge, as within the knowledge of the defendant, the prosecutor must prove the negative.[k] Thus it is incumbent on the defendant, in an indictment for selling liquor by the small, to prove he is licensed.[l] So, informations upon the game laws must negative the defendant's qualifications to kill game; but this negative need not be proved upon the part of the prosecution; on the contrary, the defendant must prove the affirmative of it as matter of defence.[m] So informations for selling ale without a license must negative the existence of a license, but the informer need not prove the negative.[n] And the defendant in an indictment for trading as a hawker and peddler without a license, must prove that he has a license.[o] Whether in such case the defendant must take out his defence beyond reasonable doubt, or whether the jury are to take the whole case altogether, and give the benefit of any doubts as to any part of it to the defendant—in other words, whether in such case the burden of proof shifts—has been much discussed.[p] The better opinion seems to be that in such case the burden is on the defendant.

In an action for a penalty for practising as an apothecary without having

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[i] See ante, § 378–80. [j] Ibid. [jj] State *v.* McGlynn, 34 N. Hamp. 422.

[k] 2 Russ. on Crimes, 769; 1 Greenleaf on Ev. sec. 79.

[l] Post, § 708; State *v.* Morrison, 3 Dev. 299; State *v.* Crowell, 25 Maine, 177; Wheat. *v.* State, 6 Mis. 455; Shearer *v.* State, 7 Blackf. 99; Com. *v.* Thurlow, 24 Pick. 374; R. *v.* Turner, 5 M. & S. 206; State *v.* Morrison, 3 Devereux, 299; Schmidt *v.* State, 14 Missouri, 137; Shearer *v.* State, 7 Blackf. 99; State *v.* Whittier, 21 Maine, 341; State *v.* Churchill, 25 Maine, 306; U. S. *v.* Hayward, 2 Gallis. 485; Gening *v.* State, 1 M'Cord, 573; State *v.* Woodward, 34 Maine, 171; Haskill *v.* Com. 3 Ben. Mn. 342; State *v.* Woodward, 34 Maine, 293; though see Elkin *v.* Janson, 13 Mees. & W. 662; R. *v.* Stone, 1 East, 639; Com. *v.* Samuel, 2 Pick. 103; Paley on Convictions, 45; see also an elaborate note on this point in 1 Bennett & Heard Lead. Cas. 347.

[m] R. *v.* Turner, 5 M. & Selw. 205; ante, § 3780; post, § 708, 9, 10, 11, &c.

[n] R. *v.* Hanson, Paley on Convictions, by Dowling, 45, n. 1; U. S. *v.* Hayward, 2 Gal. 499; see 1 Hawk. c. 89, s. 17; Apothecaries' Co. *v.* Bentley, 1 C. & P. 538; R. & M. 159.

[o] R. *v.* Smith, 3 Burr. 1475. [p] See post, § 708-9-10-11, &c.

obtained the requisite certificate, the defendant must prove that he has the certificate.[q]

§ 615. Wherever, as is frequently the case, any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it.[r] So where a party has acted in a public capacity, it will be presumed he was duly appointed; and this, whether the effect of such presumption be to charge himself with some breach of duty, or to charge a third party, with some offence towards him in that particular capacity. Thus, on an indictment for the murder of a constable, in the execution of his duty, it is sufficient that he was known to act as a constable, and his appointment need not be produced.[s] And on an indictment against a letter carrier for embezzlement, under 2 W. IV. c. 4, proof that he acted as a letter carrier will suffice, without producing his appointment.[t]

VII. Divisible Averments.[u]

§ 616. It is sufficient to prove so much of the indictment as shows the defendant to have been guilty of the substantive crime therein stated, though not the full extent charged on him.[v] Thus, on an indictment charging the defendant with having done, and caused to be done, a particular act, it suffices to prove either. So where a man was charged with publishing a libel against magistrates, with intent to defame those magistrates, and also with intent to bring the administration of justice into contempt, Bailey, J., held, that proof of his having published it with either of those intentions, would support the indictment.[w] The offence, however, of which the defendant is convicted, must be of the same class with that with which he is charged.[x] For instance, on an indictment for simple larceny, there cannot be a conviction of receiving stolen goods.[y]

§ 617. Where, as has already been shown, a minor offence is included in a greater, the defendant may be acquitted of the latter, and convicted of the former.[z] In a misdemeanor for assaulting an officer when in execution of his duty, and thereby obstructing public justice, the defendant may be convicted of the simple assault.[a] And where the defendant is charged with an assault with a felonious intent, he may be convicted of the bare assault.[b] On an

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[q] Apothecaries' Co. v. Bentley, 1 C. & P. 538, S. C.; Ry. & Moody, N. P. C. 159.

[r] Williams v. E. I. Company, 3 East, 192; Evans v. Birch, 3 Camp. 10; R. v. Hawkins, 10 East, 216; R. v. Twyning, 2 R. & Al. 386; 1 Greenl. on Ev. sec. 80.

[s] R. v. Gordon, 1 Leach, 515; 1 East, P. C. 312, S. C.

[t] R. v. Barrett, 6 C. & P. 124.

[u] See ante, § 381–91; post, § 627.

[v] R. v. Hunt, 2 Camp. 513; O'Connel v. Reg. 11 C. & Fin. 155; 1 Greenleaf on Ev. sect. 65; 1 Russ. on Crimes, 790; Larned v. Com. 12 Metc. 240; Murphy v. State, 28 Mississippi, 638; see ante, § 381–91; post, § 627.

[w] R. v. Evans, 3 Stark. 35; ante, § 558.

[x] R. v. Westbeer, 1 Leach, 143; 2 Str. 1133; State v. Shoemaker, 7 Miss. 177.

[y] Ross v. State, 1 Blackf. 391.

[z] See ante, § 383–5, 560–5.

[a] Dick. Sess. 351; Com. v. Kirby, 2 Cush. 577; Earned v. Com. 12 Metc. 240.

[b] State v. Kennedy, 7 Blackf. 233; State v. Stedman, 7 Porter, 495; State v. Coy, 2 Aiken, 181; Stewart v. State, 5 Ohio, 542; M'Bride v. State, 2 Eng. (Ark.) 374; see

indictment for killing a sheep, with the intent to steal the whole carcass (now provided against by 7 and 8 Geo. IV. c. 29, s. 25), proof of killing, with intent to steal a part, is sufficient to support the charge.[c] On an indictment for entering and breaking a dwelling-house in the day time and stealing therein, one may be found guilty of stealing in the dwelling-house in the day time, or only of stealing.[d]

§ 618. Where, as in cases of perjury, and of obtaining goods on false pretences, several distinct assignments of perjury or fraud are laid, the indictment will be sustained if any one be proved, if that, by itself, be sufficient to constitute the offence.[e] So, if on an indictment for obtaining goods on false pretences, any one of the false pretences be shown, that one being itself within the statute, and appearing to have been operative in inducing the prosecutor to part with his property, it will be sufficient to support a conviction.[f] The same principle obtains in indictments for blasphemy[g] and treason.[gg]

§ 619. Where there are several articles included in indictments for stealing, &c., proof as to one is enough.[h] Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling.[i] An indictment for embezzling two bank notes of equal value, is supported by proof of the embezzlement of one note only.[j] On an indictment for stealing over $100, one may be convicted for stealing less than $100.[k] And so, too, on an indictment for having in possession more than ten pieces of counterfeit coin, one may be found guilty of having less than ten.[l]

Upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working.[m]

§ 620. Where an indictment contains divisible averments, as that the defendant "formed and caused to be forged," proof of either averment will be sufficient.[n] Thus, a defendant may be convicted of printing and publishing a libel, upon an indictment which charges him with composing, printing, and

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Carpenter *v.* People, 4 Scam. 197; R. *v.* Mitchell, 12 Eng. Law & Eq. 588; ante, § 385–560–565; post, 627; Gillespie *v.* State, 9 Ind. 380.

[c] R. *v.* Williams, R. & M. 107.

[d] Com. *v.* Hope, 22 Pick. 1; Larned *v.* Com. 12 Metc. 240; ante, § 382.

[e] R. *v.* Hill, R. & R. 190; R. *v.* Ady, 7 C. & P. 140; People *v.* Haynes, 11 Wend. 557; Ld. Raymond, 886; 2. Camp. 138, 139; Cro. C. C. 7th ed. 622; State *v.* Hascall, 6 New Hamp. 358; State *v.* Mills, 17 Maine, 211; see Bernie *v.* State, 19 Ala. 23; see ante, § 392.

[f] R. *v.* Hill, R. & R. 190; 1 Greenl. on Ev. sec. 65; post, § 2153, 2158.

[g] Com. *v.* Kneeland, 20 Pick. 206.

[gg] Foster C. L. 194.

[h] Ante, § 361, 391; post, § 628; People *v.* Wiley, 3 Hill, N. Y. 194; Com. *v.* Eastman, 2 Gray, 76; Com. *v.* William, 2 Cush. 583.

[i] R. *v.* Burdett, 1 Ld. Raym. 149; see R. *v.* Carson, R. & R. 303.

[j] R. *v.* Carson, R. & R. 303; 1 Greenl. on Ev. sec. 65; Furneaux's case, R. & R. 335; Tyler's case, R. & R. 402.

[k] Com. *v.* Griffin, 21 Pick. 523.

[l] Ibid.

[m] R. *v.* Bykerdyke, 1 M. & Rob. 197; ante, § 392.

[n] R. *v.* Middlehurst, 1 Bur. 400; Hoskins *v.* State, 11 Geo. 92; ante, § 388.

publishing it.[o] On the same reasoning, where two intentions are ascribed to one act, as, that an assault was committed upon a female, with intent to abuse and carnally know her,[p] proof of either of these intentions will be sufficient.

Where two are charged with a joint and single offence, as, stealing in the dwelling-house, either may be found guilty; but they cannot be found guilty of separate parts of the charge; and if found guilty separately, a pardon must be obtained, or a *nolle prosequi* entered as to the one who stands second upon the indictment, before judgment can be given against the other.[q] But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only.[r] Where, however, the act is not joint, the English practice seems to be to give judgment against the party who is proved to have committed the first felony and acquit the others.[rr]

§ 621. In Massachusetts, it has been held that on an indictment for rape, the prisoner may be convicted of incest or assault and battery.[s] And on an indictment for manslaughter, the defendant may be convicted of assault and battery.[t] But it was held in a prior case, that on an indictment for murder there cannot at common law be a conviction of an assault with intent to murder.[u]

VIII. SURPLUSAGE.

1st. UNNECESSARY WORDS, § 622.
2d. AGGRAVATION OF INDUCEMENT, § 624.
3d. ALLEGATIONS WHICH MAKE UP THE DIFFERENCE BETWEEN A MINOR OFFENCE OF WHICH THE DEFENDANT IS CONVICTED, AND A MAJOR, WITH WHICH HE IS CHARGED, § 627.
4th. ALLEGATIONS OF NUMBER, QUANTITY, AND MAGNITUDE, § 628.
5th. DESCRIPTIVE AVERMENTS, § 629.

1st. UNNECESSARY WORDS.

§ 622. All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out.[v] In Redman's case[w] the indictment alleged that the defendant received

[o] R. *v.* Hunt. 2 Camp. 585; R. *v.* Williams, Id. 646; see State *v.* Locklear; 1 Busbee, 205.

[p] R. *v.* Dawson, Id. 62; People *v.* Cushing, 1 Johns. 320; R. *v.* Hanson, 1 C. & Mars. 334; ante, § 392; post, § 635.

[q] R. *v.* Hemstead, R. & R. 344; O'Connell *v.* R. 11 Cl. & Fin. 155; ante, § 434.

[r] R. *v.* Butterworth, R. & R. 520; ante, § 383.

[rr] R. *v.* Dovey, 2 Den. C. C. 86; 2 Eng. Law & Eq. 532; ante, § 434.

[s] Com *v.* Goodhue, 2 Metc. 193; Com. *v.* Drum, 19 Pick. 479; see ante, § 388.

[t] Com. *v.* Drum, 19 Pick. 479; see ante, § 388. [u] Com. *v.* Roby, 12 Pick. 496.

[v] Leach, 536; 1 T. R. 322; Com. Dig. Pleader, c. 28, 29, F. 12; 4 Co. 412; Mod. 327; People *v.* Lohman, 2 Barb. S. C. R. 235; State *v.* Copenberg, 2 Strobh. 273; State *v.* Brown, 8 Humph. 89; State *v.* Cozens, 6 Iredell, 82; State *v.* Wilder, 7 Blackf. 582; U. S. *v.* Howard, 3 Sumner, 12; State *v.* Noble, 3 Shep. 476; 2 Russ. on Crimes, 786; State *v.* Palmer, 35 Maine (5 Red.) 9; Jillard *v.* Com. 2 Casey, 170; State *v.* Bailey, 11 Foster (N. H.) 521; State *v.* Carrigan, 24 Conn. 296; State *v.* Elliott, 14 Texas, 423; see, as to "Variance," ante, § 592, 599; and as to duplicity and repugnancy, ante, § 381, 395.

[w] Leach, 536.

goods, knowing the said goods to have been feloniously stolen, and upon motion in arrest of judgment, it was holden that the words "to have" might be rejected.[x] So where an indictment alleged that the defendant, Francis Morris, the said goods above mentioned, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he the said Thomas Morris, then and there, well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away; the twelve judges held, that the words, "he, the said Thomas Morris," might be struck out as surplusage, and that the indictment was sensible and good without them.[y] And again, where it was charged that the defendant made an assault on "Henry B." and "him, the said William B. did beat," &c., "and other wrongs, to the said William B. did," &c., "to the damage of the said William B.," the indictment was held good on arrest of judgment.[z] There can, it is said, be no use in requiring proof of allegations, which are wholly impertinent; the identity of those allegations which are essential to the claim or charge, with the proof, is all that is material. Thus, if it were alleged that A., being armed with a bludgeon, and disguised with a visor, feloniously stole, took, and carried away the watch of B., the allegations that A. was armed and disguised being altogether foreign to a charge of larceny, would be wholly rejected, and would require no proof on the trial. So, where an indictment for an assault and battery with an intent to kill, stated that the defendant did bite or cut off the ear of the prosecutor, &c., it was held, that this being merely a circumstance of aggravation, the stating it disjunctively did not vitiate the indictment.[a] In a complaint which alleges that the defendant did make an assault on Lucy Ann Keach, and her did strike with a ferule, "divers grievous and dangerous blows upon the head, back, shoulders, and other parts of the body [of her the said Lucy Ann Keach, whereby the said Lucy Ann Keach, was cruelly beaten and wounded, and other wrongs to the said Lucy Ann Keach, then and there did and committed] to her great damage," the words above inclosed in brackets may be rejected as surplusage, bearing a sufficient charge of an assault on Lucy Ann Keach.[aa]

§ 623. Where the plaintiff alleged, that before the publication of a libel by the defendant, the plaintiff's carriage came in contact with a carriage in which E. S. was riding, and that the accident happened without any default on the part of the plaintiff, and then alleged a publication of a libel of and concerning the accident; and upon the evidence it appeared that the accident did happen through the default of the plaintiff; it was held to be no variance, so as to bar the plaintiff from recovering as to part of the libel, not justified, the allegations being divisible, and the averment, that the accident happened without the plaintiff's default, being an immaterial circumstance.[b]

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[x] R. v. Edwards, Leach, 127.

[y] R. v. Morris, 1 Leach, C. C. 109.

[z] R. v. Crespin, 11 Adolphus & Ellis, N. S. 914; State v. Burt, 25 Vt. (2 Deane) 373.

[a] Scott v. Com. 6 Serg. & Rawle, 224.

[aa] Com. v. Randall, 4 Gray (Mass.) 36.

[b] Ld. Churchill v. Hart, 2 B. & A. 685.

Where an indictment under the act of Congress of 1825, ch. 276, §§ 5, 22, the ownership of the vessel was alleged to be in William Nye and others, instead of Willard Nye and others, it was held that an allegation of the particular ownership was unnecessary and immaterial, and that the misnomer above mentioned was of no consequence; it being sufficient to allege that the owners were citizens of the United States.[c]

So where an indictment alleged a robbery to have been committed in the dwelling-house of A. B., it was held that a variance as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-house.[d]

2d. Aggravation or inducement.

§ 624. The same principle extends to cases where the evidence fails to prove circumstances not altogether impertinent, but which merely affect the magnitude or extent of the claim or charge; and here, although circumstances are alleged,[e] which, if proved, would have been of legal importance, yet, although the evidence failed to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the extent of which it is proved. The principles, remarks Mr. Starkie, which require the cause of action, or ground of offence to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him; and the court is enabled to pronounce on the legal effect of the part which is established as true, by the verdict of the jury, and the record shows the real nature and extent of the right or liability established.[ee] Thus, where an indictment in one count charges a rescue, and also an assault and battery, and the defendant is convicted generally, if the averments, as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the court may proceed to pass judgment upon the verdict, as for an assault and battery.[f] Where an indictment for arson describes the house burned as "the county jail and prison of the county of H., being the house of L. J., sheriff and jailer of the said county," it was held, that the burning of such jail being a felony by the Virginia statute,[ff] whether the jail was properly laid to be the house of the sheriff and jailer or not, that part of the description was unnecessary, and might be rejected as surplusage.[g]

§ 625. In an indictment charging an innholder with suffering persons "to play at cards and other unlawful games," the words "unlawful games" may be rejected as surplusage.[h] So, if such indictment charges the defendant with permitting persons to play "at the game of cards," the words "the

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[c] U. S. *v.* Howard, 3 Sumner, 12; State *v.* Cassady, 1 Richardson, 91.

[d] Pye's case, East's P. C. 785.

[e] See ante, § 298.

[ee] Starkie on Evid. 1550, 1565; U. S. *v.* Howard, 3 Sumner, 12; Cameron *v.* State, 8 Eng. (13 Ark.) 712.

[f] State *v.* Morrison, 2 Iredell, 9; State *v.* Burt, 25 Vt. (2 Deane) 373.

[ff] 1 Rev. Code, ch. 160, p. 4.

[g] Stevens *v.* Com. Leigh, 683.

[h] Com. *v.* Bolkem, 3 Pick. 281.

game" may, in like manner, be rejected.[i] So, where the defendant was charged in that "in and upon one Peddy Harvey did make an assault, and her, the said Peddy Harvey, then and there did beat, wound, and ill-treat, with an intent her, the said Peddy Harvey, &c., to ravish," &c., the clause "and her, the said Peddy Harvey, then and there," &c., may be rejected as surplusage.[j] So, where an indictment against a receiver, alleged the stealing of two bank notes, the property of Stephen Sullivan, and charged the defendant with having received the said notes, the property and chattels of the said Stephen Sullivan; it was objected that the notes, being called property, as to the principal, could not be construed chattels as the accessary; but the judges were unanimously of opinion that the word chattels might be rejected as surplusage.[k]

§ 626. A carrier of the mail may be convicted of an offence punishable generally under the law, though not as carrier; and if he is charged in the indictment as carrier, the word "carrier" will be considered as descriptive of his person and as surplusage.[l]

But while matters of inducement or aggravation need not be exactly proved, whatever is essential to the constitution of the offence must be accurately shown. Thus, where, in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that he had paid a sum of money into the bank, and the proof was, that he said a sum of money had been paid into the bank, without saying by whom; the defendant was acquitted for the variance, Lord Ellenborough holding that there was a difference in substance between the two assertions.[m] But it seems, that when the legal inference from the facts continues the same with those set forth, a variance will not always be fatal. Thus, in an indictment for murder, an allegation that the death was produced with a knife, will be supported by proof that it was produced by a dagger, sword, staff, or the like, or any instrument capable of exerting the same effect.[x] Where a declaration, under the bribery act, alleged that the bribe was to induce White to vote for Mr. Lockyer and Lord Egmont, it was held to be sufficient to prove that the bribe was to give his vote for Mr. Lockyer.[y] And where the indictment charged the defendant with a nuisance in erecting a dam, by reason of which the animal and vegetable substances, brought down the stream, were collected and accumulated, and became offensive, &c., but the evidence showed that the nuisance was caused, not by the means described, but from the alternate rise and fall of water in the pond, or from the action of the sun on the vegetable matter on its margin; it was held, there was no variance, the result and original cause being the same.[z]

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[i] Com. v. Arnol, 4 Pick. 251.

[j] Com. v. Hunt, 4 Pick. 252.

[k] R. v. Morris, Leach, 525; East, P. C. 593, 611; see R. v. Radley, 2 Car. & K. 972; S. C. 1 Den. C. C. 450.

[l] U. S. v. Burroughs, 3 M'Lean, 405.

[m] R. v. Plestow, 1 Camp. 494; see State v. Clark, 3 Foster (N. H.), 429.

[x] R. v. Mackalley, 9 Co. 67 a; Gilb. Ev. 231; Archbold, C. P. 9th ed. 382; post, § 1059.

[y] Coombe v. Pitt, 3 Burr. 1586.

[z] People v. Townsend, 3 Hill, 479.

3d. ALLEGATIONS WHICH MAKE UP THE DIFFERENCE BETWEEN A MINOR OFFENCE OF WHICH THE DEFENDANT IS CONVICTED, AND A MAJOR, WITH WHICH HE IS CHARGED.

§ 627. Under the same principle it is that the class of cases, already referred to, may be ranked, in which a man charged with a greater offence may be convicted of one of lesser degree contained in it.[a] Thus, if A. be charged with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it; the verdict enables the court to pronounce the proper judgment; and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. A familiar illustration is that of assaults upon officers, assaults with battery, or assaults with felonious intent, where, as has been seen, all but the assault may be rejected as surplusage, and the defendant convicted of that alone.[b] And so of indictments for adultery in which it is said there can be convictions for fornication.[c] Again, an indictment charging that the defendant did "embezzle, steal, take and carry away," will be good for larceny, the "embezzle," &c., being rejected as surplusage.[d]

4th. ALLEGATIONS OF NUMBER, QUANTITY AND MAGNITUDE.

§ 628. The same rule applies to allegations of number, quantity and magnitude, where the proof, *pro tanto*, supports the claim or charge. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five; for, in showing that he stole five, evidence is not admitted of a different offence from that charged, but of the same in legal essence, differing only in quantity, and constituting, therefore, a natural, but no legal variance; and the defendant is secured, also, by the fact that he may afterwards plead his conviction or acquittal, notwithstanding the variance as to number.[e] When an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony, in consequence of some other facts essential to that charge, *e. g.*, the intent of the party accused not being averred.[f] Thus, by statute it is a misdemeanor to administer drugs, &c., to a pregnant female, with intent to produce miscarriage; and by statute it is manslaughter to use the same means with intent to destroy the child in case the death of such child be thereby produced. The indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in conclusion, it charac-

[a] See ante, § 381–94, 616–7; Johnson *v.* State, 14 Geor. 55; Cameron *v.* State, 8 Eng. (13 Ark.) 712.

[b] Ante, § 385, 560, 565, 617.

[c] Post, § 2657, *sed quære.*

[d] Com. *v.* Simpson, 9 Metc. 138.

[e] Ante, § 382, 619.

[f] Lohman *v.* People, 1 Const. 379; Hackett *v.* Com. 3 Harris, 95; ante, § 400.

terized the crime as manslaughter; but the only intent charged, was an intent to produce a miscarriage; it was held, that the indictment was fatally defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence. And it seems that a conviction for a misdemeanor under such an indictment would be a bar to a subsequent indictment for the felony.[g]

5th. Descriptive averments.

§ 629. An allegation in an indictment which describes, defines, qualifies, or limits a matter material to be charged, is a descriptive averment, and must be proved as laid.[gg] Thus, in an indictment for resisting a deputy sheriff in the discharge of his duty, an averment that the sheriff was "legally appointed and duly qualified," is descriptive and must be proved; as in such case the whole averment of an assault upon a deputy sheriff cannot be omitted without affecting the charge against the prisoner.[h] And so also a description of the termini of a letter in an indictment for stealing it must be proved as laid.[i]

§ 630. Language merely formal may always be rejected. Thus, the words "then and there," in the concluding part of a charge against one person present abetting a murder, may be considered as surplusage, or referred to the act done, which caused the death, and not to the time and place of the death;[j] and so of the words "languishing did live," in an indictment for murder,[k] and, as has already been seen, the words "*contra formam statuti*," erroneously inserted in an indictment for a common law offence, may be rejected as surplusage.[l] So "goods and chattels" may be thus discharged.[m] But no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage.[n] Thus, on an indictment for stealing a pine log marked with a particular mark, the mark must be proved as alleged, and the description cannot be rejected as surplusage.[o]

IX. Knowledge and intent.

§ 631. In what way knowledge and intent must be averred, has already been considered.[p] How far specific acts of guilt may be put in evidence to

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[g] Lohman *v.* People, 1 Const. 379.

[gg] See State *v.* Canney, 19 N. H. 135; Dick *v.* State, 30 Miss. (1 George), 631; State *v.* Langley, 34 N. H. 529.

[h] State *v.* Copp, 15 N. Hamp. 212.

[i] U. S. *v.* Foye, 1 Curtis, C. C. 362.

[j] State *v.* Fleye, Rice's S. C. Dig. 104; 2 Brevard, 438.

[k] Com. *v.* Gable, 7 Serg. & R. 423; Com. *v.* Bell, Addison, 171, 173. As to rejecting the word "feloniously," see ante, § 388-9.

[l] State *v.* Buckman, 8 N. Hamp. 203; Cruiser *v.* State, 3 Harr. 206; State *v.* Phelps, 11 Ver. 116; and see ante, § 413.

[m] Ante, § 348.

[n] U. S. *v.* Howard, 3 Sumner, 12; Com. *v.* Atwood, 11 Mass. 93; Com. *v.* Tuck, 20 Pick. 356, 364; State *v.* Noble, 15 Maine (3 Shep.) 476; Com. *v.* Hope, 22 Pick. 1; U. S. *v.* Brown, 3 M'Lean, 233.

[o] State *v.* Noble, 15 Maine (3 Shep.) 476; ante, § 299.

[p] Ante, § 297.

prove bad character,[q] and how far such testimony is consistent with the general rule that the evidence must be confined to the issue,[r] will be discussed under future heads.

Under the present head it is proposed to consider guilty acts and declarations so far as they conduce to prove knowledge and intent.

Knowledge and intent, when material, must be shown by the prosecutor.[s] It is impossible, it is true, in most cases, to make them out by direct evidence, unless when they have been confessed; but both may be gathered from the conduct of the party, as shown in proof; and when the tendency of his actions is direct and manifest, he must always be presumed to have designed the result when he acted.[t]

Guilty knowledge.—With regard to *knowledge*, the case in which such evidence is most generally required, are those in which the defendant is charged with having in his possession, or uttering, illegal papers, notes, books, coin, or apparatus for coining. The law in this respect seems to be that evidence of other acts or conduct of a similar character, even though involving substantive crimes, is admissible to prove guilty knowledge.[u] Thus upon a trial of an indictment for passing counterfeit bank notes, proof that the prisoner had, about the same time, passed another note of the same kind which was thought to be a counterfeit, and which he took back, though this note is not produced on trial, is admissible evidence to prove the scienter.[v] It may also be proved by the fact of similar forged orders, or coin, or implements for forging, found in the possession of the defendant, or of an accomplice in passing them.[w]

Having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the prisoner knew the coin was counterfeit and intended to utter it.[ww]

On an indictment charging defendant with having in his possession with intent to pass the same as true, an altered and forged bank note, the govern-

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[q] Post, § 636, 643. [r] Post, § 647, 651.

[s] Wright *v.* State, 6 Yerger, 345.

[t] Dick. Sess. 353; R. *v.* Farrington, R. & R. 207; R. *v.* Philips, 6 East, 464; post, § 712; State *v.* Preswell, 12 Ired. 103; Walls *v.* The State, 7 Blackf. 572; Forsythe *v.* State, 6 Ohio, 19; State *v.* Nixon, 18 Vt. 70; State *v.* Hunter, 8 Blackf. 212; Shover *v.* State, 5 Eng. 299; R. *v.* Johnson, 11 Mod. 62; R. *v.* Jones, 2 B. & Ad. 611; Needham *v.* State, 1 Texas, 139; R. *v.* Firey, 1 Car. & K., 704; Perdue *v.* State, 2 Humph. 494; R. *v.* Price, 3 Per. & D. 421; 11 A. & E. 727; R. *v.* Fursey, 6 Car. & P. 81; Kelly *v.* Com. 11 S. & R. 345; R. *v.* Holroyd, 2 Moody & R. 339; State *v.* Hart, 4 Ired. 246.

[u] Post, "Forgery," § 1452, &c.; see R. *v.* Roebuck, 36 Eng. Law and Eq. 631.

[v] Martin *v.* Com. 11 Leigh, 745; see Spencer *v.* Com. 11 Leigh, 751; Hendricks *v.* Com. 5 Leigh, 708; State *v.* McAlister, 24 Maine, 139; McCartney *v.* State, 3 Ind. 353; Com. *v.* Stearns, 10 Metcalf, 256; U. S. *v.* Craig, 4 Wash. C. C. R. 729; State *v.* Antonio, 2 Tr. Car. R. 776; U. S. *v.* Doeble, 1 Baldwin, 519; R. *v.* Hough, R. & R. C. C. 120; R. *v.* Ball, Ibid. 132; R. *v.* Hodgson, 1 Loomis, 102; R. *v.* Balls, 1 Moody C. C. 470.

[w] Com. *v.* Percival, Thach. C. C. R. 293; State *v.* Turtly, 2 Hawks, 248; U. S. *v.* Harman, 1 Baldwin, 292; U. S. *v.* Burns, 5 McLean C. C. R. 23; U. S. *v.* King, Ibid. 209; R. *v.* Fuller, R. & R. 308.

[ww] R. *v.* Jarvis, 33 Eng. Law and Eq. 567.

ment attempted to show that, soon after the arrest, the wife of defendant was searched, and there were found in her pockets portions of bank notes prepared apparently for similar alterations. There was no evidence of any concert of action between husband and wife in the business of altering bank notes, or that either had knowledge of the facts proved against the other. It was held that the evidence was inadmissible.[x]

§ 632. It was at one time thought that where the second uttering has been made the subject of a distinct indictment, evidence of such uttering might be, in the discretion of the judge,[xx] refused. The better opinion now is that the fact of another indictment being found does not alter the rule.[y]

§ 633. The law appears to be,[z] that in order to enable the prosecutor to give in evidence other utterings subsequent to that charged in the indictment, the notes or bills must be produced,[a] and they must in some way be connected with the principal case, or the notes or bills must be of the same manufacture, and similar. It has lately been held in England, however, that the subsequent uttering of a counterfeit shilling is admissible on an indictment for uttering a counterfeit half crown.[b]

§ 634. Proof of the mere possession of a counterfeit bank bill does not raise the presumption of an intent to pass it, but knowledge of the note being counterfeit, and intent to pass it as good, must be proved.[c]

Declarations respecting a bill which the prisoner had passed, if made after he passed it, are not admissible to prove that such bill was counterfeit, without producing the bill or accounting for its non-production.[d]

The prisoner was indicted for receiving stolen goods, knowing them to be stolen at the time; the prosecution offered evidence of several acts of like character, with a view of showing therefrom a guilty knowledge on the part of defendant. It was held that the evidence was admissible.[dd]

§ 635. *Intent and motive.*—The same evidence is generally admissible to prove intent as to show scienter or guilty knowledge.[e] A defendant's conduct during the *res gestæ*, as his manner at the time of passing the note,[f] or his having passed by several names, is also admissible for the same purpose.[g] But the intent or guilty knowledge must be brought directly home to the

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[x] People *v.* Thorns, 3 Parker C. R. (N. Y.) 256.

[xx] R. *v.* Smith, 2 C. & P. 633; Talfourd's Dicken. Sess. 359; but see R. *v.* Kirkwood, Lewin's C. C. 103; R. *v.* Foster, 29 Eng. Law & Eq. 548; People *v.* Cushing, 1 Johns. 320; ante, § 392, and post, § 640, n. n.

[y] R. *v.* Hodgson, Lewin, 102; R. *v.* Smith, 4 C. & P. 411.

[z] R. *v.* Taverner, Carr. L. 195, and R. *v.* Smith, 4 C. & P. 411; see R. *v.* Millard, Russ. & Ry. 245; and R. *v.* Kirkwood, Lewin, C. C. 103; Com. *v.* Stearn, 10 Met. 256; State *v.* Smith, 5 Day, 175; Hendrick *v.* Com. 5 Leigh, 708; Reed *v.* State, 15 Ohio, 217.

[a] R. *v.* Millard, R. & R. C. C. 245; R. *v.* Forbes, 7 C. & P. 242; R. *v.* Philips, 1 Lewin, C. C. 105.

[b] R. *v.* Foster, 29 Eng. Law & Eq. 548.

[c] Brown *v.* People, 4 Gilm. 439.

[d] Com. *v.* Bigelow, 8 Metc. 235.

[dd] People *v.* Rands, 3 Parker C. R. (N. Y.) 335.

[e] R. *v.* Millard, R. & R. 245; R. *v.* Wylie, 1 N. R. 93; R. *v.* Ball, R. & R. 132; Butler *v.* State, 22 Alab. 43; 1 Greenleaf on Evid. sec. 53; R. *v.* Dossett, 2 Cox, C. C. 243; 2 C. & K. 306; State *v.* Wentworth, 37 N. H. 196; post, § 649.

[f] Butler *v.* State, 22 Alab. 43; post, § 825.

[g] Bayley on Bills, 449; Archbold's C. P. 9th ed. 103.

defendant, and in no case can evidence tending to show it be admitted, until the *corpus delicti* is first clearly shown.

On a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed,[h] if the intent cannot be inferred from the letter itself.[i]

Threats, &c.—On an indictment for murder, former attempts of the defendant to assassinate the deceased are admissible in evidence; so are former menaces of the defendant, or expressions of vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question.[j]

On the other hand, on a charge of murder, expressions of good will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes.[a]

Other attempts.[b]—On an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person.[c]

On an indictment against one for forging a check on a certain bank, and others as his accomplices, evidence of their concert to defraud banks generally is admissible to show conspiracy.[d]

Evidence of a single instance of unlawful gaming, may go to the jury, upon the trial of one indicted as a common gambler, and with other circumstances, *e. g.*, that he displayed gaming implements, &c., might warrant a conviction; while proof of many instances of playing, accompanied with evidence that the accused pursued a lawful calling, and only played for pastime, might not.[e]

Upon an indictment of an overseer for whipping a slave to death, evidence that he struck the father of the slave to prevent his going to her relief after her release, and when she had fallen from the effects of the punishment, is admissible to show malice.[k]

In indictments for adultery it is admissible to prove other acts of illicit intercourse,[l] for rape, former attempts,[m] and for general conspiracies, to show special illegal overt acts other than those pleaded.[n]

On the trial of an indictment for assault and battery, in order to show some motive of resentment on the part of the defendant, it was held competent for

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[h] R. *v.* Robinson, 2 Leach, 749. [i] R. *v.* Boucher, 4 C. & P. 562.

[j] State *v.* Rash, 12 Ired. 382; Johnson *v.* State, 17 Alab. 618; Archbold's C. P. 283; Heath *v.* Com. 1 Robinson, 735; State *v.* Wentworth, 37 N. H. 196; Dunn *v.* State, 2 Pike, 229; post, § 945-6-7.

[a] 1 Phillips on Evid. (London ed. 1843), 470.

[b] See § 727, 945.

[c] R. *v.* Voke, R. & R. 531.

[d] State *v.* Martin, 1 Williams (Vt.), 310. [e] Com. *v.* Hopkins, 2 Dana, 419.

[k] Jordan *v.* State, 22 Geo. 545. [l] Post, § 649. [m] Ibid. [n] Ibid.

the State to prove that the prosecutor had said, in the defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt law," and then to prove further, that the defendant's father had previously been talking about taking the benefit of that act.[o]

Bad character, or independent crimes.—It is under no circumstances admissible for the prosecutor to put in evidence the defendant's general bad character, or his tendency to commit the particular offence charged,[p] nor is it admissible to prove independent crimes, even though of the same general character, except when falling strictly within the exceptions stated above.[q]

Libel.—On an indictment for libel, it is admissible to prove *prior*, but not *subsequent*, libellous writings in reference to the same subject matter.[r]

Marital homicide.—On the trial of a husband for the murder of his wife, the State has a right to prove a long course of ill treatment by the husband towards the wife,[s] and his adultery with another.[t] On an indictment against the defendant for the murder of his wife, where the killing was shown to have taken place on the 8th of July, a witness who had lived near the defendant for about six months, ending the last of May, was offered to prove that while witness had lived there, the prisoner had had frequent difficulties and altercations with his wife. It was held, that the evidence was admissible as tending to show want of affection, and as justifying the jury in inferring that the same state of mind continued after the witness moved away. It was also ruled that evidence was admissible on the question of motive, to show that about six months before the homicide, the wife made a complaint against her husband for an assault, on which he was held to bail.[tt] In a similar case, it was held that it was competent for the government to show, as bearing on the question of motive, that some time before the alleged killing, the wife had complained of her husband as a disorderly person, he having abandoned her, and that after recognizance, &c., he had paid two dollars weekly to the magistrate for her support.[u]

Two intents.—Where there are two intents, one of which is necessary to complete the crime, the fact that the second exists is no defence, but may be treated as surplusage.[uu]

When operative.—On a trial for arson, the prosecuting officer offered evidence to prove that previous attempts to commit the crime had been made, which was admitted on the assurance that he would introduce other evidence to connect the prisoner with the facts proved; but no such evidence was produced. It was held that it was error in the court to leave such evidence to be considered by the jury.[v]

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[o] State *v.* Griffis, 3 Ired. 304.
[p] Post, § 640.
[q] Post, 647-8.
[r] Post, § 2595.
[s] Post, § 639, 648.
[t] State *v.* Rash, 12 Iredell, 382; post, § 648.
[tt] McCann *v.* People, 3 Parker, C. R. (N. Y.) 272.
[u] People *v.* Williams, 2 Parker, C. R. (N. Y.) 84.
[uu] R. *v.* Cox, R. & R. 362; R. *v.* Gillow, 1 Moody, 85; R. *v.* Hill, 2 Moody, 30; R. *v.* Batt, 6 C. & P. 329; R. *v.* Johnson, 11 Mood. 62; R. *v.* Geach, 9 C. & P. 499; Com. *v.* M'Pike, 3 Cush. 181; State *v.* Cocker, 3 Harring. R. 554; State *v.* Moore, 12 N. H. 42; People *v.* Cushing, 1 Johns. 320; ante, § 392.
[v] State *v.* Freeman, 4 Jones, Law (N. C.), 5.

How rebutted.—A. was tried for maliciously burning a barn of B., and there was evidence implicating C. in the offence. To show malice on the part of C. toward B., the prosecution proved that he had, before the fire, commenced a criminal prosecution against B., in which the latter was discharged. It was held that A. could not show in order to disprove malice, that such prosecution was founded on probable cause.[vv]

X. CHARACTER.

1st. DEFENDANT'S GOOD CHARACTER AS A GENERAL DEFENCE, § 636.
2d. DEFENDANT'S PRIOR MISCONDUCT AS PART OF THE CASE OF THE PROSECUTOR, TO PROVE MALICE OR GUILTY KNOWLEDGE, § 639.
3d. CHARACTER OF DECEASED, OR PROSECUTOR, § 641.
4th. WEIGHT TO BE ATTACHED TO CHARACTER, § 643.

1st. DEFENDANT'S GOOD CHARACTER AS A GENERAL DEFENCE.

§ 636. The prisoner will, in all criminal prosecutions, be allowed to call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless such evidence tend directly to the disproof of some of the facts put in issue by the pleadings.[w] In each case the character sought to be proved, must not be general, but such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged.[x] The general object for which such evidence is introduced is to disprove guilt, but it is said in Tennessee that evidence of the mild and pacific habits of the defendant are admissible on a trial for murder, to aid the jury in ascertaining the probable grade of the offence.[y]

§ 637. Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced, it has been said the examination may be extended to particular facts;[z] though this has lately been denied by courts of high respectability,[a] and certainly it is very oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal a series of independent facts, forming each a constituent offence. General rebutting evidence of bad character is, however, received by the American courts.[aa]

If a person on trial for an alleged offence offer no evidence of his good

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[vv] Com. *v.* Vaughan, 9 Cush. (Mass.) 594.

[w] Archb. C. P. 104; 2 Russ. on Cr. 784; R. *v.* Stannard, 7 C. & P. 673; Com. *v.* Hardy, 2 Mass. 307; State *v.* Wells, Coxe, R. 424; Com. *v.* Webster, 5 Cush. 324; Davis *v.* State, 10 Georgia, 101. See this subject discussed, post, § 824.

[x] 2 Rus. Cr. & M. 784; 1 Greenl. on Evid. sec. 54; R. *v.* Clarke, 2 Stark. 241; R. *v.* Hodgson, R. & R. 211; State *v.* Dalton, 6 Missouri (Jones), 12; Douglas *v.* Towsey, 2 Wend. 352.

[y] Carroll *v.* State, 3 Humph. 315.

[z] Com. *v.* Robinson, Thach. Cr. Cas. 230.

[a] Com. *v.* Beale, Phil'a, 1854, Thompson, P. J.; Keener *v.* State, 18 Georg. 194.

[aa] Com. *v.* Webster, 5 Cush. 324; People *v.* White, 14 Wend. 111; Bennett *v.* State, 8 Humphreys, 118; Com. *v.* Sacket, 22 Pickering, 394; though see contra, R. *v.* Burt, 5 Cox, C. C. 284.

character, no legal inference can arise, from such omission, that he is guilty of the offence charged, or that his character is bad.[b]

§ 638. When the defendant introduces evidence for the purpose of proving his general good character previous to the date of the transaction charged against him, and the attorney for the commonwealth introduces evidence to impeach his general character, the latter should not be allowed to inquire of the witness what he had learned of the character of the prisoner previous to the date of the transactions, by conversation had since the said date, with persons acquainted with the prisoner;[c] though it is said in Massachusetts that when the defendant introduces evidence of good character prior to the commission of the offence, the prosecution may rebut by showing what his character was afterwards.[d] Unless, however, he puts his character in issue, the prosecution cannot call witnesses to impeach it;[e] and where the defendant, in part of a confession, said he was an old convict, the court held that part of the confession inadmissible, he not having put his character in issue.[f]

2d. Defendant's prior misconduct as part of the case of the prosecution to prove malice or guilty knowledge.

§ 639. While, however, bad character cannot be put in issue by the prosecution, it is permitted to introduce evidence of prior misconduct where it is relevant either to (1) prior malice towards an individual, or (2) guilty knowledge.[g] Thus it has been already noticed that on the trial of a man charged with the murder of his wife, the State can show, that he had lived in adultery with another woman as well as other acts of maltreatment.[h] So, evidence of previous malice is admissible to show the *quo animo*, or perhaps to lend to circumstantial evidence a motive,[i] and when counterfeit paper is passed, guilty knowledge may be proved in the same manner.[j]

§ 640. It is here, however, that the fundamental distinction begins, for while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove either in this or any other way, that the defendant had a *tendency* to the crime charged.[k] Thus in England it has been held that on the trial of a person charged with an unnatural crime, it was not evidence to prove that the defendant had admitted that he had a tendency to such prac-

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[b] State *v.* Upham, 36 Maine, 261; Ackley *v.* People, 9 Barb. S. C. 609; People *v.* Bodine, 1 Denio, 281; State *v.* O'Neill, 7 Iredell, 294; though see State *v.* McAlister, 11 Shep. 139.

[c] Carter *v.* Com. 2 Virg. C. 169.

[d] Com. *v.* Sackett, 22 Pick. 394.

[e] State *v.* O'Neil, 7 Iredell, 251; Dewit *v.* Greenfield, 5 Ohio, 227; Com. *v.* Hopkins, 2 Dana, 418; Fannin *v.* State, 14 Mis. 386; Bull. N. P. 296; Com. *v.* Webster, 5 Cush. 325; Carter *v.* Com. 2 Virg. Ca. 169.

[f] People *v.* White, 14 Wend. 111.

[g] Ante, § 632-3-4-5, post, § 646-7-8-9.

[h] Ante, § 653; State *v.* Watkins, 9 Conn. 47; Johnson *v.* State, 17 Ala. 618; see also State *v.* Rash, 12 Ired. 382.

[i] State *v.* Wilson, 8 Porter, 511; Cole *v* Com. 5 Grat. 696.

[j] See ante, § 632-3-4-5.

[k] Albricht *v.* State, 6 Wisc. 74.

tices;[1] and so on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves is not admissible for the prosecution.[m] For it would be in entire variance with the usual view of the common law, if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge.[n]

3d. Character of deceased or prosecutor.

§ 641. On the trial of an indictment for homicide, evidence to prove that

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[1] 1 Phillips' Evid. 499; R. *v.* Oddy, 5 Cox C. C. 210; 2 Dennison C. C. 264; 4 Eng. Law & Eq. 572; 1 Russ. on Crimes, 700. And post, § 824, 859.

[m] Dowling *v.* State, 5 Smedes & March, 664.

[n] See State *v.* Kenton, 15 New Hamp. 169. A late writer thus discusses this point: "Nothing can be given in evidence, which does not directly tend to the proof or disproof of the matter in issue. Therefore, as Mr. Phillips lays it down, in his 'Law of Evidence,' it is not allowable, upon the trial of an indictment, to show that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. But where several felonies are so connected together as to form an entire transaction upon an indictment for the one, the other may be proved, to show the character of the transaction. An exception to this general rule appears to prevail in the case of forgery—the prosecutor being allowed to produce evidence of other instances of his having committed the same offence for which he is indicted. Upon a recent trial for uttering a forged bank note, upon the Northern Circuit, before Mr. Justice Cresswell, the counsel for the prisoner raised an objection to the reception of this kind of evidence; but the learned judge admitted it, on the ground that he was bound by precedent. It may be gathered, however, from the important case of Regina *v.* Oddy (5 Cox C. C. 210; 2 Denison C. C. 264; 4 Eng. Law & Eq. 572), argued before the Lord Chief Justice, and four of his learned brethren, in the Court of Criminal Appeal, that the tendency of the courts is, not to extend any further this species of evidence. That was an indictment containing counts for stealing, and for receiving the property of A., knowing it to be stolen. At the trial, it was proved that the cloth mentioned in the indictment had been stolen in the night, between the 2d and 3d of March, A. D. 1851, from a mill, and was the property of the party named in the indictment. The prisoner gave a false account of the manner in which he became possessed of the cloth. The prosecuting counsel proposed to give in evidence of the possession, by the prisoner, of four other pieces of cloth, which had been stolen between the 4th and 5th of December, 1850, from another mill, and which cloth was the property of different owners. Prisoner's counsel objected to the reception of this evidence. The learned Recorder, before whom the case was tried, admitted the evidence. The Lord Chief Justice, in giving judgment in the Court of Criminal Appeal, thought the evidence ought not to have been received, and observed: 'The English law does not permit the issue of criminal trials to depend on this species of evidence. The proposed evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue, namely, that at the time he received these articles, he knew them to be stolen. The cases of uttering with a guilty knowledge, certainly go very far, and I should be very unwilling to apply their principle generally to the criminal law.' It is difficult to draw a distinction in principle, between the reception of such evidence, in the case of uttering and receiving stolen property, without it be in this—that in the former case, a person having previously uttered forged instruments, might be presumed to have a better knowledge of the character of a forged instrument. Where it is necessary to prove malice, acts not included in the indictment are admissible in evidence. Thus, if A. be charged with the murder of B., it is competent to show that A. on other occasions had attempted to assassinate B. On an indictment for rape, the prisoner may give general evidence of the woman's character for want of chastity, and he may even go so far as to show that she has been criminally connected with him before." (Dearsley's Criminal Process, 57.) In 1855, however, Pollock, C. B., Parke, B.; Wrightman, B.; Crompton, B.; and Crowder, J., sitting in the Court of Criminal Appeal, held that on an indictment for uttering a counterfeit half crown, evidence was admissible of the subsequent uttering of a counterfeit shilling. R. *v.* Foster, 29 Eng. Law and Eq. 548.

the deceased was well known and understood generally by the accused and others, to be a quarrelsome, riotous, and savage man, is inadmissible.[o] In the eye of the law, to murder the vilest and most abject of the human race is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law, as above laid down, was distinctly recognized, it has been said that when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, the general character of the deceased may sometimes be drawn into evidence.[p] But the rule undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*, for it would be a barbarous thing to allow A. to give as a reason for his killling B., that B.'s disposition was savage and riotous.[q] The defendant may prove that he was acting in self-defence, or he may exhibit whatever provocations were given to him by the deceased, or he may put in evidence threats and expressions of hostile feeling from the deceased to himself,[r] but he cannot set up general reputation as a defence. Thus, on an indictment against an overseer for the murder of his employer, it is not competent for the prisoner to offer evidence of the general temper and deportment of the deceased towards his overseers and tenants.[s] When, however, it is shown that the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, &c., is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defence, in which the defendant placed himself.[t] And it has been thought admissible to show that the deceased was possessed of preponderating strength, and that his character was so far desperate as to necessitate the extremest precaution on

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[o] State *v.* Field, 14 Maine Rep. 248; Com. *v.* York, 9 Metcalf, 110; State *v.* Hawley, 4 Harring. 562; State *v.* Jackson, 17 Miss. (2 Bennet) 544; Com. *v.* Hillyard, 2 Gray, 294; State *v* Brien, 10 La. R. 453; People *v.* Murray, 10 Cal. 309; State *v.* Jackson, 12 La. Ann. Rep. 679; Shorter *v.* People, 2 Comstock, 197. Post, § 1027. Campbell *v.* People, 16 Illinois, 17; Henderson *v.* State, 12 Texas, 525.

In a late case in Massachusetts (1854), this point was thus summarily disposed of: "J. G. Abbot, for the defendant, offered evidence that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm: and cited Dusenberry *v.* The State, 3 Stew. & Port. 308; The State *v.* Tackett, 1 Hawks. 210; Oliver *v.* The State, 17 Alab. 599; Com. *v.* Seibert, Wharton on Homicide, 227.

J. H. Clifford (Attorney General) objected to the admissibility of the evidence, and cited Com. *v.* York, 7 Law reporter, 507–509.

By the Court.—The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ;* and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant." Com. *v.* Hilliard, 2 Gray, R. 294.

[p] Queensbury *v.* State, 3 Stewart & Por. 315; State *v.* Tacket, 1 Hawks, 210; Wright *v.* State, 9 Yerger, 342; Franklin *v.* State, 29 Alab. 14; Colton *v.* State, 31 Miss. (2 George) 504.

[q] State *v.* Jackson, 17 Miss. (2 Bennet) 544.

[r] Com. *v.* Wilson, 1 Gray R. 337; Haynes *v.* State, 17 Geo. 465.

[s] State *v.* Tilly, 3 Iredell, 424.

[t] See Wharton on Homicide, 215–1220.

the part of a person attacked by him.[u] The question then is, not whether A. was justified in killing B., because B. was savage and riotous, but whether A. being attacked, he was justified in concluding that killing B. was his only chance of escaping with his own life.

In 1858, the Supreme Court of California stated the rule as follows:—

"The other point made is, the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question the prisoner acted in self-defence. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal. But the record must show this state of case. This does not."[v]

In 1859, in the Supreme Court of North Carolina, the law was thus given by Pearson, C. J.: "It is a general rule, that on a trial for homicide, evidence of the character and habits of the party killed, as to temper and violence, is not admissible. * * * There may be exceptions to the rule. State *v.* Tackett, 1 Hawks, 211, is admitted to be one; but we are not at liberty to enter into an investigation for the purpose of defining the principle on which exceptions may be allowed, or of fixing the limits; for the case now before us certainly comes within the operation of the general rule, and it is sufficient to refer to Bottoms *v.* Kent, Jones' Rep. 154; State *v.* Barfield, 8 Ired. Rep. 344, to show that the general rule is settled both in civil and criminal proceedings.

"The deceased committed a violent assault upon the prisoner as he entered the room. This was legal provocation, and if the case stopped there, the killing would be manslaughter, and the character of the deceased as a quiet or violent man would be immaterial; but the case did not stop there, for the jury, under instructions of which the prisoner has no right to complain, find that he killed 'of his malice aforethought'—that he had formed the deadly purpose—prepared the weapon, and sought that particular time and place to do the deed. So the character of the deceased was immaterial. It is surely murder to kill with malice, express or aforethought, no matter how violent or wicked the deceased may be."[w]

In 1858, the Court of Appeals of Kentucky thus spoke on the same point:—

"From the bill of exceptions certified by the judge, it appears that testimony was admitted on the trial which conduced to show that White was a man of violent, cruel, and bloodthirsty temper and disposition; that he was in the constant habit of carrying concealed deadly weapons, and was scarcely ever known to be out of his house without them. It is stated in the other

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[u] Pritchett *v.* State, 22 Alab. 39; State *v.* Hicks, 6 Jones Mo. 588; Payne *v.* Com. 1 Metc. Ky. 370; Com. *v.* Seibert, post, § 1026 7, note.

[v] 3 S. & P. 316; People *v.* Murray, 10 Cal. 309.

[w] State *v.* Hogue, 6 Jones' Law, N. C. 383.

bill of exceptions, however, that all the evidence to this effect was excluded by the court. There thus appears to be no difference of opinion between the court below and the counsel for the appellant as to the competency of this testimony; but the whole controversy is confined to the question of fact whether it was rejected or admitted upon the trial. This question it is wholly unnecessary that we should consider or determine, inasmuch as the judgment must be reversed upon other grounds. We are of opinion that the testimony in question was admissible, in view of all other proof as presented by this record. The general principle upon which the admissibility of such evidence depends, was recognized by this court in the cases of Rapp *v.* Commonwealth;[x] of Meredith *v.* Commonwealth;[y] and Condens *v.* Commonwealth,[z] although the point was not in either of those cases directly presented. Numerous cases decided by the courts of other States furnish conclusive authority upon this subject, a reference to which is to be found in Wharton's American Law of Homicide (p. 229), where the doctrine is thoroughly and ably discussed."[a]

§ 642. On the trial of an accessary to the crime of murder, evidence that the prisoner is a man of violent passions, and in the habit of using threatening language, is not admissible to rebut the presumption arising from evidence of threats by the prisoner against the deceased.[b]

Where A. is charged with an assault upon B., with intent to kill, remarks or threats affecting A. made by B. to a third party before the assault, are not admissible in evidence in A.'s behalf; especially when it does not appear at what time they are communicated to him.[c]

The admissibility of evidence of the character of the prosecutor in rape, will hereafter be considered.[d]

4th. WEIGHT TO BE ATTACHED TO CHARACTER.

§ 643. The remarks of Sir William Russell as to the weight to be attached to this species of testimony are worthy of grave consideration: "It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn ther attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought *always* to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of

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[x] 14 B. Mon. 614.
[y] 18 B. Mon. 49.
[z] 15 B. Mon. 546.
[a] See also Pritchett *v.* State, 22 Alabama Rep. 39; Payne *v.* Commonwealth, 1 Metcalf Rep. 370.
[b] State *v.* Duncan, 6 Iredell, 236.
[c] State *v.* Jackson, 17 Mis. (2 Bennett) 544.
[d] § 1149 51.

the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their own conclusion upon the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer."[e]

§ 644. "To these remarks," says Mr. Sergeant Talfourd, "we may be permitted to add that, according to the language frequently adopted by judges in their charges, it may be proved that character is in no case of any value. They say that in a clear case, character has no weight, but if the case be doubtful—if the scale hangs even—then the jury ought to throw the weight of character into the scale, and allow it to turn the balance in the prisoner's favor; but the same judges will tell juries, 'that in every doubtful case they ought to acquit,' stopping far short of the even balance, and that the prisoner 'is entitled to the benefit of every reasonable doubt;' in clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted: it is never to be considered by the jury but when the jury would acquit without it. The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear. There may certainly be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is in truth a fact varying greatly in its own intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed; but always a fact, fit, like all other facts proved in the cause, to be weighed and estimated by the jury."[f] Hence it has been held to be error in a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf;" the true rule being, that in all cases, a good character is to be considered.[g]

§ 645. "There are cases of circumstantial evidence," says Chief Justice Shaw, "where the testimony adduced for and against a prisoner is nearly balanced, in which a good character would be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crimes. He may show, that notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character, for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience—it is

[e] 2 Rus. on C. and M. 785.

[f] Dicken. Quar. Ses. 6th ed. 563; see Epps *v.* State, 19 Geo. 102.

[g] State *v.* Henry, 5 Jones, N. C. 65.

so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty would satisfy a jury that he would not be likely to yield to such a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character."[h]

§ 646. Mittermaier[a] says, "Throughout the middle ages, the German as well as the Latin codes made ill repute a cause of inquest, and attached to it certain consequences averse to the defendant in the original and in mesne process, on a substantive trial. Similar expressions occur in the modern codes, and in the proceedings preparatory to the trial by jury, it is an important point of the defence to establish the good character of the accused by witnesses. In the German practice, the inquiry into reputation has grown into a principal portion of the inquest, in the shape of a statement on the record, of the walk and conduct of the accused, and his moral character. The influence of the character of the accused upon the weight to be ascribed to the suspicion, and the requisition of the modern codes that he be put face to face with the judge, make this inquiry particularly valuable."

"The better course is to examine witnesses in regard to the character of the accused; the result, however, will depend upon the selection as witnesses, of those who are best able to speak from personal experience of the facts necessary to be known, for the purpose for which the inquiry is conducted. This inquiry is general, when its purpose is merely to learn the walk and the personal character of the accused. This will be attained by the general question put to the accused; the inquiries made of the municipal authorities under whose jurisdiction he lived, and the trial of the persons who had an opportunity of becoming acquainted with him. But it is also special, for the purpose of obtaining cognizance of particular circumstances of his life (*e. g.*, a disposition to commit certain offences), or peculiarities of his moral

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[h] Com. *v.* Webster, 5 Cush. 535; Bemis' Webster's case, 495, 496.
[a] Deutsch. Straf. sec. 131.

nature (*e. g.*, in questions of self-defence, a peaceable disposition), the knowledge of which is necessary to a proper appreciation of certain points which exert an influence on the decision, whether the facts referred to are incriminatorial or exculpatory. Where the evidence is involved and circumstantial, or where a partial confession has been obtained, this investigation must not be omitted. Its importance in particular cases will vary as the circumstances evolved at the primary examination, which demand further remark, are more or less weighty, or as the trial takes a turn which makes the discovery of the moral peculiarities of the accused more or less desirable. Its directions will be determined by the nature of the crime (as, for instance, in infanticide) which is in question, and in one and the same species of crime by the particular turn and course of the proceedings. The judge must bear in mind that impertinent matters, the investigation of which would swell the costs and cause delay, must not, perhaps to gratify an idle curiosity, be made the subject of an inquiry into character; but a declaration of opinion of the witness on the character of the accused will never suffice, and the witness must state the arguments and facts upon which he founds his opinion, and the necessary proofs thereof, so that the inquiry may, if necessary, be extended to the application of the proofs thus adduced."

In this country, it is hardly necessary to repeat, this latitude is not tolerated, and the prosecution cannot show that the prisoner's character would make his guilt likely, until the latter puts his character in issue.[b]

CHAPTER II.

METHOD OF PROOF.

I. EVIDENCE TO BE CONFINED TO ISSUE, § 647.
II. SECONDARY EVIDENCE, § 652.
III. HEARSAY, § 662.
IV. DYING DECLARATIONS, § 669.
V. CONFESSIONS AND DECLARATIONS, § 683.
VI. DECLARATIONS OF CO-CONSPIRATORS, § 702.
VII. PRESUMPTIONS, § 707.
VIII. CIRCUMSTANTIAL EVIDENCE, § 732.

I. Evidence to be confined to issue.

§ 647. The general rule on the subject of permitting testimony to be given of matters not alleged, is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue.[a] Evidence of a distinct substantive offence cannot be admitted in support of another offence, *a fortiori* evidence of an intention to commit another of-

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[b] Ante, § 640; post, § 824.

[a] State *v.* Wisdom, 8 Porter, 511; State *v.* Whittier, 8 Shep. 341; Kinchelow *v.* State, 5 Humph. 9; 2 Russ. on Crimes, 772.

fence, cannot be admitted.[b] So, proof of a distinct murder, committed by the defendant at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time, in which the defendant participated, cannot be admitted until proof has been given, establishing, or tending to establish, the offence with which he is charged, and showing some connection between the different transactions; or such facts and circumstances as will warrant a presumption that the latter grew out of, and was, to some extent, induced by some circumstances connected with the former; in which case, such circumstances connected with the former as are calculated to show the *quo animo* or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction, are competent and legitimate testimony.[c]

On the trial of an indictment for arson, after the State has proved the burning of the house as charged, and offered evidence tending to show that the defendant was the person who set fire to it, evidence showing that another house belonging to the prosecutor was subsequently burned, is irrelevant and inadmissible; nor is it made relevant by being offered in connection with proof of defendant's declaration, made after the first but before the second burning, that he was not yet done with the prosecutor, especially when the declaration is shown to have been made in a conversation, in which "no reference was made to either of the burnings, but the parties were speaking of a civil case which defendant had before the prosecutor as a justice of the peace, and in which defendant complained the prosecutor had treated him rascally."[cc]

On an indictment for stealing a slave, evidence is not admissible of conversations held by the prisoner with the other slaves at a former period, advising their escape,[d] unless such conversations were part of the *res gestæ*.[e]

§ 648. On a trial for homicide, the attorney-general offered proof going to establish the fact that the defendant had, some short time before the murder, set fire to the house of the deceased, in the night. The proof was offered for the purpose of proving the defendant to have been the perpetrator of the murder; but it was held that the proof was not admissible.[f] In the same case, however, proof was admitted, showing that the defendant had beat his wife, and forced her to abandon his house, and seek refuge under the protection of the deceased. It was held that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and, therefore, proper proof of malice prepense on his part, and that the incidental abuse accompanying, and perhaps inducing the flight of the wife, was not such proof of a separate criminal charge as vitiates the verdict.[g]

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[b] Kinchelow *v.* State, 5 Humph. 9; R. *v.* Mobbs, 6 Cox C. C. 223; Com. *v.* Miller, 3 Cush. 243.

[c] Dunn *v.* State, 2 Pike, 229; 2 Russ. on Crimes, 777; Tharp *v.* State, 15 Ala. 749; R. *v.* Dossalt, 2 Car. & K. 304; Com. *v.* Call, 21 Pick. 515; Brock *v.* State, 16 Ala. 104; Farrer *v.* State, 2 Ohio, St. R. (N. S.) 54; § 631-2-3-4-5; post, § 725.

[cc] Brock *v.* State, 26 Ala. 104.

[d] State *v.* Wisdom, 8 Porter, 511; Cole *v.* Com. 5 Grat. 696.

[e] Burr *v.* Com. 4 Grat. 534.

[f] Stone *v.* State, 4 Humph. 27.

[g] Stone *v.* State, 4 Humph. 27.

On a trial of indictment for larceny of a watch, evidence of another larceny of a cloak, committed by the prisoner, the two acts being wholly distinct and unconnected, is not admissible for any purpose.[h] So, also, under an indictment for one burglary, evidence of the manufacture by the defendant of the burglarious instruments by which another burglary was committed, was held inadmissible.[i]

§ 649. When the acts form one transaction, the evidence is admissible.[ii] Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible, under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.[j]

Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime.[k] Where a prisoner was indicted as accessary before the fact, to the crime of killing a person who had been actively engaged in ascertaining the perpetrators of a former murder, evidence of the guilt of the accused as to the former murder, was held admissible for the purpose of showing motive as to the second murder.[l] And so, on an indictment against persons for a conspiracy to carry on the business of common cheats, evidence is admissible of the defendant having made false representations to other tradesmen besides those named in the indictment.[m] In another case,[n] upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was holden that the previous conduct of a portion of the assembly, in training, &c., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was held competent to show also, as against Hunt (who, though a stranger, except by political connection, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views

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[h] Walker *v.* Com. 1 Leigh, 574; see, also, Brock *v.* State, 26 Ala. 104.

[i] Com. *v.* Wilson, 2 Cushing, 590.

[ii] See Osborne *v.* People, 2 Parker, C. R. (N. Y.) 583.

[j] Heath *v.* Com. 1 Robinson, 735; State *v.* Rash, 12 Ired. 382; Johnson *v.* State, 17 Ala. 618; R. *v.* Voke, R. & R. 431; ante, § 635.

[k] Bottomly *v.* U. S., 1 Story, 135; Dunn *v.* State, 2 Pike, 229; 2 Russ. on Crimes, 777; People *v.* Hopson, 1 Denio, 574; R. & Roebuck, 36 Eng. Law and Eq. 631; People *v.* Wood, 3 Parker C. R. (N. Y.) 681; 1 Greenl. on Ev. sec. 53; ante, § 631-2-3-4-5.

[l] Dunn *v* State, 2 Pike, 229; ante, § 635.

[m] R. *v.* Roberts, 1 Camp. 400.

[n] R. *v.* Hunt et al. 3 B. & Ald. 566.

on the particular subject of such meetings, and of the topics there discussed. So in an indictment for adultery, previous improper familiarities may be shown to show the *quo animo*,[o] though it is otherwise with evidence of subsequent improper intercourse at another place.[p] And so, too, on an indictment for an assault with intent to commit a rape, evidence of previous assaults on the prosecutrix, are admissible to show the intent.[q]

In many cases, it is an important question whether a thing was done accidentally or wilfully. Thus, as is said by Maule, J., in a recent case, if a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person, who had died, although that might be proof of a distinct felony.[r]

§ 650. To what extent circumstantial evidence is admissible to increase the presumption of guilt will be noticed more fully hereafter.[s] One or two cases may be here enumerated. It is competent for the prosecutor of an indictment for selling liquor without a license, to prove that the defendant kept a bar with bottles in it.[t] And so a copy of a newspaper, containing an advertisement of the usual time of arrival of a certain stage coach, is admissible in evidence of the advertised time of such arrival, and of knowledge of such time by one who usually read the paper.[u] But where a defendant was on trial for breaking and entering the City Hall, at Charlestown, and a mass of burglarious tools and implements, found in his possession at the time of his arrest, were exhibited to the jury, some of which were adapted to the commission of the offence with which he was charged; it was held, that it was not competent for the government to prove, that the ward of a key found among such tools and implements, was made and fitted by the defendant, for the purpose of opening the door of the building of the Lancaster Bank.[v] On the other hand, it was ruled that where the prisoner was seen on the day after the burglary, for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home.[w] It is important not to confound the principles on which these two classes of cases rest. On the one hand, it is admissible to produce evidence of a distinct crime to prove *scienter* or to make out the *res gesta*, or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged.[x] On the other hand, it is necessary strictly to limit the evidence to these exceptions, and to exclude it when it does not legitimately fall within their scope.

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[o] State *v.* Wallace, 9 N. Hamp. 518; Lawson *v.* State, 20 Ala. 66; post, § 2653; see ante, § 632, 636, 640.

[p] Com. *v.* Horton, 2 Gray, 354; 2 Greenl. Ev. § 47; State *v.* Crowley, 13 Ala. 172; post, § 865.

[q] Williams *v.* State, 8 Humph. 585.

[r] R. *v.* Dassett, Maule, J., 2 Car. & Kir. 306.

[s] Post, § 330, 342.

[t] People *v.* Hubert, 4 Denio, 133.

[u] Com. *v.* Robinson, 1 Gray, R. 555.

[v] Com. *v.* Wilson, 2 Cushing, 590.

[w] People *v.* Larned, 3 Selden, 445.

[x] Ante, § 631-2-3-4-5.

§ 651. On the trial of an indictment for manslaughter, the record of a previous conviction of the defendant for an assault and battery upon the person of the deceased, and judgment thereon before her death, is admissible evidence to prove the fact of such conviction; but it is not evidence of an assault committed on the deceased, as alleged in the indictment for manslaughter, or that the assault stated in the record of such conviction is the same.[y]

An offer to bribe, and an attempt to escape from commitment under a different offence, are admissible, when both offences are founded on the same fact.[z]

II. Secondary evidence.

1st. As a general rule secondary evidence is inadmissible, § 652.
2d. Exceptions to rule, § 653.
 (a) Public officer acting as such, § 653.
 (b) Exemplifications of records, § 654.
 (c) Copies of writings or marks which cannot be brought into court, § 655.
 (d) Voir dire, § 656.
 (e) Papers in the possession of the opposite side, or papers lost or destroyed, § 657.
3d. Oral evidence inadmissible to prove, § 658.
 (a) Records, § 659.
 (b) Contracts, § 660.
 (c) Disputed writings generally, § 661.

1st. As a general rule secondary evidence is inadmissible.

§ 652. Secondary evidence, as a general rule, is inadmissible to prove any fact whatever, and the design of the rule is to prevent the introduction of any testimony, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that evidence of a higher order is held back, it is fair to presume, that if offered it would have told against the party withholding it.[a] By requiring the production of the best evidence applicable to each particular fact, is meant, that no evidence shall be received, which is merely substitutionary in its nature, so long as the original evidence can be had. Thus, the contents of a letter, written by a prisoner, cannot be testified to, by a witness for the prosecution, unless it is shown that the letter is destroyed or is in the possession of the prisoner.[b] So a title by deed must be proved by the production of the deed itself, if it is within the power of the party, no higher evidence being possible; and its non-production would raise a presumption that had it been produced, it would have injuriously affected the title of the party refusing to offer it. But where there is no withholding of evidence, but only a substitution of stronger for weaker points, the rule is not infringed.[c] Thus, a deed being

[y] Com. v. M'Pike, 3 Cush. 181.

[z] Dean v. Com. 4 Grat. 541.

[a] 1 Greenleaf on Evid. sec. 82.

[b] Com. v. Thompson, Thach. Cr. Ca. 28.

[c] Phil. & Am. on Evid. 438; 1 Phil. Evid. 418; 1 Stark. Evid. 437; Glassford on Evid. 266, 278; Tayloe v. Riggs, 1 Peters, 591, 596; U. S. v. Reyburn, 6 Peters, 352, 367; Milnor v. Tillotson, 7 Peters, 100, 101.

produced, its execution may be proved by only one of the subscribing witnesses, although the other also is at hand. So the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. On the same principle, as will be shown hereafter, it is not necessary to call the supposed writer himself, to prove or disprove his writing. Even where it is necessary to prove negatively that an act was done without the consent or against the will of another, it is not in general necessary to call the person whose will or consent is denied.

2d. Exceptions to rule.

§ 653. (*a.*) *Public officer acting as such.*—The exceptions to this rule are several. Proof, in the first place, that an individual has acted notoriously as a public officer, is *prima facie* evidence of his official character, without producing his commission or appointment.[d] A commissioner appointed to take affidavits is a public officer within the exception.[e] There must, however, be some color of right to the office, or an acquiescence on the part of the public, for such length of time as will authorize the presumption of at least a colorable election or appointment.[f] Where the office is private, some proof must be offered of its existence, and of the appointment of the agent or incumbent:[g] But secondary proof of the contents of a letter of appointment cannot be received in evidence to establish the agency of a government agent without first accounting for the non-production of the original.[h]

§ 654. (*b.*) *Exemplifications of records.*—The contents of any record of a judicial court, in the second place, and of entries in any other public books or registers, may be proved by an examined copy.[i] All records and entries of a public nature, in books required by law to be kept, are included in the exception; and the reason is the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two places at the same time; and, also, because of the public character of the facts they contain, and the ease with which any fraud or error in the copy can be detected.

§ 655. (*c.*) *Copies of writings or marks which cannot be brought into court.*—A third exception is where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in court.[j] Thus, where the question

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[d] 1 Greenleaf on Evid. sec. 92; U. S. *v.* Reyburn, 6 Peters, 352, 367; R. *v.* Gordon, 2 Leach, Cr. C. 581, 585, 586; R. *v.* Shelley, 2 Leach, Cr. C. 381; Jacob *v.* U. States, 1 Brockenb. 520; Milnor *v.* Tillotson, 7 Peters, 100, 101; Berryman *v.* Wise, 4 T. R. 366; Bank of U. S. *v.* Danbridge, 12 Wheaton, 70; Doe *v.* Brawn, 5 B. & A. 243; Cannell *v.* Curtis, 2 Bing. 228, 234; R. *v.* Verelst, 3 Camp. 432; R. *v.* Howard, 1 M. & Rob. 187; M'Gahey *v.* Alston, 2 M. & W. 206, 207; Jacob *v.* U. S. 1 Brock. 520.

[e] R. *v.* Howard, 1 M. & R. 187.

[f] Wilcox *v.* Smith, 5 Wend. 231, 234.

[g] Short *v.* Lee, 1 Jac. & W. 464, 468.

[h] U. S. *v.* Boyd, 5 How. U. S. R. 29.

[i] Greenleaf on Evid. sec. 91.

[j] 1 Greenl. on Evid. sec. 93; Phil. & Am. on Evid. 454; 1 Phil. Evid. 433, 434.

is upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.[k] Other exceptions of the same character are, the case of inscriptions on walls, and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, &c., which as they cannot conveniently be produced in court, may be proved by secondary evidence. But if they can conveniently be brought into conrt, their actual production is required.[l]

The owner of property stolen may testify to certain marks upon the same, to establish its identity, although the goods or marks are not produced.[ll]

§ 656. (*d.*) *Voir dire.*—Another instance is the examination of a witness on the *voir dire*, and in preliminary inquiries of the same nature. If, upon such examination, the witness discloses the existence of a written instrument affecting its competency, he may also be interrogated as to its contents.

§ 657. (*e.*) *Papers in the possession of the opposite side.*—Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his attorney with a notice to produce it; and if he do not produce it at the trial, in pursuance of the notice, then, upon proving the serving of the notice, secondary evidence of its contents will be allowed to be given. The rule in this respect is the same in criminal as in civil cases;[m] and the notice must be served a reasonable time before the trial.[n] Wherever, however, the character of the indictment is sufficient notice to the defendant, of the subject of trial, formal notice is insufficient; as when upon an indictment for stealing a bill of exchange, parole evidence of it was admitted, without a notice to produce it.[o] So, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said was holden to be sufficient, without giving him notice to produce the paper.[p] So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person, it was holden that this copy might be given in evidence, without a notice to produce the original.[q] This, however, is not the case, upon an indictment for arson with intent to defraud an insurance company, in which case secondary evidence of the policy of insurance cannot be given without prior notice to produce.[r] It is not necessary to produce or account for banners bearing certain inscriptions, &c., exhibited at a public meeting, but parol evidence of such matters, eye-witnesses, was ruled admissible to show the general character and intention of the transaction.[s]

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[k] Roberts *v.* Doxon, Peak's Cases, 83. [l] Jones *v.* Tarleton, 1 D. P. C. N. S. 625.

[ll] Com. *v.* Hills, 10 Cush. (Mass.), 530.

[m] Attorney-General *v.* La Merchant, 2 T. R. 210; State *v.* Kimbrough, 2 Dev. 431.

[n] 8 Mass. 110; People *v.* Badgely, 16 Wend. 53; R. *v.* Ellicombe, 1 M. & Rob. 260; Trist *v.* Johnson, 259; R. *v.* Kitson, 20 Eng. Law & Eq. 590.

[o] See ante, § 311, 608; R. *v.* Aickles, 1 Leach, 330; People *v.* Holbrook, 13 Johnson, 90; Com. *v.* Messenger, 1 Binney, 274; Bucher *v.* Jarrett, 5 Bos. & Pull. 145; Howe *v.* Hall, 14 East, 275.

[p] R. *v.* Moore, 6 East, 421. [q] R. *v.* Hunt, 3 B. & Ald. 566.

[r] R. *v.* Kitson, 20 Eng. Law & Eq. 590.

[s] R. *v.* Hunt, 3 B. & Ald. 566; Sheridan's case, 31 Howell's St. Tr. 672.

Parol evidence of a destroyed or mutilated paper is in like manner admissible.[ss]

3d. What oral evidence is inadmissible to prove.

§ 658. The case most frequently requiring the operation of the rule excluding secondary evidence, as distinguished by Mr. Greenleaf in his excellent treatise on evidence,[t] relate, *first*, to those instruments which the law requires to be in writing; *secondly*, to those contracts which the parties have put in writing; and, *thirdly*, to all other writings the existence of which is disputed, and which is material to the issue.

§ 659. (*a.*) *Records.*—In the first place, it is said oral evidence cannot be received in the place of an instrument which the law requires to be in writing, such as records, public documents, official examinations, deeds of conveyance of lands, wills, other than nuncupative, promises to pay the debt of another, and other writings mentioned in the statute of frauds. And where oaths are required to be taken in open court, where a record of the oath is made, or before a particular officer, whose duty it is to certify it; or where an appointment to an additional office is required to be made and certified on the back of the party's former commission; the written evidence must be produced. Even the admission of the fact, by a party, unless solemnly made, as a substitute for other proof, does not supersede direct proof of matter of record, by which it is sought to affect him; for the record being produced may be found irregular and void, and the party might be mistaken. Thus, the admission of a witness that he has been convicted of an infamous crime is inadmissible: the record itself of conviction must be exhibited. Where, however, the record or document appointed by law is not part of the fact to be proved, but is a mere extraneous memorandum of the fact, such as the registry of marriages and births, and the like, it does not supersede all other proof, but any other legal evidence can be received.[u]

§ 660. (*b.*) *Contracts.*—In the second place, oral proof cannot be substituted for the written evidence of any contract, which the parties have put in writing.[v] Thus, in an indictment for feloniously setting fire to a house, with intent to defraud the insurers, the policy itself is the appropriate evidence of the fact of insurance, and must be produced.[w] The fact, that in such cases the writing is in the possession of the adverse party does not change its character. It is still the primary evidence of the contract; and its absence must be accounted for, by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received.[x]

[ss] Ante, § 608; Thompson *v.* State, 3 Alab. 28.

[t] 1 Greenleaf, sec. 85.

[u] Com. *v.* Norcross, 9 Mass. 492.

[v] See Domat's Civil Law, liv. 3, tit. 6, sec. 2, as translated in 7 Monthly Law Magazine, p. 73.

[w] 5 R. *v.* Doran, 1 Esp. 127; R. *v.* Gilson, Rus. & Ry. 130.

[x] R. *v.* Rawden, 8 B. & C. 708; Sebree *v.* Door, 9 Wheaton, 558; Bullock *v.* Koon, 9 Cowen, 30; Mather *v.* Goddard, 7 Conn. 304; Rank *v.* Shewey, 4 Watts, 218; Northus *v.* Jackson, 13 Wend. 86; Vinal *v.* Burrill, 16 Pick. 401, 407, 408; Cowen & Hill's note, 860, to 1 Phil. Evid. 452; Lanauze *v.* Palmer, 1 M. & M. 31.

§ 661. (*c.*) *Disputed writings generally.*—In the third place, oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material either to the issue between the parties, or to the credit of witnesses, and is not merely the memorandum of some other fact. "I have always," said Lord Tenterden, "acted most strictly on the rule that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."[y] On cross-examination, for instance, in the statement of the question to a witness, it is not admissible to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and having asked him whether he wrote that letter; because if it were otherwise, the cross-examining counsel might put the court in possession of only a part of the contents of a paper, when a knowledge of the whole was essential to a right judgment in the cause.[z]

III. HEARSAY.

1st. HEARSAY GENERALLY INADMISSIBLE, § 662.
(*a*) Declarations for third parties, § 662.
2d. EXCEPTIONS, § 663.
(*a*) Information going to make up the bona fides of an act, § 663.
(*b*) Opinions as to condition of a party's mind, &c., and his own representations on the subject, § 664.
(*c*) Declarations of prosecutrix in rape, § 665.
(*d*) Pedigree, § 666.
(*e*) Testimony of a deceased or absent witness, § 667.
3d. WHERE THE INDICTMENT CHARGES A COMMON AND GROSS OFFENCE, *e. g.* A NUISANCE, § 668.

1st. HEARSAY GENERALLY INADMISSIBLE.

§ 662. Hearsay, in its legal sense, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.[a] Such evidence is inadmissible to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. Its incompetency to satisfy the mind as to the existence of such facts, as well as the frauds which may be practised under its cover, combine to support the rule which excludes it from judicial tribunals.[b]

(*a.*) *Declarations of third parties.*—Declarations by third persons in reference to the offence with which the defendant is charged are hearsay, and

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[y] Vincent *v.* Cole, 1 M. & M. 258.

[z] Queen's Case, 2 B. & B. 287; Bellinger *v.* People, 3 Wend. 595; R. *v.* Edwards, 3 C. &. P. 26; R. *v.* Taylor, 9 C. & P. 726.

[a] 1 Greenl. on Ev. sec. 99; 1 Phil. Evid. 185.

[b] Per Marshall, C. J., in Mima Queen *v.* Hepburn, 7 Cranch, 290, 295, 296; Davis *v.* Wood, 1 Wheat. 6, 8; R. *v.* Erswell, 3 T. R. 707.

consequently inadmissible in evidence. Hence evidence of what a living, though absent witness testified in a former trial is inadmissible.[bb]

Thus on an indictment for murder, the admissions of other persons that they killed the deceased are not evidence;[c] and evidence of threats by other persons are inadmissible.[d] So, too, on an indictment for larceny, declarations of third parties that they committed the theft are inadmissible.[e] But if such third persons, on being examined as witnesses, had implicated the prisoner by their testimony, evidence of their declarations that they were guilty of the offence is admissible to discredit the witnesses.[f] And it has been held admissible for a witness to state that he was induced by information derived from a negro to waylay a party suspected of a design to commit a felony.[g]

2d. Exceptions.

§ 663. (*a.*) *Information going to make up the bona fides of an act.*—There are, however, several qualifications to the rule by which hearsay evidence is excluded. When it becomes a subject of inquiry whether a person acted, *bona fide*, prudently or wisely, the information and circumstances on the faith of which he acted, whether true or false, are original and material evidence. This is often illustrated in actions for malicious prosecutions; and also in cases of agency and of trusts.[h]

§ 664. (*b.*) *Opinions as to condition of a party's mind, &c., and his own representations on the subject.*—Letters and conversation, also, addressed to a person whose sanity is disputed, being connected in evidence with some act done by him, are admissible for the purpose of showing whether he was insane or not.[i] The bodily or mental feelings of an individual, also, become sometimes material to the issue, and when such is the case, the usual expressions of such feelings, made at the time in question, are also original evidence.[j] If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. Whether they were real or feigned is for the jury to determine. Thus the representations of a sick person of the character of his disease, at the time, are received as original evidence. If made to a medical attendant or adviser, they are of greater weight; but if made to any other person, they are not, on that account, rejected.[k] With this are to be considered, under certain limitations, opinions of medical and other experts.[l]

§ 665. (*c.*) *Declarations of prosecutrix in rape.*—In prosecutions for rape,

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[bb] Bergen *v.* People, 17 Ill. 426. See for an exception, post, § 667, closing paragraph.
[c] State *v.* Duncan, 6 Iredell, 326; Smith *v.* State, 9 Ala. 990.
[d] State *v.* Duncan, 6 Iredell, 326.
[e] Rhea *v.* State, 10 Yerger, 258.
[f] Smith *v.* State, 9 Ala. 990.
[g] Whaley *v.* State, 11 Geo. 123.
[h] 1 Greenl. on Evid. sec. 101.
[i] Ante, § 45–57; Wheeler *v.* Alderson, 3 Hagg. Eccl. R. 574, 608; Wright *v.* Tatham, Ad. & El. 3, 8; 7 Ad. & El. 313, S. C.; 4 Bing. N. C. 484, S. C.
[j] Greenleaf on Evid. sec. 102.
[k] Aveson *v.* Lord Kinnaird, 6 East, 188; 1 Phil. Evid. 191; Grey *v.* Young, 4 M'Cord, 38; Gilchrist *v.* Bale, 8 Watts, 355; 1 Greenl. on Evid. sec. 102.
[l] Ante, 45–6–7.

where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent. Proof of such complaint, therefore, is original evidence; but the statement of details and circumstances is excluded, it being no legal proof of their truth.[m] In such a prosecution, however, the declarations of the injured female as to the transaction immediately after the offence is committed, are admissible to sustain her testimony, but not to prove the commission of the offence.[n] On the same principle in a prosecution for conspiring to assemble a large meeting for the purpose of exciting terror in the community, the complaints of terror made by persons professing to be alarmed, were permitted to be proved by a witness who heard them, without calling the persons themselves.[o]

§ 666. (*d.*) *Pedigree.*—Hearsay evidence is admissible, also, under certain limitations, to prove pedigree or marriage. The main inquiry in such cases is, that of parentage, marriage, or descent; and in order to ascertain the fact, it is essential to know how the party was acknowledged and treated by those who were interested in him, or sustained towards him any relations of blood or of affinity. The law resorts to hearsay evidence in such cases, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family.[p] The rule of admission is, however, restricted to the declarations of deceased persons, who were related, by blood or marriage, to the person, and, therefore, interested in the succession in question.[q] General reputation in the family, shown by the testimony of a surviving member of it, has been held to be included within the exception;[r] and the declarations of a woman since dead, as to the statements of her husband, in his lifetime, were admitted.[s] So, an entry by a deceased parent, or other relative, made in a Bible, family missal, or any book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative, is regarded as the declaration of such parent or relative, in a matter of pedigree.[t] Tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, may be described in court, and their inscriptions given as original evidence of the same facts. The

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[m] 2 Russ. on Cr. 751; 1 East, P. C. 444, 445; 1 Hale, P. C. 633; 1 Russ. on Cr. 565; R. *v.* Clarke, 2 Stark. R. 241; post, § 1150.

[n] Johnson *v.* State, 17 Ohio, 593; People *v.* M'Gee, 1 Denio, 19.

[o] R. *v.* Vincent, 9 C. & P. 275.

[p] 1 Greenl. on Evid. sec. 103.

[q] Vowles *v.* Young, 13 Ves. 140, 147; Goodright *v.* Moss, Cowp. 591, 594; 1 Greenleaf on Ev. s. 103; Whitelock *v.* Baker, 13 Ves. 514; Johnson *v.* Lawson, 2 Bing. 86; Monkton *v.* Attorney Gen. 2 Russ. & My. 147, 156; Crease *v.* Barrett, 1 Cromp. Mees. & Ros. 919, 928; Jewell *v.* Jewell, 1 How. S. C. Rep. 231; 17 Peters, 213, S. C.; Jackson *v.* Browner, 18 Johns. 37; Chapman *v.* Chapman, 2 Conn. 347; Waldron *v.* Tuttle, 4 N. Hamp. 371; Cowen & Hill's note, 466, to 1 Ph. Evid. 240.

[r] Doe *v.* Griffin, 15 East, 293.

[s] Doe *v.* Randall, 2 M. & P. 20; Monkton *v.* Attorney Gen. 2 Russ. & My. 165; Bull. N. P. 295; Elliott *v.* Piersol, 1 Peters, 328, 337; Doe *v.* Davies, 11 Jur. 607; Johnston *v.* Todd, 5 Beav. 599.

[t] Berkley Peerage case, 4 Camb. 401, 418; Doe *v.* Bray, 8 B. & C. 813; Monkton *v.* Attorney Gen. 2 Russ. & My. 147; Jackson *v.* Cooley, 8 Johns. 128, 131, per Thompson, J.; Douglass *v.* Sanderson, 2 Dall. 116; Slane Peerage case, 5 Clark & Fin. 24; Burskadden *v.* Poorman, 10 Watts, 82; Sussex Peerage case, 11 Cl. & F. 85; Watson *v.* Brewster, 1 Barr, 381.

ground of such admission is, that it is to be presumed that the relatives of the family would not permit an inscription, without foundation, to remain; and that a person would not wear a ring with an error on it.[u] Under the same head are classed family conduct, such as the trait of recognition of relationship, and the disposition and descent of property, as affording a presumption from which the opinion and belief of the family may be inferred, resting ultimately on the same basis as evidence of family tradition. To adopt the language of Mansfield, C. J., in the Berkley Peerage case, "If the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate."[v] On similar reasoning, in the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.[w]

§ 667. (*e.*) *Testimony of a deceased or absent witness.*—The testimony of a deceased witness, given at a former trial, or examination, may be proved at a subsequent trial by persons who heard him testify.[x] Even the notes of

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[u] 1 Greenleaf on Evid. sec. 105; per Lord Erskine, in Vowles *v.* Young, 13 Ves. 144; Monkton *v.* Attorney General, 2 Russ. & Mylne, 147; Kidney *v.* Cockburn, Ibid. 167; Camoy's Peerage, 6 Cl. & Fin. 789.

[v] 1 Greenl. on Evid. sec. 106; Berkley Peerage case, 4 Campbell, 416; Goodright *v.* Saul, 4 T. R. 356.

[w] 2 Russ. on Crimes, 750; 1 Greenl. on Evid. sec. 108; 21 Howell's St. Tr. 542.

[x] U. S. *v.* Macomb, 5 M'Lean, C. C. R. 287; U. S. *v.* White, 5 Cranch, C. C. R. 457; Finn *v.* Com. 5 Rand. 701; Com. *v.* Richards, 18 Pick. 434; U. S. *v.* Wood, 3 Wash. C. C. 440; Rhine *v.* Robinson, 27 Penn. St. R. 30; State *v.* Mc. O'Blennis, 24 Mis. (3 Jones) 402; State *v.* Baker, Ibid. 437; Summons *v.* State, 5 Ohio (N. S.), 325; State *v.* Houser, 26 Miss. (5 Jones) 431.

In U. S. *v.* Macomb, 5 M'Lean, C. C. R. 287, Judge Drummond says, delivering the opinion of the court:—

"It is not controverted that the testimony of a deceased witness given at a former trial between the same parties in the same issue, is admissible in civil cases. There seems no difference of opinion as to that. But some of the authorities, &c., deny the application of the rule to criminal cases. A case which is generally cited as deciding that it does not apply to criminal proceedings, is that of Sir John Fenwick, in 1696. He was charged with being concerned in treasonable projects, but the witnesses who were expected to prove his guilt having left the country, there was no sufficient legal evidence to convict him of treason before the courts of law. The government resorted to a bill of attainder in Parliament. A question arose, whether the deposition of a person named Goodman, who was absent, taken before a justice of the peace, when neither the defendant nor his counsel was present, should be read as evidence? It was decided in the affirmative, on the ground that the Commons were not obliged to adhere to the rules established in Westminster Hall. During the discussions which took place in that case, it was said that such evidence could not be admitted in criminal cases in a court of law. Of course it is clear that such testimony could not be admitted in a court of law; for, first, the witness was living; and, secondly, the defendant had no opportunity of cross-examining him; and however the authorities may differ as to the first, they all agree as to the second point, that being an indispensable prerequisite to the introduction of the testimony. Mr. Parke relies upon this case for his assertion that there is a distinction between civil and criminal cases in this particular. The same opinion is expressed in Finn *v.* Commonwealth, 5 Randolph, 701; though the question there was, whether the testimony was admissible where the witness was absent. In Crary *v.* Sprague, 12 Wend. 41, Judge Nelson, who delivered the opinion of the court, while he admits it is questioned by high authority, and cites Hawkins and Parke, states his own opinion, that the testimony is admissible in criminal cases. In the People *v.* Newman, 5 Hill, 295, while deciding that nothing but the death of the witness would authorize the admission of such testimony

counsel of the testimony of such witness, on a former trial, between the same parties, touching the same subject matter, are evidence, when proved to be correct in substance, although the counsel does not recollect the testimony independent of his notes.[xx] The better opinion seems to be, that it is sufficient to prove the substance of what the deceased witness said, provided the material particulars are stated;[y] though it has been sometimes held

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under the law of New York, the court say, if the rule were otherwise in civil cases, they thought it ought not to be applied to criminal proceedings. And they distinctly waive the question whether it would be allowed at all in criminal cases, if the witnesses were dead. The Commonwealth *v.* Richards, 18 Pick. R. 434, was a case very much like this: A witness who had testified against the defendant at a preliminary examination before a magistrate, having died, witnesses were called to state what the deceased witness had sworn at the examination. They were permitted to testify, and the case went to the Supreme Court of Massachusetts on this and another point. It was like this, a case of an offence which was investigated in the first place before an officer, and the party was afterwards indicted for the same offence. The case was reversed, as we shall presently see, on another ground, but the court examined at some length the authorities for the purpose of ascertaining whether there is any distinction in this particular between civil and criminal proceedings, and came to the conclusion that there is none.

"In the United States *v.* Wood, 3 Washing. C. C. R. 440, which, like this, was a case of robbing the mail, though the testimony was rejected because the precise words could not be given, no allusion whatever is made to any difference between civil and criminal cases. The King *v.* Joliffe, 4 T. R. 290, in which Lord Kenyon used these words in relation to the rule which has been since so often quoted, was a criminal information, and he speaks of no distinction. Most of the modern elementary writers, Phillips, Starkie, Roscoe, and Greenleaf, advert to the rule as one of general application in all cases. And Russel, particularly, in his valuable little treatise of the Law of Evidence, which he has added to his work on Crimes, says expressly, the rule applies to criminal prosecutions, 2 Russ. 683. By the statutes of Philip and Mary, magistrates were directed and required to take the depositions of witnesses in certain criminal cases, and it has always been held, under these English statutes, that if the defendant were present at the taking of the deposition, and the witness were dead, it might be read on the trial as evidence. And yet there was nothing in the statutes from which it could be inferred that depositions were to be received as evidence. But the law having sanctioned them, it seems they became admissible upon general principles, provided the defendant was present, had the liberty to cross-examine, and the witness was dead. See note to the case of Rex *v.* Smith, 2 Starkie, R. 208; 3 Eng. Com. Law, R. 316, sec. 6. These statutes require the magistrate to take the examination, as well of the prisoner as of the witnesses, in writing; still, if this was not done, it seems to have been the practice to admit the statements of the defendant and witnesses; though if the examination were reduced to writing, that must be produced. Rex *v.* Fearshire, 1 Leach, 240; Rex *v.* Jacob, 1 Leach, 347; Rex *v.* Lasube, 2 Leach, 625.

"By the acts of Congress, the officers before whom the persons charged with the commission of offence are taken, have the right to allow bail. This implies the power to examine the facts of the case to ascertain whether the party shall be discharged, committed, or admitted to bail. The law does not require that the examination shall be reduced to writing. It was not done in this case. As a matter of practice, however, it is frequently done, and generally it is desirable that it should be. See the authorities collected in 2 Cowen, and Hill's notes to Phil. Ev. 571, or note 437, where the opinion is expressed in a criminal the same as in a civil proceeding." U. S. *v.* Macomb, 5 M'L. C. C. R. pp. 288 to 291.

[xx] Rhine *v.* Robinson, 27 Penn. State R. 30; Jones *v.* Ward, 3 Jones, Law (N. C.), 24.

[y] U. S. *v.* Macomb, 5 M'Lean, C. C. R. 987; Finn *v.* Com. 5 Rand. 701; 2 Russ. on Cr. 683; Cornell *v.* Green, 10 S. & R. 14; U. S. *v.* White, 5 Cranch, C. C. R. 457; Chess *v.* Chess, 17 S. & R. 409; Gilderstein, *v.* State, 10 Ala. 260; Wagers *v.* Dickey, 17 Ohio, 439; Marshall *v.* Adams, 11 Illinois, 37; Jones *v.* Ward, 3 Jones, Law (N. C.), 24; Rhine *v.* Robinson, 27 Penn. St. R. 30; Rivereau *v.* St. Ament, 3 Iowa, 118; Summons *v.* State, 5 Ohio (N. S.), 325.

that unless the precise words could be given, the testimony would be rejected.[yy]

The competency of the evidence, it has been said in Ohio, depends on first, that the statements of deceased witness at the first trial should have been under oath; second, between the same parties and on the same matter, and where the party accused could cross-examine; and lastly, that the matter sworn to by the deceased witness should be related in all its material parts, in the order which it was given, so far as it is necessary to a correct understanding of it.[z] In the same State it is said that the question whether all had been sworn to which a deceased witness testified at a former trial in a criminal case, is properly within the province of the jury, and is preliminary to the consideration of such evidence. When it is evident that certain matters have been omitted in giving the evidence of a deceased witness, by a person who professes to give the substance of all the statements sworn to by a deceased witness, the evidence of such person will not be rejected, if the jury are satisfied that in connection with the testimony of others, they have the substance of all the evidence given by deceased witness at the former trial.[zz] It is not necessary therefore that the testimony should all be proved by a single witness.[a]

Where a witness, in behalf of the State, is detained from court, at the trial, by the procurement of the accused, the memorandum made by the committing magistrate of the witness' testimony before him may be read in evidence.[aa]

3d. Where the indictment charges a common and gross offence, *e. g.*, nuisance.

§ 668. Where an offence is laid generally in the indictment, as where the defendant is charged as a common barrator, or a common scold, or as keeping a common gaming house, or disorderly house, evidence of general reputation is not admissible, it being necessary to sustain the indictment that the particular facts which constitute the offence should be proved.[b] Thus upon the trial of one indicted as a common gambler, evidence that he was and is by reputation "a common gambler," is not admissible; his acts, not his character, are to be shown.[bb] And so, on an indictment for fornication, general reputation in the neighborhood, that the defendant lived in fornication with a woman, is inadmissible.[c] But it is admissible to prove the bad character of the women haunting an alleged house of ill-fame.[d]

[yy] R. *v.* Joliffe, 4 T. R. 290; Wilbur *v.* Selden, 6 Cowen, 162; Com. *v.* Richards, 18 Pick. 434; Warren *v.* Nichols, 6 Metc. 261; Ephraim *v.* Murdock, 7 Blackf. 10.

[z] Summons *v.* State, 5 Ohio (N. S.) 325.

[zz] Ibid.

[a] Ibid.

[aa] Williams *v.* State, 19 Geo. 402; State *v.* Houser, 26 Mis. (5 Jones), 431.

[b] Com. *v.* Stewart, 1 S. & R. 342; Archb. C. P. 105; see R. *v.* Rogier, 1 B. & C. 272; 2 D. & R. 431; post, § 2390.

[bb] Com. *v.* Hopkins, 2 Dana, 418.

[c] Overstreet *v.* State, 3 How. Miss. 328.

[d] Clementine *v.* State, 14 Mississ. 112.

IV. Dying declarations.

1st. Must be made under a sense of impending dissolution, § 669.
2d. Only admissible when death is the subject of the charge, § 675.
3d. Admissible by husband against wife, and vice versa, § 676.
4th. The deceased must have been competent as a witness, § 677.
5th. The evidence must have been admissible had the deceased been sworn, § 678.
6th. When part of the res gestæ, §, 680.
7th. Admissibility is for the court, § 681.
8th. How to be examined and impeached, § 682.
9th. When in prisoner's favor, § 682.

1st. Must be made under a sense of impending dissolution.

§ 669. The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions, where the death is the subject of criminal inquiry, (1) though the prosecution be for manslaughter,[dd] (2) though the accused was not present when they were made, and had no opportunity for cross-examination,[e] and (3) against or in favor of the party charged with the death.[f] For it is considered that when an individual is in constant expectation of immediate death, all temptation to falsehood, either of interest, hope, or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice.[g] When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions.[h]

The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations *in extremis* of the murdered person, in such cases, are admissible in evidence.[i]

§ 670. Dying declarations are admitted from the necessity of the case, to identify the prisoner, and to establish the circumstances of the *res gestæ*, or to show transactions from which the death results; when they relate to former and distinct transactions, they do not seem to come within the principle of necessity. Therefore, it seems that a dying declaration by a party that the

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[dd] State *v.* Hanna, 10 La. R. 131.

[e] See 1 Phil. Ev. 223; 1 Stark. Ev. 101; People *v.* Green, 1 Denio, 614; 1 Park. C. C. 11; State *v.* Brunetto, 13 La. Ann. 45.

[f] R. *v.* Scaife, 1 M. & Rob. 551; U. S. *v.* Taylor, 4 Cranch, C. C. R. 338.

[g] 1 Leach, 502; 1 Gilb. Evid. 280; 1 Chit. C. L. 568, 569; Com. *v.* Murray, 2 Ashm. 61; Com. *v.* Williams, Ibid. 69; State *v.* Nash, 7 Iowa, 347; State *v.* Scott, 12 La. Ann. R. 274; Donnelly *v.* State, 2 Dutch. (N. J.) 463; Walston *v.* Com. 16 B. Monr. 15.

[h] Dunn *v.* State, 2 Pike, 229.

[i] Woodsides *v.* State, 2 How. Miss. R. 655; Anthony *v.* State, 1 Meigs, 265; Campbell *v.* State, 11 Georgia, 355; Robbins *v.* State, 8 Ohio, St. R. (N. S.) 131; State *v.* Nash, 7 Iowa, 347.

prisoner had, two or three times previously, attempted to kill him, is not admissible.[j]

§ 671. Dying declarations, however, are not admissible unless it appear to the court that they were made under a sense of impending dissolution,[k] and a consciousness of the awful occasion,[l] though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made.[m] Where the party expressed an opinion that she should not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible.[n] But it is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury,[o] which may be collected from the general circumstances of his condition;[oo] as when the party was a member of the Romish Church, and had confessed, been absolved, and received extreme unction, before making the declaration.[p]

The mere fact that a slave after receiving his mortal wound, was heard to cry out "O my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the admission of his declarations.[q]

§ 672. A boy, between ten and eleven years of age, was mortally wounded, and died the next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was not true; a declaration made by him, at this time, was, therefore, held receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis*.[r]

But in a case of murder, it appeared that, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and that, on the day before her heath, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she

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[j] Nelson *v.* State, 7 Humph. 542.

[k] R. *v.* Woodcock, 1 Leach, 652; R. *v.* Welburn, 1 East's P. C. 358; R. *v.* Van Butchell, 3 C. & P. 629; Com. *v.* Williams, 2 Ashmead, 69; 1 Greenl. on Ev. sec. 158; 2 Russ. on Cr. 752; Hill's case, 2 Grat. 594; Nelson *v.* State, 7 Humph. 542; Moore *v.* State, 12 Ala. 764; Brakefield *v.* State, 1 Sneed, 215; Starkie *v.* People, 17 Ill. 17; Robbins *v.* State, 8 Ohio St. R. (N. S.) 131; Brown *v.* State, 32 Miss. (3 Georg.) 433; Kilpatrick *v.* Com. 7 Casey, 198.

[l] R. *v.* Pike, 3 C. & P. 589; R. *v.* Crockett, 4 C. & P. 544; R. *v.* Hayward, 6 C. & P. 157; R. *v.* Spilsbury, 7 C. & P. 187; Montgomery *v.* State, 11 Ohio, 424; State *v.* Poll, 1 Hawks, 442; Dunn *v.* State, 2 Pike, 229.

[m] R. *v.* Mosley, R. & M. 97; 2 Russ. on Crimes, 757.

[n] R. *v.* Fagent, 7 C. & P. 238.

[o] R. *v.* Bonner, 6 C. & P. 386; Dunn *v.* State, 2 Pike, 229; 1 East, P. C. 385; R. *v.* Dingler, 2 Leach, 561; Anthony *v.* State, 1 Humph. 265; Meigs R. 265; People *v.* Grunzig, 1 Harris C. C. 299; People *v.* Knickerbockr, Ibid. 302; Hill's case, 2 Gratt. 594; Nelson *v.* State, 7 Humph. 542; Brakefield *v.* State, 1 Sneed (Tenn.) 215; 2 Russ. on Crimes, 761.

[oo] Kilpatrick *v.* Com. 7 Casey, 198.

[p] Com. *v.* Williams, 2 Ashmead, 69; R. *v.* Minton, 1 M'Nally, 38.

[q] Lewis *v.* State, 9 S. & M. 115.

[r] R. *v.* Perkins, 9 C. & P. 395.

had been in hopes she would have got better, but, as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was considered not receivable in evidence, as a declaration *in articulo mortis*, as it did not sufficiently appear that, at the making of it, the deceased was without hope of recovery.[s]

§ 673. In a case before the twelve judges,[t] it was held that the declarations of the deceased, made on the day he was wounded, and when he believed he should not recover, were evidence, although he did not die till eleven days after, and although the surgeon did not think his case hopeless, and continued to tell him so till the day of his death. In one case where the party, being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never recover," and in another, where the surgeon having said, "You are in great danger," the party replied, "I fear I am;" declarations subsequently made were admitted.[u] In R. *v.* Christie,[v] the deceased asked his surgeon if the wound was necessarily mortal; and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement. This statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that the deceased thought himself at the point of death; for, being told that the wound was not necessarily mortal, he might still have had hope of recovery. And where the only evidence of the dying man being aware of his situation, consisted in his saying "he should never recover," it was held insufficient.[w]

A statement concluded with these words: "I have made this statement believing I shall not recover;" at the time it was made the deceased was in such a state that his death must speedily follow; and he died seven days afterwards. But it appeared, also, that shortly before he made the declaration he had said to a constable, who asked him how he was: "I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better; but I do not myself think I shall ultimately recover." Afterwards, on the same occasion, he said he could not recover. It was held that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.[ww]

§ 674. In New York, it has been laid down in a Circuit Court that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery.[x] But such a relaxation of the rule is without precedent, and though perhaps a case might arise where the fact that the deceased entertained, at a particular moment, a fugitive and transient hope, would not exclude the evidence, yet it is best to take the rule without qualification.

The fact of the declarations not being made immediately previous to death,

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[s] R. *v.* Megson, 9 C. & P. 418.
[t] R. *v.* Mosley, Ry. & M. C. C. R. 97.
[u] R. *v.* Craven, Lewin, C. C. 77; R. *v.* Simpson, Lewin, C. C. 78.
[v] Car. L. 232, O. B. 1821.
[w] R. *v.* Van Butchell, 3 C. & P. 631; see also People *v.* Robinson, 2 Parker, C. R. 235.
[ww] R. *v.* Reany, 40 Eng. Law and Eq. 552.
[x] People *v.* Anderson, 2 Wheel. C. C. 398.
[y] State *v.* Moody, 2 Haywood, 31.

is not fatal to them, provided the deceased was conscious at the time he was in a dying situation.[z]

Where the deceased said on the evening before the morning of her death, "Mr. F. has killed me," and about the same time, "I am dead; Mr. F. has killed me," it was held that the declarations were admissible as the dying declarations of the deceased.[a]

Where the deceased, on the day the mortal blow was inflicted, was told that his deposition ought to be taken, as he must inevitably die before morning, and he replied, he thought so too, and afterwards exclaimed, "O Lord, I shall die soon," it was held that his declarations, reduced to writing, and signed by him at that time, were admissible as dying declarations, although he lived ten days after.[b]

In a case in Virginia, a person having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death, was asked, "Did P. V. strike you first?" To which he answered, "Yes, sir." "Did P. V. stab you?" to which he also answered, "Yes, sir." "Do you think you are going to die?" to which he again answered, "Yes, sir;" and was asked a fourth question, which he was unable to answer, but it did not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the first three it was put to the dying man: it was held that the declarations, being distinct and complete in themselves, were competent evidence on the trial of P. V. on an indictment for the homicide.[c]

2d. ONLY ADMISSIBLE WHEN DEATH IS THE SUBJECT OF THE CHARGE.

§ 675. The declarations are only admissible where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration.[d] Thus, in a case where the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion; the woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge who tried the case, rejected the evidence, observing that, although the declaration might relate to the causes of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.[e] In another case,[f] the defendant having being convicted of perjury, a rule *nisi* for a new trial was obtained; whilst that was pending, the defendant, Mead, shot the prosecutor, Law; and, on showing cause against the rule, an affi-

[z] State *v.* Poll, 1 Hawks, 442; R. *v.* Mosley, R. & M. 97; 1 Greenl on Ev. § 158.

[a] State *v.* Freeman, 1 Speers, 57.

[b] M'Daniel *v.* State, 8 S. & M. 401.

[d] 2 Russ. on Crimes, 761; State *v.* Shelton, 2 Jones (Law), N. C. 360; but see post, § 680.

[c] Vass *v.* Com. 3 Leigh, 786.

[e] R. *v.* Hutchinson, 2 B. & C. 608; Wilson *v.* Boerem, 15 Johns. 286.

[f] R. *v.* Mead, 2 B. & C. 605; 4 D. & R. 120, S. C.

davit was tendered of the dying declaration of the latter as to the transaction out of which the prosecution for perjury arose. The court held that it could not be read; for dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration. So, in trials for robbery, the dying declarations of the party robbed are rejected.[g] In Wright *v.* Littler,[h] however, the declarations of subscribing witnesses, confessing the forgery of a deed, were admitted;[i] but in Sutton *v.* Ridgway,[j] Abbott, C. J., says that the cases cited, viz., those of the deceased persons, in cases of murder or manslaughter, or subscribing witnesses to deeds, confessing the deeds to be forged, are the only exceptions to the general rule of not receiving evidence unless upon oath, and with the opportunity of a cross-examination; and Bayley, J., observes, that the declarations admitted in the case of Aveson *v.* Kinnaird,[k] were part of the *res gestæ.*

3d. ADMISSIBLE BY HUSBAND AGAINST WIFE, AND VICE VERSA.

§ 676. On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner,[l] and so are the dying declarations of a husband against the wife.[m]

4th. THE DECEASED MUST HAVE BEEN COMPETENT AS A WITNESS.

§ 677. The dying party, to make the declarations evidence, must, at the time of their making, have an idea of a future state; therefore, the declarations of a dying child, of only four years of age, have been held inadmissible.[n] But if the child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences in a future state of telling a falsehood, his declarations, made under a sense of impending dissolution, are admissible.[o] Thus, the dying declarations of an intelligent child ten years old, have been admitted.[p]

T. being at the point of death, and conscious of her condition, but unable to speak articulately, in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and, if so, she was requested to squeeze the hand of the person making the inquiry. It was held, that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury; they being the sole judges of its credibility, and of the effect to be given to it.[pp]

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[g] Per Bailey & Best, J. J., 1822, 1 Phil. Ev. 225; R. *v.* Lloyd, 4 C. & P. 233; see R. *v.* Baker, 2 M. & Rob. 53; 1 Green. 156, n. 2.

[h] 3 Burr. 1244.

[i] See Aveson *v.* Lord Kinnaird, 6 East, 195.

[j] 4 B. & Al. 54.

[k] 6 East, 188.

[l] People *v.* Green, 1 Denio, 614; Pa. *v.* Stoops, Addison, 381.

[m] Moore *v.* State, 12 Ala. 764.

[n] R. *v.* Pike, 3 C. & P. 598; 2 Russ. on Crimes, 765.

[o] 2 Russ. on Crimes, 765.

[p] R. *v.* Perkins, 2 M. C. C. 135; S. C. 9 C. & P. 395.

[pp] Com. *v.* Casey, 11 Cush. (Mass.) 417.

A statement written by an attorney during the night on which the deceased died, was held not admissible as the dying declarations of the deceased, when it appeared that the attorney propounded questions to him, which he tried to answer, but was unable to do so; that his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" that the statement, consisting of the answers thus made, was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed, while the statement was being read to him, to be in a stupor."[q]

5th. THE EVIDENCE MUST HAVE BEEN ADMISSIBLE HAD THE DECEASED BEEN SWORN.

§ 678. Nothing can be evidence, in a declaration *in articulo mortis*, that would not be so if the party were sworn. On this rule, anything the murdered person, *in articulo mortis*, says as to facts, is receivable, but not what he says as matter of opinion or belief.[qq]

§ 679. If the declaration of the deceased, at the time of his making it, be reduced into writing, the written document must be given in evidence, and no parol testimony respecting its contents can be admitted.[r] And if a declaration, *in articulo mortis*, be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration.[s] But where the dying person repeated his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of a magistrate, on the second occasion, will not, it seems, exclude parol evidence of the others, where it is not in the power of the prosecutor, at the trial, to give that which has been committed to writing in evidence.[t] And on one occasion, in Ireland, in a case where the depositions of the individual were made at the time when he thought himself dying, taken down by the magistrate, and not in the presence of the prisoner, it being objected at the trial that the depositions were not pursuant to the statute,[u] the magistrate was sworn, and gave parol evidence of the declarations of the deceased.[v] In this country, when no statute exists, it has been said that such a written statement is *per se* inadmissible, though it may be received as secondary evidence, or to refresh the memory of the magistrate.[w] On the other hand a deposition was received upon evidence that upon being read to the deceased, he said it was "as nigh right as he could recollect the circumstances."[ww]

[q] McHugh *v.* State, 31 Alab. 317.

[qq] R. *v.* Sellers, O. B. 1796, Car. C. L. 283; McPherson *v.* State, 22 Georg. 478; Johnson *v.* State, 17 Alab. 618.

[r] Vin. Ab. Evid. 38, A. b.; though see Beets, 1 Meigs, 106.

[s] R. *v.* Gay, 7 C. & P. 230.

[t] R. *v.* Reason, 1 Str. 500; 16 How. St. Tr. S. C.

[u] 10 Car. c. 1, Irish.

[v] R. *v.* Callaghan, 1 M'Nally, 385; R. *v.* Woodcock, 2 Leach, 563.

[w] Beets *v.* State, 1 Meigs, 106.

[ww] State *v.* Ferguson, 2 Hill, 607.

The dying declarations of a criminal at the scaffold will not be admissible, because his oath could no longer have been received in a court of justice, after his blood is corrupted.[x]

6th. WHEN PART OF THE RES GESTÆ.

§ 680. It seems that where the declarations of the injured party are part of the *res gestæ*, they are admissible without proof of a consciousness of approaching death;[y] but such is not the case, when they relate to anything beyond the mere statements necessary to give information on the subject of the wound.[z]

It is competent to prove declarations of the deceased, respecting the disposition of his property, made at the time of declarations charging the prisoner with his murder, to show that certain property was in his possession, and might have been an incentive to the murder, and to show *in limine*, that his mental faculties were unimpaired, and that he thought death impending.[zz]

7th. ADMISSIBILITY IS FOR THE COURT.

§ 681. The court are to decide as to the admissibility of the declarations.[a]

The truth of the facts put in evidence, to show that declarations were made in view of speedy death, is fact for the court; and its decision on the facts it finds proven, is matter of law, and may be reviewed.[aa]

8th. HOW TO BE EXAMINED AND IMPEACHED.

§ 682. The same principles of law are applicable to the contradictory statements of persons *in extremis*, as to those of a witness under examination on oath.[b] Where the court below charged the jury, "that if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous.[c]

If it appear that the declarations were uttered by the dying man, to be connected with, and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully made, it had been interrupted, and the narrative left unfinished; such partial declarations, it is said, would not be competent evidence.[d]

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[x] Drummond's Case, 1 Leach, 337; 2 Russ. on Crimes, 763; 2 Hawk. c. 46, s. 51.

[y] Com. *v.* M'Pike, 3 Cush. 181.

[z] Denton *v.* State, 1 Swan (Tenn.) 279.

[zz] Donnelly *v.* State, 2 Dutch (N. J.) 463, 601.

[a] 1 Leach, 504; R. *v.* Hucks, 1 Stark. 532; R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Reany, 40 Eng. Law & Eq. 532; 2 Rus. on Crimes, 761; 1 Greenl. on Evid. § 160; M'Daniel *v.* State, 8 S. & M. 401; Hill's case, 2 Gratt. 594; People *v.* Glenn, 10 Cal. 32; Starkey *v.* People, 17 Ill. 17; Donnelly *v.* State, 2 Dutch (N. J.) 601; State *v.* Poll, 1 Hawks, 442; Lambeth *v.* State, 22 Missis. 322; Com. *v.* Murray, 2 Ashmead, 211; contra, Campbell *v.* State, 11 Georgia, 354.

[aa] Donnelly *v.* State, 2 Dutch (N. J.) 463, 601.

[b] M'Pherson *v.* State, 9 Yerger, 279.

[c] Ibid.

[d] Vass *v.* Com. 8 Leigh, 786.

The objection that the questions to which the answers of the dying man were given, were leading questions, is not properly applicable in such a case.[dd]

The substance of dying declarations may be admitted in evidence, and this may be done, if need be, through the medium of interpreters.[e]

It seems that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth; he standing on the same footing as a witness called into court and then examined; and, in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that she was considered a woman of loose character and light reputation.[ee] It has been held, however, that it is not competent for the prisoner to prove that before the affray, the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him.[f]

Where dying declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error.[g] The jury are to judge of the credit due to dying declarations, as in the case of any other testimony, by all the circumstances.[gg]

9th. When in prisoner's favor.

The dying declarations of the deceased may be received in favor of a prisoner. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state which he was in, and said he knew he could not get better, and afterwards said, "I don't think he would have struck me if I had not provoked him." Coleridge, J., at first expressed some doubt whether he ought to receive the statement, but afterwards received the evidence, observing that it might have an influence on the amount of punishment.[h]

V. Confessions and declarations.

1st. General weight of confessions and degree of caution with which they should be received, § 683.
2d. How far the admissibility of confessions is affected by, § 685.
(*a*) Threats, § 685.
(*b*) Promises, § 686.

[dd] Ibid.; Com. *v.* Casey, 11 Cush. (Mass.) 417; R. *v.* Fagent, 7 C. & P. 238.

[e] Starkey *v.* People, 17 Ill. 17; Montgomery *v.* State, 11 Ohio, 424; Ward *v.* State, 8 Blackford, 101; Nelmo *v.* State, 11 Sm. & M. 500; see ante, § 679.

[ee] People *v.* Knapp, per Edmonds, J., MSS.; see Carter *v.* People, 2 Hill's N. Y. R. 317.

[f] State *v.* Varney, 8 Boston Law Rep. 562.

[g] Moore *v.* State, 12 Ala. 764; Starkey *v.* People, 17 Ill. 17.

[gg] Donnelly *v.* State, 2 Dutch (N. J.), 463, 601.

[h] R. *v.* Scaife, 1 Moody & Robinson, 551; 2 Lewin C. C. 150; see Moore *v.* State, 12 Ala. 764.

(c) Duress, § 689.
(d) Interrogations, either voluntary or under oath, § 690.
(e) Artifice, § 691.
(f) Authority or influence of the party by whom the confession is elicited, § 692.
3d. How far an original improper influence vitiates subsequent confessions, § 694.
4th. How far extraneous facts deduced through an inadmissible confession may be received, § 695.
5th. How far confessions of one are evidence against another, and herein of the defendant's silence under statements of others implying his guilt, § 696.
6th. How confessions are to be construed, § 697.
7th. By whom the admissibility of confession is to be determined, § 698.
8th. How far a defendant's declarations in his own favor can be received, § 699.
9th. Confessions of slaves, § 701.

1st. General weight of confessions and degree of caution with which they should be received.

§ 683. A free and voluntary confession by a person accused of an offence, whether made before his apprehension or after; whether on a judicial examination or after commitment; whether reduced to writing or not; in short, any voluntary confession, made by a defendant to any person, at any time or place, is strong evidence against him, and, if satisfactorily proved, when there is proof of the *corpus delicti*, sufficient to convict, according to the English rule, without any corroborating circumstances.[hh] But in this country, in particular, there is a growing unwillingness to rest convictions on confessions alone. The confessions of a party, it has been held in several States, not made in open court, or on examination before a magistrate, but to an individual, uncorroborated by circumstances, will not justify a conviction,[i] especially in capital cases.[j] In New Jersey, it is true, it has been thought otherwise, and it was there considered that the confession of a boy of twelve years, afterwards retracted, and corroborated only in unessential points, was enough to convict of murder. He was executed accordingly, but the case stands alone in its character and result.[k] On the other hand, in North Carolina the position has been broadly taken that where A. makes a confession, and relates circumstances which are proven actually to have existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner, but a naked confession, unattended with circumstances, is not sufficient.[l] In New York and Illinois the same view is held.[ll]

In capital cases, these cautions should be applied with peculiar jealousy. It is hardly supposable, it has been well said, that a man possessed of him-

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[hh] Per Grose, J., Lambe's case, 2 Leach, C. C. 625; 2 Hawk. P. C. c. 46, s. 31; 2 Russ. on Crimes, 824; Stephen *v.* State, 11 Georgia, 226.

[i] People *v.* Hennessey, 15 Wendell, 147; People *v.* Badgely, 1 Wendell, 53; State *v.* Fields, Peck's R. 140; State *v.* Gardiner, Wright's R. 392; Keithler *v.* State, 10 Sm. & Mar. 229; 1 Greenleaf, sec. 247.

[j] Stringfellow *v.* State, 26 Mississippi, 157.

[k] State *v.* Guild, 5 Halsted, 165.

[l] State *v.* Long, 1 Hayw. 455; though see State *v.* Cowan, 7 Iredell, 239.

[ll] Bergen *v.* People, 17 Ill. 426; People *v.* Rulloff, 3 Parker C. R. (N. Y.) 401.

self, would make a confession to take away his own life. It must generally proceed from a promise or hope of favor, or from a dread of punishment, and in such situations the mind is agitated; the man may be easily tempted to go further than the truth. Besides, the witness, respecting the confession, may have mistaken his meaning.[m] A remarkable instance of this kind is mentioned by Mr. Dickenson, as singularly illustrative of the propriety of this caution. Two brothers committed a robbery in a dark night to a large amount, and fled. A younger brother, who was innocent, in order to favor their escape, contrived to draw suspicion on himself, and when examined, tacitly admitted his guilt. He was afterwards committed to prison, and all pursuit of his brothers was discontinued. On the trial he proved an alibi on the clearest and most satisfactory evidence, and was consequently acquitted. In the mean time, the actual felons had safely arrived in America with their plunder.[n] Matthews relates an instance of a countryman who was convicted, on his own confession, of the murder of a widow, who, two years afterwards, returned to her home, and had never received any injury whatever.[o] In another case, a Frenchman named Hubert was convicted and executed on a most circumstantial confession of his guilt in having occasioned the great fire in London, "although," adds the historian, "neither the judges nor any one present believed him guilty, but that he was a poor, distracted wretch, weary of life, and who chose to part with it in that way."[p] And so Bunyan tells us of a case where the confession was also evidently the result of a disordered mind: "Since you are entered upon stories, I will also tell you one, the which, though I heard it not with my own ears, yet my author I dare believe: It is concerning one old *Tod*, that was hanged about twenty years ago, or more, at *Hartford*, for being a thief. The story is this: At a Summer Assize holden at *Hartford*, while the judge was sitting upon the bench, comes this old *Tod* into the court, clothed in a green suit, with his leathern girdle in his hand, his bosom open, and all in a dung sweat as if he had run for his life; and being come in, he spake aloud as follows: *My Lord*, said he, *here is the veryest rogue that breathes upon the face of the earth; I have been a thief from a child: when I was but a little one, I gave myself to rob orchards, and to do other such like wicked things, and I have continued a thief ever since. My Lord, there has not been a robbery committed this many years, within so many miles of this place, but I have either been at it or privy to it.* The judge thought the fellow was mad; but after some conference with some of the justices, they agreed to indict him, and so they did, of several felonious actions; to all which he heartily confessed guilty, and so was hanged with his wife at the same."

Two brothers named Boorns, who, on being charged in Vermont with the murder of another, were convicted and sentenced to death, chiefly on their

[m] State *v.* Long, 1 Hawy. 455.

[n] 1 Dick. Just. 460.

[o] Matth. de Prob. c 1, n. 4. See, also, the false confession of a man named John Sharpe, for the murder of Catharine Elmes; Ann. Reg. 1833, p. 74; and a series of cases in Blackwood's Mag. for July, 1860, p. 54.

[p] Continuation of Lord Clarendon's Life, written by himself, p. 352.

admissions, were fortunately relieved from execution by the reappearance of their alleged victim.[r]

In Illinois, in 1841, three brothers named Trailor, were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examination had scarcely finished, before one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct statement, under oath, of the homicide. To the amazement of the whole country, however, the deceased made his appearance in just time enough to intercept a conviction; and the only way of accounting for the confession which had been produced, was that the party who made it, in the desperation of impending conviction, took this method of cutting short suspense.[s]

§ 684. Mr. Abercrombie relates an instance where a *quasi* confession was made by an innocent person, which shows also that it may not be impracticable for an artful man to so operate upon the nervous sensibility of another less intelligent, as to lead the latter to declarations or conduct which would produce a strong presumption of guilt.

During a late investigation in the North of Scotland, respecting an atrocious murder committed on a peddler, a man came forward voluntarily and declared that he had had a dream, in which there was represented to him a house, and a voice directed him to a spot near the house, in which there was buried the pack, or box for small articles of merchandise, of the murdered person. On search being made, the pack was found, not precisely on the spot which he had mentioned, but very near it. The first impression on the minds of the public authorities was, that he was either the murderer or an

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[r] N. Am. Review, vol. 10, p. 418; 5 Law Reporter, 195; 1 Greenl. on Evid. sec. 214. Subject to the restrictions which are thus suggested, remarks Mr. Greenleaf, 1 Evid. s. 215, however, deliberate confessions, when made advisedly and with a due sense of their meaning, are among the most effectual proofs in the law. (Dig. Lib. 42, tit. 2, Confess.; Van Leenwen's Comm. b. 5, ch. 21, sec. 1; Poth. on Obl. (by Evans,) App. Numb. xvi. sec. 13; 1 Gib. Evid. by Lofft, 216; 4 Hawk. P. C. 425, b. 2, ch. 46, sec. 35; Mortimer *v.* Mortimer, 2 Hagg. Conn. R. 315; Harris *v.* Harris, 2 Hagg. Eccles. 409.) Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received as evidence, as among the proofs of gilt. (Lambe's case, 2 Leach, Crim. Cas. 625, 629, per Grose, J.; Warickshall's case, 1 Leach, Cr. Cas. 298; M'Nally's Evid. 42, 47.) Confessions, too, like admissions, may be inferred from the conduct of the prisoner, and from his silent acquiescence in the statements of others, respecting him, and made in his presence, provided they were not made under circumstances which prevented him from replying to them. See, also, R. *v.* Bartlet, 7 C. & P. 832; R. *v.* Smithie, 5 C. & P. 332; R. *v.* Appleby, 3 Star. R. 33; Joy on Confessions, &c., 77–80. The degree of credit due to them is to be estimated by the jury, under the circumstances of the case.

[s] See 4 Western Law Journal, 25.

accomplice in the crime. But the individual accused was soon after clearly convicted; and before his execution he fully confessed his crime, and in the strongest manner exculpated the dreamer from any participation in, or knowledge of the murder. The only fact that could be discovered calculated to throw any light upon the occurrence was, that immediately after the murder, the dreamer and the murderer had been together in a state of almost constant intoxication, for several days: and it is supposed that the latter might have allowed statements to escape from him which had been recalled to the other in his dream, though he had no remembrance of them in his sober hours.[t]

There is a species of morbid vanity which sometimes leads innocent persons to declare themselves guilty of crimes to which public attention is particularly drawn. Of this the memoirs of Lord Cockburn give us the following instances:—

"On the 13th of November, 1806, a murder was committed in Edinburgh, which made a greater impression than any committed in our day, except the systematic murders of Burke. James Begbie, porter to the English Linen Company's Bank, was going down the close in which the bank then was, on the south side of the Canongate, carrying a parcel of bank-notes of the value of four or five thousand pounds, when he was struck dead by a single stab, given by a single person who had gone into the close after him, and who carried off the parcel. This was done in the heart of the city, about five in the evening, and within a few yards of a military sentinel, who was always on guard there, though not exactly at this spot, and at the moment possibly not in view of it. Yet the murderer was never heard of. The soldier saw and heard nothing. All that was observed was by some boys who were playing at hand-ball in the close; and all that they saw was that two men entered the close as if together, the one behind the other, and that the front man fell, and lay still; and they, ascribing this to his being drunk, let him lie, and played on. In was only on the entrance of another person that he was found to be dead, with a knife in his heart, and a piece of paper, through which it had been thrust, interposed between the murderer's hand and the blood. The skill, boldness, and success of the deed produced deep and universal horror. People trembled at the possibility of such a murderer being in the midst of them, and taking any life that he chose. But the wretch's own terror may be inferred from the fact, that in a few months the large notes, of which most of the booty was composed, were found hidden in the grounds of Bellevue. Some persons were suspected, but none on any satisfactory ground; and, according to a strange craze or ambition not unusual in such cases, several charged themselves with the crime, who, to an absolute certainty, had nothing to do with it."

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[t] Abercrom. on the Intellect. Powers, 12 ed. 222.

2d. HOW FAR THE ADMISSIBILITY OF CONFESSIONS IS AFFECTED BY,

§ 685. (*a.*) *Threats.*—A confession can never be received in evidence where the defendant has been influenced by any threat of harm,[u] or where it has been extorted by pain, or made under the influence of fear.[v] Thus, a confession induced by saying, "If you do not tell me all you know, you will be put in the dark room and hanged," was held inadmissible.[w] Confessions, when extorted by torture, purposely applied, ought to weigh nothing.[x] It is an indictable offence to attempt to extort by torture a confession of guilt from another.[y] If it appears, in fine, that any inducement was held out, tending to extort a confession, either by intimidation or promise of favor, such confession cannot be received.[z]

A confession made by a prisoner to the committing magistrate, was held inadmissible where it appeared that the magistrate had sworn the prisoner, and had said, "If you do not tell the truth, I will commit you."[a] In this case the defendant was at the time directly charged with the offence. When he is examined as a mere witness, the same result does not obtain.[b]

Nor will the confession be excluded where there is a mere adjuration to tell the truth, unaccompanied with a threat. Thus when a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held strictly admissible.[c] Nor, as it has been held in New York, is it a valid objection that the defendant had been called upon to touch the deceased's body.[d] But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," Gaselee, J., refused to receive a statement, thereupon made by the prisoner, in evidence.[e]

A confession, though made under the representations of the infamy of a concealment, if without threats or promises, may be received.[f]

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[u] Moore *v.* Com. 2 Leigh, 701; State *v.* Phelps, 11 Ver. 116; State *v.* Grant, 9 Shep. 171; Ann *v.* State, 11 Humph. 159; Stephen *v.* State, 11 Georgia, 226; Deathridge *v.* State, 1 Sneed, 75.

[v] Hector *v.* State, 2 Missouri R. 135; U. S. *v.* Nott, M'Lean, 499; Serpentine *v.* State, 1 Howard's Miss. Rep. 256; 2 Russ. on Crimes, 826, 831; Berry *v.* State, 10 Georgia, 511.

[w] People *v.* Rankin, 2 Wheeler's C. C. 467.

[x] State *v.* Jenkins, 2 Tyler, 379.

[y] State *v.* Hobbs, 2 Tyler, 380.

[z] Com. *v.* Chabbook, 1 Mass. 144; Com. *v.* Drake, 15 Mass. 161; Com. *v.* Knapp, 9 Pick. 496; State *v.* Grant, 22 Maine R. 171; State *v.* Phelps, 11 Vermont R. 117; Stephen *v.* State, 11 Geor. 225; State *v.* Jenkins, 2 Tyler, 377; State *v.* Brick, 2 Harrington, 530; Boyd *v.* State, 2 Humph. 39; Hector *v.* State, 2 Missouri, 135; People *v.* Ward, 15 Wendell, 231; Oakley *v.* Shumaker, 15 Wendell, 226; Smith *v.* Com. 10 Grattan, 734.

[a] Com *v.* Harman, 4 Barr, 269.

[b] Post, § 690.

[c] R. *v.* Wild, 1 Mood. C. C. 452.

[d] People *v.* Johnson, 2 Wheel. C. C. 337.

[e] R. *v.* Shepherd, 7 C. & P. 579.

[f] State *v.* Clark, 2 Bailey, 66; but see People *v.* Ward, 15 Wendell, 231; Oakley *v.* Schumaker, 15 Wend. 226.

The settled law may now be held to be, that confessions made even to constables or police officers cannot be excluded unless it appear that there was a threat of harm or a promise of worldly advantage employed by an authoritative person.[g] Who is such an authoritative person will be hereafter considered.[h]

§ 686. (*b.*) *Promises.*—As a general rule confessions obtained through promises are inadmissible.[i] Thus, a confession obtained by a promise to put an end to a prosecution, will not be received,[j] though in New York, the confessions of a prisoner arrested for larceny may be given in evidence, though made after the owner of the goods stolen had promised not to prosecute;[k] it not appearing that the confession and the promise were directly connected, and the owner not being a person in authority.

A confession or admission by one under arrest, under a criminal charge, to the officer having him in custody, made the day after the party had been told by the officer, that "he could make him no promises, but if he made any disclosure that would be of benefit to the government, the officer would use his influence to have it go in his favor," is not admissible in evidence; although the officer testified that he thought the statement was voluntary, and would have been made if the inducements the day before had not been held out; and although the judge instructed the jury, that if the statement was not made freely and voluntarily, or if it was induced by the previous promises, they should exclude it altogether.[l]

Shortly after the arrest, and on the way to jail, the prosecutor who made the arrest, attempted to strike the prisoner, but was prevented by an assistant, who said, "You have been telling lies, the best policy is to retract and tell us all about it; if you do not, I cannot save you any longer;" afterwards, "you had better turn State's evidence (the co-defendants were then arrested) and get out of it." It was held that a confession thereupon obtained was inadmissible.[ll]

So also a confession was rejected where it appeared that the officer arresting said, immediately after the arrest, "If you are guilty you had better own it."[m]

In Missouri, where the sheriff said to his prisoner, "that it would be better in the long run for her to tell the truth about the matter, and not any lies," it was held that this was not sufficient to exclude a confession made some fifteen minutes afterwards, on the ground that it was induced by flattery or hope.[mm]

This principle was at one time carried to a great length by the English courts. Thus, confessions have been held inadmissible when they were obtained by saying, "Tell me where the things are, and I will be favorable

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g R. *v.* Baldry, 12 Eng. Law & Eq. 591; 5 Cox C. C. 523; 2 Denison C. C. 430.

h Post, § 692.

i See authorities cited notes to § 685.

j Boyd *v.* State, 2 Humph. 390; Smith *v.* Com. 10 Grattan, 734.

k Ward *v.* People, 3 Hill, 395.

l Com. *v.* Taylor, 5 Cush. 605.

ll Deathridge *v.* State, 1 Sneed (Tenn.) 75.

m State *v.* York, 37 N. H. 175.

mm Hawkins *v.* State, 7 Mis. 190.

to you;"[n] or "You had better say where you got the property;"[o] or "It would have been better for you if you had told at first;"[p] or "You had better tell all you know;"[q] or "I should be obliged to you if you would tell all you know; if you will not, of course we can do nothing."[r] Any advice to a prisoner by a person in authority, telling him it would be better or worse for him if he confesses, vitiates, it was said, a confession induced by it.[s] Lately, however, this has been greatly qualified, and it is now held that there must be a positive promise made or sanctioned by a person in authority to justify the judge in the exclusion of the confession.[t] It has been doubted whether the principle extends to any other cases; and it has been held that a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised, without the means of performance, can hardly be deemed sufficient to produce any effect even on the weakest mind, as an inducement to confess; and accordingly confessions, made under such circumstances, have been admitted in evidence.[u] This conflict of authority, as is remarked by Mr. Greenleaf,[v] seems to have arisen from the endeavor to define and settle, as a rule of law, the facts and circumstances, which shall be deemed, in all cases, to have influenced the mind of the prisoner in making the confession. In regard to persons in authority, there is not much room to doubt. Public policy requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet even here, the age, experience, intelligence and constitution, both physical and mental, of prisoners, are so various, and the power of performance so different in the different persons promising, that the rule will necessarily sometimes fail of meeting the truth of the case.

When the prisoner was first arrested, one of the two special constables, who had him in charge, said to him, "Come, Jack, you might as well out with it:" the magistrate interposed and warned him not to confess; some hours afterwards, the prisoner made confession to B., who was in no position of authority over him, but with whom, and in whose buggy, as a convenient mode of transportation, he was riding to jail, the two constables being near, but not within hearing. It was held, that the confessions to B. were admissible.[vv]

A confession is not incompetent because made under advice, that if the party was guilty the confession could not put him in any worse condition, and that he had better tell the truth at all times.[w]

A statement by a jailer, after the arrest of a prisoner, "that if the com-

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[n] R. *v.* Cass. 5 C. & P. 290, n; Boyd *v.* State, 2 Humph. 37.

[o] R. *v.* Dunn, 4 C. & P. 543.

[p] R. *v.* Walkeley, 6 C. & P. 175.

[q] R. *v.* Kingston, 4 C. & P. 543.

[r] R. *v.* Partridge, 7 C. & P. 551.

[s] 2 East, P. C. 659; R. *v.* Drew, 8 C. & P. 146; R. *v.* Richards, 5 C. & P. 518; R. *v.* Thomas, 6 C. & P. 353; R. *v.* Jones, R. & R. 152; R. *v.* Barrett, 4 C. & P. 570.

[t] R. *v.* Baldry, 12 Eng. Law & Eq. 591; 5 Cox C. C. 523; 2 Den. C. C. 430; overruling R. *v.* Drew, 8 C. & P. 146; post, § 692.

[u] R. *v.* Hardwick, 6 Petersd. Abr. 84, per Wood, B.; R. *v.* Taylor, 8 C. & P. 734; see accordingly, R. *v.* Gibbons, 1 C. & P. 97; R. *v.* Taylor, 1 C. & P. 129; R. *v.* Lingate, 6 Petersd. Abr. 84; R. *v.* Spencer, 7 C. & P. 776; 2 Lewin's Cr. Cas. 125.

[v] 1 Greenleaf's Evid. sec. 223.

[vv] State *v.* Vaigneur, 5 Richardson, 391.

[w] Fonts *v.* State, 8 Ohio State R. (N. S.) p. 98.

monwealth should use any of them as witnesses, he supposed it would prefer her to either of the others," who were arrested and charged with the same offence, is not sufficient to exclude a voluntary confession made by her, on the same day, to a magistrate, after the magistrate had told her such confession might be used as evidence against her.[ww]

Where the promise is made by a person who the prisoner knows has no possible power in the premises, such confession is admissible in evidence.[x]

In New Hampshire it was ruled (1859) that confession, though made under the influence of some collateral benefit or boone, no hope or fear being held out in respect to the particular criminal charge, could be received.[xx]

The degree of authority of the party to whom the confession is made, as connected with the admissibility of the confession, will be examined under a subsequent head.[y]

§ 687. The chief question, it is said,[z] is whether the inducement held out to the prisoner was calculated to make his confession an untrue one; if not, it will be admissible.[a] To this may be added as an important element, whether, as will be presently more fully seen, the person holding out the inducement had authority to promise; if not, it goes a great way to make the confession admissible. Thus, where a prisoner asked of a witness with whom he was in conversation, whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible.[b] So where a prisoner was taken before a magistrate on a charge of forgery, and the prosecutor said, in the hearing of the prisoner, that he considered him as the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable.[c]

§ 688. So, where one under arrest for stealing, was visited in jail by the prosecutor, who said to him that if he wished for any conversation he could have a chance; the prisoner made no reply for a minute or two; the prosecutor then told the prisoner he thought it was better for all concerned, in all cases for the guilty party to confess; the prisoner then said he supposed he should have to stay there whether he confessed or not; the prosecutor replied that he supposed he would, and in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to confess. It was held that the confessions of the prisoner, made immediately after this conversation, were admissible in evidence against him.[d]

[ww] Fife v. Com. 29 Penn. State R. 429.

[x] R. v. Row, Russell & Ryan C. C. 153; R. v. Gibbon, 1 Car. & Payne, 97; R. v. Hardwick, 1 Car. & Payne, 98, in note; R. v. Tyler, 1 Car. & Payne, 129; R. v. Berigan, 1 Irish Circ. R. 177 (Cork Lent Assizes, 1841); State v. Kirby, 1 Strobhart (S. C.), 155.

[xx] State v. Wentworth, 37 N. H. 196.

[y] Post, § 692.

[z] Archb. C. P. 9th ed. 110; State v. Grant, 9 Shep. 171.

[a] 2 Russ. on Cr. 845; R. v. Thomas, 7 C. & P. 345; see U. S. v. Nott, 1 M'Lean, 499; State v. Kirby, 1 Strobhart, 155.

[b] R. v. Thomas, 7 C. & P. 345.

[c] R. v. Court, 7 C. & P. 496.

[d] Com. v. Morey, 1 Gray R. 461.

Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prisoner, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said there had, but he hoped A. would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act. When A. saw the magistrate, he said that no person had held out any inducement to him to confess anything, and that what he was about to say was his own free and voluntary act and desire. A. then made a statement to the magistrate. It was ruled that this statement was receivable against A. on his trial for the murder.[e]

Spiritual inducements.—The inducement must refer to a temporal benefit, for hopes which are referable to a future state merely are not within the principle which exclude confessions obtained by improper influence.[ee]

§ 689. (*c.*) *Duress.*—Legal imprisonment does not operate to exclude a confession made during its continuance when no threats or promises were used.[f] Thus where a prisoner after his arrest, upon being interrogated why he had killed his wife, replied, "Because I loved her," and said further, "I killed her because she loved another better than me;" and also said to a fellow prisoner in jail, that he had killed her, but if it was to do again he would not do it, it was held that there was nothing in the circumstances under which these confessions were made to render them inadmissible.[g]

A confession made to an officer who has the prisoner in custody, is admissible, provided it was not induced by improper means.[h]

§ 690. (*d*). *Interrogations either voluntary or under oath.*—A confession is admissible, although it is elicited by questions put to a prisoner by a magistrate, constable, or other person.[hh] Nor will a confession, even under oath, be excluded by the fact that it was elicited by questions, if no undue influence be used, and the party is not at the time under a criminal charge;[i] and declarations of the defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were holden by Abbott, C. J.,[j] to be admissible against the defendant, upon an indictment for corruptly granting licenses to public houses.[k] It would seem, however, that such testimony must have been taken on a collateral process. Thus a prisoner before he was accused, or even suspected of the crime, was examined on oath,

[e] R. *v.* Dingley, 1 Car. & Kir. 637; State *v.* Vaigneur, 5 Rich. 391.

[ee] R. *v.* Gilham, R. & M. 186; Com. *v.* Drake, 16 Mass. 161; State *v.* Bastick, 4 Harr. 564, post, § 775; 2 Rus. on Cr. 827, 849; see 2 Bennett & H. Lead. Cas. 205.

[f] Stephen *v.* State, 11 Geor. 225; Austin *v.* State, 14 Arkansas, 556; People *v.* Rogers, 4 E. P. Smith (N. Y.), 9.

[g] State *v.* Freeman, 1 Speer, 37.

[h] Com. *v.* Mosler, 4 Barr, 204.

[hh] R. *v.* Wild, 1 Moody C. C. 452; R. *v.* Thornton, 1 Moody C. C. 27; R. *v.* Gibney, Jebb. C. C. 15; R. *v.* Upchurch, 1 Moody C. C. 465; R. *v.* Kerr, 8 Car. and Payne, 179; R. *v.* Rees, 7 Car. and Payne, 569; R. *v.* Bartlett, 7 Car. and Payne, 832; R. *v.* Ellis, Ryan and Moody N. P. C. 432; *contra* R. *v.* Devlin, 2 Crawford and Dix, C. C. 152.

[i] R. *v.* Ellis, R. & M. N. P. 432; R. *v.* Thornton, 1 Mood. C. C. 27; R. *v.* Garbett, 1 Denison C. C. 236, 2 Cox C. C. 448; R. *v.* Wheaton, 2 Mood. C. C. 45; R. *v.* Goldshede, 1 C. & K. 657.

[j] R. *v.* Merceron, 2 Stark. 366.

[k] R. *v.* Wheaton, 2 Moody C. C. 45; R. *v.* Gilham, 1 Mood. C. C. 203.

before the coroner's jury, as an ordinary witness; he denied all knowledge of the felony, but made statements which led to a discovery of facts inducing a strong suspicion of his guilt; other questions were then put and answered which lead to other evidences of guilt. It was held that the prisoner's statements before the jury were admissible as evidence against him.[1]

But the examination of an accused party, taken as such, is not, however, admissible, when such accused party is put on his oath and sworn, and examined.[m] This rule is founded upon the unreliable character of such statements; and therefore, where a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, it was held, that the statements thus made by him were not admissible against him on his trial for the murder.[mm]

Where a magistrate told a prisoner on examination before him for larceny of a watch, that unless he accounted for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing, and also warned him not to commit himself by his confessions, it was held that the statements of the prisoner on his examination were admissible as his confession on a subsequent trial.[n]

As has been seen, the most solemn adjurations do not exclude a confession when there were no threats or promises used.[nn]

A prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which assumed his guilt.[o] Thus, where the officer, who committed the prisoner on a charge of murder, asked "whether, if it was to do over again, he would do it," and the reply was, "Yes sir-ree, Bob;" it was held, that both the question and answer were admissible in evidence, as well as the fact that, in making the reply, the prisoner's "manner was short."[oo]

When the prisoner voluntarily confesses before an examining magistrate, it is the duty of the latter to take the examination in writing, and when such is done, the writing alone is evidence of the confession, unless it appear that the writing is lost or destroyed.[p]

The statute 11 and 12 Vict. c. 42, § 18, which requires that on a criminal charge, after the examination of the witnesses has been completed, and their depositions read over, the justice shall give the prescribed caution to the prisoner before he takes his statement in answer to the charge, does not

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[1] State *v.* Vaigneur, 5 Richards, 391; State *v.* Broughten, 7 Iredell, 96; People *v.* Hendrickson, 1 Harris C. C. 407; Schaeffer *v.* State, 3 Wisc. 823; People *v.* Banker, 2 Parker C. R. 26; People *v.* McMuhany, 2 Parker, C. R. (N. Y.) 663; though see R. *v.* Lewis, 6 C. & P. 161; R. *v.* Davis, Ibid. 177; R. *v.* Owen, 9 C. & P. 238; which cases, however, appear overruled by R. *v.* Wheater, *infra* People *v.* Thayer, 1 Harris C. C. 595.

[m] Ibid.; Schaeffer *v.* State, 3 Wis. 823.

[mm] People *v.* McMahon, 15 N. Y. (1 Smith) 384.

[n] State *v.* Cowen, 7 Iredell, 329.

[nn] Ante, § 685.

[o] Thornton's case, 1 Mood. C. C. 28, Phil. on Ev. 427, Gibney's case, Jebb. C. C. 15.

[oo] Carrol *v.* State, 23 Ala. 28.

[p] State *v.* Parish, 1 Busbee, 239; State *v.* Erwin, 1 Hay. 113; 1 Leach, 309; Foster, 255; Roscoe's Cr. Ev. 60; post, § 696.

render inadmissible in evidence on the trial, a statement voluntarily made by the prisoner before a magistrate when brought up on an application for a remand.[pp]

§ 691. (*e.*) *Artifice.*—No objection can be taken because the confession was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the confession.[q]

It is said, that a letter given by the defendant to the jailer to put into the post is evidence against him.[r]

§ 692. (*f.*) *Authority or influence of the party by whom the confession is elicited.*—It has already been noticed that confessions elicited by a promise by the owner of goods,[s] by religious advisers on sanctions having connection with a future state,[t] and by indifferent and unofficial persons generally,[u] are admissible. The party to whom the confession is made, to make it inadmissible, must be an *officer of the law.* When an improper influence is used by such, it excludes the confession.[v] The only extension of this is when the confession is made to a master, who holds out threats or promises, when the offence directly concerns himself, which makes the confession inadmissible.[w] When the latter is not the case, the confession is admissible. Thus, where the prisoner was indicted for infanticide, and her mistress told her "she had better speak the truth," the confession was received.[x] "The cases," said Parke, B., "have gone quite far enough, and ought not to be extended. It is admitted that the confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary), that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. The authorities

[pp] R. *v.* Stripp, 36 Eng. Law and Eq. 587.

[q] R. *v.* Burley, 1 Phil. Evid. 104; Com. *v.* Knapp, 9 Pick. 496; 2 Russ. on Cr. 845.

[r] R. *v.* Derrington, 2 C. &. P. 418.

[s] Ward *v.* People, 3 Hill, 395; Com. *v.* Morey, 1 Gray, 461.

[t] R. *v* Gilham, R. & M. 186; State *v.* Bastick, 4 Harr. 564; R. *v.* Dingley, 1 Car. & Kir. 637; post, § 775.

[u] Ante, § 685–6. [v] Deathridge *v.* State, 1 Sneed, 75, cases cited, ante, § 685–6.

[w] R. *v.* Garnor, 2 Car. & K. 920; see Joy on Confessions, 23.

[x] R. *v.* Moore, 12 Eng. Law & Eq. 583; 5 Cox C. C. 554.

are collected in Mr. Joy's very able treatise on Confessions and Challenges, p. 23. But, in referring to the cases where the master and mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress, that their holding out the threat or promise renders the confession inadmissible. In Rex *v.* Upchurch, Ry. & M. 865, the offence was arson of the dwelling-house, in the management of which the mistress took a part. Regina *v.* Taylor, 8 Car. & K. p. 733, is to the like effect. So, Rex *v.* Carrington, Id. 109, and Rex *v.* Howell, Id. 534. So where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him; and, the offence being a felony, and a felony actually committed, would have a power to do so on reasonable suspicion that the prisoner was guilty. In Rex *v.* Warringham, tried before me at the Surrey Spring Assizes, 1851, the confession was in consequence of what was said by the mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my notes. In the present case the offence of the prisoner, in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice the prosecution is always the result of the coroner's inquest. Therefore, we are clearly of opinion that her confession was properly received."[y]

The confessions of a prisoner, made by him in the presence of a deputy sheriff, who had no control over the jail, to a friend who advised him to tell the truth, were held admissible.[z]

A prisoner, when arrested, made certain confessions to the officer, who used no threats and made no promises. The prisoner was very much frightened at the time, and spoke partly in English and partly in German; the officer did not understand the latter. The evidence was held admissible.[a]

A confession, to adopt Mr. Joy's summary of the cases, is not admissible in evidence where it is obtained by temporal inducement, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, or where there is reason to presume that such person appeared to the party to sanction such a threat or inducement.[b]

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[y] See, also, remarks of Shaw, C. J., Com. *v.* Mercy, 1 Gray, 462; and see Com. *v.* Taylor, 5 Cush. 608; Spears *v.* State, 2 Ohio St. Rep. (N. J.) 582.

[z] State *v.* Gossett, 9 Rich. Law (S. C.) 428.

[a] People *v.* Thomas, 3 Parker, C. R. (N. Y.) 256.

[b] State *v.* Bostick, 4 Harrington, 563, 564; R. *v.* Upchurch, 1 Moody, C. C. 465; R. *v.* Drew, 8 Carrington & Payne, 140; R. *v.* Jones, Russell & Ryan, C. C. 152; R. *v.* Jenkins, Russell & Ryan, C. C. 492; R. *v.* Hearne, Carrington & Marshman, 109; R. *v.* Mills, 6 Carrington & Payne, 146; R. *v.* Shepherd, 7 Carrington & Payne, 579; R. *v.* Thomas, 6 Carrington & Payne, 353; R. *v.* Enoch, 5 Carrington & Payne 539; R. *v.* Parrott, 4 Carrington & Payne, 570; R. *v.* Thompson, 1 Leach, C. C. 4th ed. 291; but see R. *v.* Thomas, 6 Carrington & Payne, 353; R. *v.* Shaw, 6 Carrington & Payne, 372; R. *v.* Court, 7 Carrington & Payne, 486; R. *v.* Heeman, 1 Dearsly, C. C. 269; R. *v.* Nolan, 1 Crawford & Dix. C. C. 74; R. *v.* Cain, 1 Crawford & Dix. C. C. 37; R. *v.* Wright, 1 Lewin, C. C. 48; R. v. Sexton, 1 Deacon Crim. Law, 424, 427; Roscoe's Crim.

Parol evidence of a statement made by a prisoner before a magistrate during his examination, is admissible, although such statement neither appears in the written examination nor is vouched by the magistrate;[c] and a confession before a magistrate is admissible, although it was made before the evidence of the witnesses against the party was concluded. Nor is parol evidence of such a confession excluded by the existence of an informal written examination.[d]

§ 693. A person to whom a free negro is bound as an apprentice, though a justice of the peace, if not acting as such, and in no way affected by the offence, is not, it has been held in Virginia, a person in authority in the sense of the above rule.[e]

Confessions made by slaves are considered under a subsequent head.[f]

3d. How far original improper influence vitiates subsequent confessions.

§ 694. Where a confession has once been obtained by means of hope or fear, confessions subsequently made are presumed to come from the same motive, and are inadmissible, though no such influences are shown.[g] But if it be shown that the original influences have ceased to operate, the confessions are admissible.[h] For this reason, where a boy of twelve years old, who had been indicted for arson, was urged to make a confession, by holding out the expectation of a pardon, if he did, and by threats of a rigorous confinement if he did not, but without effect; and afterwards on an examination before a magistrate voluntarily confessed the crime; the court seems to have been of opinion that the confession was admissible, leaving it to the jury to consider whether the prisoner had falsely declared himself guilty or not.[i]

After the fact is known, that either the influence of hope or fear existed, inducing a former confession, an explicit warning must be given the prisoner of the consequences of a confession; and it must also be clear that he understood such warning, before such second confessions are admissible in evidence.[j]

The burden is on the State to prove that the second confession was not made under influences which rendered the first inadmissible.[k]

Ev. 37; R. *v.* Thornton, 1 Moody C. C. 27; R. *v.* Lloyd, 6 Carrington & Payne, 39; R. *v.* Simpson, 1 Moody, C. C. 410; R. *v.* Moody, 2 Crawford & Dix, C. C. 347; R. *v.* Lockhurst, 1 Dearsly, C. C. 245; 6 Cox, C. C. 243; 22 Eng. Law & Eq. Rep. 604.

[c] R. *v.* Harris, 1 Moody C. C. 338; R. *v.* Spilsbury, 7 Carrington & Payne, 188; R. *v.* Bell, 5 Carrington & Payne, 163.

[d] Post, § 697.

[e] Smith *v.* Com. 10 Grattan, 734.

[f] Post, § 701.

[g] State *v.* Roberts, 1 Dev. 259; Com. *v.* Harman, 4 Barr, 259; Peter *v.* State, 4 Sm. & Marsh, 31; Deathridge *v.* State, 1 Sneed, 75; 2 Russ. on Crimes, 832; State *v.* Guild, 5 Halsted, 163; but see, per contra, Moore *v.* Com. 2 Leigh, 701.

[h] State *v.* Roberts, 1 Devereaux, 259; Peter *v.* State, 4 Sme. & Marsh, 31; 2 Russ. on Crimes, 824, 836; State *v.* Hash, 12 La. Ann. 895.

[i] Com. *v.* Dillon, 4 Dall. 111.

[j] Van Buren *v.* State, 24 Miss. 512; State *v.* Fisher, 6 Jones, N. C. (Law) 498; State *v.* Scates, 5 Ibid. 420; State *v.* Gregory, Ibid. 315.

[k] Deathridge *v.* State, 1 Sneed (Tenn.) 75; State *v.* Roberts, 1 Devereaux, 259.

4th. How far extraneous facts deduced through an inadmissible confession may be received.

§ 695. Although confessions obtained by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony, *e. g.*, where the party thus confessing, points out or tells where the stolen property is, or where he states where the deceased was buried.[e] But if in consequence of the confession of the prisoner thus improperly drawn out, the search for the property or person in question proves ineffectual, no proof of either will be received.[f] And the property must be identified by other evidence as that which was actually stolen.[g]

Mr. Joy states the rule to be that where confessions are not admissible, from the circumstances under which they were obtained, contemporaneous declarations of the party are receivable in evidence or not according to the attending circumstances, but any act of such party, though done in consequence of such confessions, is admissible in evidence, if it appears from a fact thereby discovered, that so much of the confession as immediately relates to it, is true.[gg]

5th. How far confessions of one are evidence against another, and herein of the defendant's silence under statements of others implying his guilt.

§ 696. The subject of declarations of co-conspirators will be considered under another head.[h]

Where there is a joint indictment against a man and woman for living together in illicit intercourse, the woman's confessions are admissible against herself. But it is the duty of the court to caution the jury, that such confessions can operate only against the party making them, and that the other defendant cannot be convicted, except upon evidence *aliunde* sufficient to establish his guilt.[i]

The declarations of a messenger sent by the prisoner to a third party, if made with reference to the object of his visit, are admissible in evidence against him, if the evidence show they were made by his authority.[ii]

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[e] Hudson *v.* State, 9 Yerger, 408; State *v.* Brick, 2 Harring, 530; 2 Russ. on Crimes, 861, 862; Com. *v.* Knapp, 9 Pick. 496; State *v.* Crank, 2 Bailey, 67; R. *v.* Griffin, R. & R. 151; R. *v.* Jones, Ib. 152; State *c.* Vaigneur, 5 Richardson, 391; Deathridge *v.* State, 1 Sneed, 75; Jordon *v.* State, 31 Miss. (3 George) 382.

[f] R. *v.* Jenkins, R. & R. 492; R. *v.* Hearn, 1 Car. & Marsh, 109.

[g] State *v.* Due, 7 Foster, 256.

[gg] R. *v.* Warickshall, 1 Leach, C. C. 263; R. *v.* Gould, 9 Carrington & Payne, 364; R. *v.* Harris, Evans & Butler, 1 Moody, C. C. 338; Com. *v.* Knapp, 9 Pickering, 496, 511; R. *v.* Cain, 1 Crawford & Dix. C. C. 37; R. *v.* Griffin, Russell & Ryan, C. C. 151. But see R. *v.* Jones, Russell & Ryan, C. C. 152; R. *v.* Jenkins, Russell & Ryan, C. C. 492.

[h] Post, § 702, 3, 4, 5, 6.

[i] Lawson *v.* State, 20 Alab. 66.

[ii] Browning *v.* State, 33 Miss. 48.

The declarations of a third person made in the presence of a defendant, and assented to by him, are admissible evidence against him, and stand on an equal footing with admissions by himself;[j] though where the declarations were made in the presence of a party who was partially intoxicated, and not contradicted by him, it is a question for the jury to ascertain whether the party was too much intoxicated to understand the statement when made.[k] The assent of the party is presumed, if nothing be said by him inconsistent with that presumption.[l] But it is a question for the jury whether the defendant's apparent assent, in such a case, arose from inattention or ignorance.[m] Where a man at full liberty to speak, and, not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury.[n] Such silence, however, cannot be treated as an absolute admission; particularly in case of larceny, of the ownership of property stolen.[o]

This rule, also, does not apply to silence at a judicial hearing. Thus, where the deposition of a witness or examination of another prisoner before a magistrate, in presence of the prisoner, contains some statements affecting the prisoner, such statement is not admissible in evidence, even as an implied admission.[oo]

The fact that an unanswered letter is found in a defendant's pocket, at the time of his arrest, does not, it has been held, enable such letter to be read in evidence on the trial.[p]

On the trial of an indictment against two persons for setting fire to a building, evidence of admissions by one defendant, in a conversation with another person three months after the fire, that he was with the other defendant when that other set the fire, are admissible in evidence against him, though not against the other defendant; and it is no ground of exception that the judge permitted the witness, against the objection of the other defendant, to state the whole conversation as it occurred, if the jury are afterwards instructed not to allow it any weight against that other defendant.[pp]

In an action for assault and battery, there being no direct evidence that the injury was caused by the defendant, two witnesses testified that shortly after the injury was inflicted, they heard the plaintiff charge the defendant with causing it, and did not hear the defendant deny it. Two other witnesses testified that about an hour before this they heard the same charge made by the plaintiff, and the defendant denied it. The presiding judge

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[j] Com. *v.* Call, 21 Pick. 515; R. *v.* Smithies, 5 C. & P. 332; though see Norman *v.* State, 1 Sm. & Marsh. 562.

[k] State *v.* Perkins, 3 Hawks, 377; Berry *v.* State, 10 Georgia, 511.

[l] State *v.* Perkins, 3 Hawks, 377.

[m] Ibid.

[n] State *v.* Swink, 2 Dev. & Bat. 9; State *v.* Stone, Rice, 147; Donnelly *v.* State, 2 Dutch (N. J.), 463.

[o] Com. *v.* Kenney, 12 Metc. 233.

[oo] R. *v.* Turner, 1 Moody C. C. 347; Melen *v.* Andrews, Moody & Malkin, 336; R. *v.* Appleby, 3 Starkie N. P. C.; but see R. *v.* Edmonds, 6 Carrington & Payne, 164.

[p] People *v.* Green, 1 Parker C. C. 11.

[pp] Com. *v.* Ingraham, 7 Gray, Mass. 46.

instructed the jury that if the plaintiff charged the defendant with having committed the assault, and he at the same time denied it, it furnished no evidence against him; but, if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to; that the jury would not probably conclude that the defendant, after he had once emphatically denied the accusation, would be called upon to deny it again, if the accusation were repeated; but that it was left to the jury, under the rules which had been stated as to remaining silent, to give such weight to the defendant's silence when the charge was repeated, as they thought it entitled to. It was held, that there was no objection to these instructions, the evidence being such that the jury would be justified in believing that the two conversations took place on different occasions.[q]

6th. How confessions are to be construed.

§ 697. The admission by the defendant of a fact disadvantageous to himself will not be received, without receiving at the same time his contemporaneous assertion of a fact favorable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge.[qq] As in the case of all other evidence, the whole confession should be left to the jury, to say whether the facts asserted by the prisoner in his favor be true.[r] Parol evidence of a confession made during an examination before a magistrate, is admissible in evidence, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible; and such examination, though informal, may

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[q] Jewett *v.* Banning, 23 Barb. (N. Y.) 13.

[qq] Chambers *v.* State, 26 Alab. 59; Frank *v.* State, 27 Alab. 37; Haiston *v.* Hixen, 3 Sneed (Tenn.), 69; State *v.* Phillips, 24 Mis. (3 Jones) 476; 4 Taunt. 245; and see the Queen's case, 2 B. & B. 294. So, however, did not act Sir E. Coke, whatever he may have thought. Among the many stains which recent developments have cast on the memory of that profound jurist, but most arbitrary judge, the blackest is that which has been brought to public notice by the researches of Mr. Amos, in that very curious book, "The Great Oyer of Poisoning; the Trial of the Earl of Somerset, for the Poisoning of Sir Thomas Overbury.—London, 1846." Mr. Amos places it beyond all doubt, that Coke, when prosecuting officer for the crown, superintended in person the examination of prisoners; applied the most inhuman and indecent influences to extort confessions; and then, when the confession was got, altered it to suit his own purposes, striking out qualifications, and even working with his own hand into the text glosses which would meet what he so well knew would be the pinch of the case. No counsel was then allowed to the prisoner; and the fraud was either not detected, or if observed, the attempt to expose it was bluffed off by the coarse and bullying tone Coke could so well assume. But the papers themselves survive, and there will be seen the original confession, with Sir E. Coke's marginal notes, erasures, and interlineations. The reports in the State trials follow the papers as amended, and it was on them the convictions took place. The originals are now exhibited by Mr. Amos, to show how different the confession was, as actually given, from what it was when Coke procured on it a conviction. Great Oyer, &c., 208, 224, 342, 346.

[r] Smith *v.* Blandy, R. & M. N. P. 258; R. *v.* Higgins, 3 C. & P. 603; R. *v.* Clewes, 4 C. & P. 221; Young *v.* State, 2 Yerger, 292; Tipton *v.* State, Peck, 308; R. *v.* M'Carty, 2 Dallas, 86; Brown's case, 9 Leigh, 633; Bower *v.* State, 3 Mis. 364; Green *v.* State, 13 Miss. 382.

be used to refresh the memory of a witness who was present and took it down.[rr]

7th. By whom the admissibility of confessions is to be determined.

§ 698. It is the province of the court and not of the jury to determine whether a confession be made with that degree of freedom which is necessary to make it admissible evidence.[s] And when there is a general statement that the confessions were made under threats, the court may inquire what these threats were, so as to ascertain their sufficiency in law to exclude the confessions.[t]

In order to exclude evidence of a prisoner's confession, it must appear *affirmatively* that some inducement to confess was held out to him, by or in the presence of some one having authority.

In such a case it does not turn on what may have been the precise words used, but in such a case it is for the judge to consider, before he receives or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not.[u]

If a confession be received in evidence, it not appearing that any inducement had been held out, but, at a later period of the trial, it appear that such an inducement was held out before the making of the confession as would render it inadmissible, the judge will strike the evidence of the confession out of his notes, and, if there be no other evidence, direct an acquittal.[v]

So the court will permit the statement of the alleged confession to be interrupted for the purpose of showing *aliunde* that it was improperly extorted.[w]

8th. How far a defendant's declarations in his own favor can be received.

§ 699. Declarations made by a prisoner in his own favor, unless part of the *res gestæ*, are not admissible for the defence.[x] Thus, on an indictment

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[rr] Telicote's case, 2 Starkie, N. P. C. 483; Foster's case, 1 Lewin, C. C. 46; Hirst's case, 1 Lewin, C. C. 46; Pressly's case, 6 Carrington & Payne, 183; R. v. Bell, 5 Carrington & Payne, 162; R. v. Jones, Carrington, Suppl. 13; R. v. Watkins, 4 Carrington & Payne, 550, note b; R. v. Thomas, 2 Leach, C. C. 637; R. v. Jacobs, 1 Leach, C. C. 310; R. v. Hinxman; R. v. Fisher, 1 Leach, C. C. 310, 311. See ante, § 690.

[s] Hector v. State, 2 Missouri R. 135; Boyd v. State, 2 Humphrey, 39; R. v. Gould, 9 C. & P. 364; Whaley v. State, 11 Georgia, 525; Fife v. Com. 29 Penn. St. R. 429; Simon v. State, 5 Florida, 285; Brister v. State, 26 Alab. 687; see Com. v. Harman, 4 Barr, 269.

[t] Whaley v. State, 11 Geor. 123.

[u] R. v. Garner, 2 Car. & Kir. 290; S. C. 1 Den. C. C. 329.

[v] Berry v. State, 10 Georgia, 511.

[w] Serpentine v. State, 1 How. Miss. R. 256; Com. v. Harman, 4 Bar, 269.

[x] State v. Scott, 1 Hawks, 24; State v. Wisdom, 8 Porter, 511; Bland v. State, 2 Carter (Ind.) 608; State v. Jackson, 17 Mis. (2 Bennett) 544; Campbell v. State, 23 Ala. 44; Golden v. State, 19 Ark. 590; Tupper v. Com. 1 Metc. Ky. 6; Corbett v. State, 31 Alab. 329.

for larceny, the defendant cannot give in evidence his declarations at the time of the arrest, of his claims of ownership in the property taken.[y] And, on an indictment against a prisoner for having in his possession coining tools, with intent to use them, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instruments, as to the purpose for which he wished them made.[z] One indicted for murder cannot give in evidence his own conversations had after going half a mile from the place of murder.[a] And so, too, where a prisoner in conversation with a witness, admitted the existence of a particular fact, which tended strongly to establish his guilt, but coupled it with an explanation, which if true would exculpate him, it was held that the accused could not show that he had made the same statement and explanation to others.[b]

Where a prisoner, indicted for murder, was met after the transaction at some distance from the scene with blood on his hands, it was held that his declarations at the time to account for the blood on his hands, and other suspicious circumstances, were not admissible;[c] and this, though there was no person present when the homicide was committed.[d]

§ 700. A party may in certain cases, however, show by his own cotemporaneous statements, that he was acting at the particular moment, not illegally, but under the direction of the law. Thus it was ruled that an officer, indicted as an accessary to a burglary, may, for the purpose of explaining his frequent intercourse with those indicted as principals, and to prove his own diligence and fidelity in pursuing them, give in evidence the conversations between himself and another officer as to the best means of gaining their confidence and thereby bringing them to justice, and also the information received by him in answer to inquiries made of persons whom he met while in pursuit of the burglars.[e]

9th. Confessions of slaves.

§ 701. Confessions of slaves are regarded with peculiar tenderness. Thus, where it is shown that a slave was arrested, tied, and left by his master in charge of a third person, to whom he immediately after made a confession, proof that the master had always been in the habit of tying his slaves when they were charged with any matter, and whipping them till they confessed the truth, and that he had frequently treated the prisoner in the same way, is competent, and should be considered by the court, in determining whether the confession was induced by the influence of hope or fear.[f]

Where a slave made confessions under the influence of threats, and "shortly after" on the same day was taken before a magistrate, where he made the same confessions, without being cautioned as to the effect of his replies to

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[y] State v. Wisdom, 8 Porter, 511.
[z] Com v. Kent, 6 Metc. 221.
[a] Gardner v. People, 3 Scam. 83.
[b] Earhart's case, 9 Leigh, 671.
[c] Scaggs v. State, 8 S. & M. 722.
[d] Bland v. State, 2 Carter (Ind.) 608.
[e] Com. v. Robinson and others, 1 Gray R. 555.
[f] Spence v. State, 17 Ala. 192.

questions put to him, it was held that his confessions made before the magistrate were inadmissible, having been made under the influence of the previous threats.[g]

While, however, peculiar liberality should be exercised in such cases, yet a voluntary confession of a slave is always admissible;[h] and this, though made to his master, if no improper influence be shown.[i] That he is a slave, and ignorant, and to some extent unacquainted with the consequences which may attend the making of such confession should be referred to the jury, in connection with the admissions, in ascertaining the weight to be given to them.[j]

The confessions of a slave made to his master are not privileged communications, and are properly admissible in evidence against him, if made freely and voluntarily, and without any undue influence being exerted to obtain them.[a]

A slave being summoned to the presence of a company of white persons, among whom were his master and mistress, for the purpose of having his shoes compared with the measure of certain tracks supposed to have been made by the perpetrator of a crime whom they were endeavoring to discover; and several of the company exclaiming, when it appeared that there was a perfect correspondence between his shoes and the tracks "that they were the shoes that made the tracks"—it was held, that this exclamation, with the fact that the slave made no reply to it, was not admissible evidence against him, as an implied admission.[b]

The master, after the arrest of his slave, chained him, and while they were together alone, he asked the slave why he had burned his gin-house, assuming, in the form in which he put the interrogatory, that the slave was guilty, but used no force to extort the confession, whereupon the slave confessed the burning, and said he had committed the crime because he wished to be hung. It was held, that no improper means were used to obtain the confession, and that it was properly admissible in evidence against the slave.[c]

Where a slave was indicted for murder, with two others as accessaries, and they being all surrounded with a threatening crowd of people, and being in irons, the principal was struck in the face by one much excited, and bidden to tell all about it, and the defendant was bid to tell all about it, or they (the crowd) would hang him. It was held, that confessions made within an hour of these demonstrations (the crowd still continuing), were inadmissible.[d]

On the trial of an indictment against a free white citizen, the State may give in evidence the confessions of a negro, even when extorted by the pain of punishment, provided they are proven by a white person, not as independent testimony, but as an inducement and an illustration of what was said

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[g] Peter v. State, 4 Sm. & Marsh. 31.
[h] Jim v. State, 15 Georgia, 535; Austin v. State, 14 Arkansas, 556.
[i] State v. Hannah, 10 La. R. 131.
[j] Seaborn v. State, 20 Ala. 15.
[a] Sam v. State, 33 Miss. 347.
[b] Bob v. State, 32 Ala. (Shep.), 560.
[c] Sam v. State, 33 Miss. 347.
[d] State v. George, 5 Jones, N. C. 233.

and done by the accused, he being present and consenting that the negro should tell all he knew.[k]

Since a slave's confessions to his master, when elicited or influenced by the fear of punishment or the hope of some benefit to be gained by making them, are not admissible evidence against him, his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation. And where a slave's confessions to his master were on this principle excluded, because the latter had said to him, "Boy, these denials only make the matter worse;" the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect.[l]

A slave was arrested for murder, and, being bound, placed in the keeping of the witness over night. In the morning the witness took the slave to where the body of the deceased was lying, and applied the boot of the slave to tracks near by. The boot precisely fitting the tracks, witness said to the slave, "You might as well tell all about it, for I am satisfied." The slave denied the killing, and the witness, being angry, said to him, "If you belonged to me I would make you tell." The slave still denied the killing, and the parties went to breakfast. After breakfast, the slave of his own accord took the witness aside and made a full confession of the homicide. It was held that such confession was admissible.[m]

VI. DECLARATIONS OF CO-CONSPIRATORS.

§ 702. In a case of conspiracy, riot, or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator, or accomplice, in the prosecution of the enterprise, is considered the act or declaration of all, and is evidence against all. Each is deemed to assent to, or command, what is done by any other in furtherance of the common object.[n] A foundation, however, must first be laid, by proof, sufficient, in the opinion of the court, to establish *prima facie*, the fact of conspiracy between the parties, or to be laid before the jury, as tending to establish such fact.[o] Thus, where T. in a letter to N. uses expressions supposed to amount to a challenge to fight a duel, and by postscript, refers N. to H. (the bearer of the letter) if any further arrangements were necessary,

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[k] Berry *v.* State, 10 Georgia, 511.

[l] Wyatt *v.* State, 25 Ala. 9; Clarissa *v.* State, 11 Ala. 57.

[m] State *v.* Patrick, 3 Jones, Law (N. C.), 443.

[n] U. S. *v.* Harman, 1 Baldwin, 292; Martin *v.* Com. 11 Leigh, 745; U. S. *v.* Goodwin, 12 Wheaton, 469; State *v.* Soper, 13 Maine, 293; Glory *v.* State, 8 Eng. (13 Ark.) 236; Stewart *v.* State, 26 Ala. 44; Cornelius *v.* Com. 15 B. Monroe, 539; Waterbury *v.* Sturdevant, 18 Wendell, 353; State *v.* Poll, 1 Hawks, 442; State *v.* George, 7 Iredell, 321; State *v.* Loper, 4 Shep. 293; Malone *v.* State, 8 Geo. 408.

[o] 1 East, P. C. c. 2, s. 37, p. 96; 2 Stark. Ev. 326; 1 Phil. Ev. 447, citing the Queen's case; 2 Brod. & B. 302; 2 Russ. on Cr. 697; State *v.* George, 7 Ired. N. C. 321; Clayton *v.* Anthony, 6 Randolph, 285; American Fur Co. *v.* U. S. 2 Peters, 365; U. S. *v.* Cole, 5 McLean, C. C. R. 513; State *v.* Nash, 7 Iowa, 347.

it was held that N. might give testimony of the conversation between H. (the bearer of the letter) and himself, the letter and its delivery being proved.[p]

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, so made the false pretences charged, warrants the conviction of both.[q] If there is a concert between two or more, to pass counterfeit notes, or any joint or concurrent action in passing them, the act of one is evidence against the other; and the possession of counterfeit notes by one, is the possession of the other.[r]

§ 703. This co-responsibility holds good without regard to the time in which the party entered the combination. He becomes subsequently responsible for every act which may afterwards be done by any one of the others, in furtherance of such common design.[t] Thus, in an indictment against the owner of a ship, for violation of the statutes against the slave trade, testimony of the declarations of the master, being part of the *res gestæ*, 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, is admissible against the owner.

When, however, the common enterprise is at an end, whether by accomplishment or abandonment, it is not material, no one is permitted by any subsequent act or declaration of his own to affect the others.[u] His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such against any but himself.[v] Under no circumstance can the most solemn admission made by him on trial be evidence against his accomplices.[w] Thus, on an indictment against A., for concealing a horse-thief, knowing him to be such, it is not competent for the prosecutor to give evidence of what the alleged horse-thief subsequently confessed in the presence of A., to establish the fact that a horse was stolen.[x]

§ 704. So also, what one of the party may have been heard to say at any other time, when no act was committed by him, as to the share which some of the others had in the execution of the common design, or as to the object of conspiracy, cannot, it seems, be admitted as evidence against the other

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[p] State *v.* Taylor, 3 Brevard, 243; Com. *v.* Boott, Thacher's C. C. 390.

[q] Com. *v.* Harley, 7 Metc. 462.

[r] U. S. *v.* Harman, 1 Baldwin, 292.

[t] R. *v.* Watson, 32 Howell's State Tr. 7, per Bayley, J.; R. *v.* Brandreth, 32 How. St. Tr. 857, 858; R. *v.* Hardy, 24 How. St. Tr. 451–453, 475; American Fur Co. *v.* U. S. 2 Peters, 358, 365; Crowninshield's case, 10 Pick. 497; R. *v.* Hunt, 3 B. & Ald. 566; 1 East, P. C. 97, s. 38; Nichols *v.* Dowding, 1 Stark. 81; Gardner *v.* People, 3 Scam. 90; State *v.* Hanney, 2 Dev. & Bat. 390; Martin *v.* Com. 11 Leigh, 745; U. S. *v.* Harman, 1 Baldwin, 292; Kirby *v.* State, 7 Yerger, 259; Frank *v.* State, 27 Alab. 38.

[u] 1 Phil. & Am. on Evid. 215, n. 4; 1 Greenl. on Evid. s. 3; U. S. *v.* White, 5 Cranch C. C. R. 38.

[v] R. *v.* Turner, 1 Mood. Cr. Cas. 347; R. *v.* Appleby, 3 Stark. 33; and see Melen *v.* Andrews, 1 M. & W. 336, per Parke, J.; Hunter *v.* Com. 7 Gratt. 641.

[w] State *v.* Poll, 1 Hawks, 442; see State *v.* Hanney, 2 Dev. & Bat. 390; Kirby *v.* State, 7 Yerger, 259.

[x] Morrison *v.* State, 5 Ohio Rep. 439; Lowe *v.* Boteler, 4 Har. & M'Hen. 349.

defendants.[y] In R. *v.* Hunt and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held (H. Hunt having presided at their meeting) that resolutions passed at a former meeting assembled a short time before in a distant place, and at which H. Hunt was also president, and the avowed object of which meeting, that of the meeting mentioned in the indictment, were admissible in evidence to show the intention of H. Hunt in assembling and attending the meeting in question.[z]

§ 705. The distinction appears to be well settled between the admissibility of declarations accompanying the act of the conspirators, and statements subsequently made, as evidence against the rest. Thus, if on a charge of a conspiracy to annoy a broker who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but what a person who was at the meeting said some time after, when he was himself distrained upon for church-rate is not receivable in evidence.[a] So, where A. was charged with having conspired with W. I., and others unknown, to raise insurrections and obstruct the laws, it was proved that A. and W. I. were members of a Chartist Lodge, and that A. and W. I. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. I. to go to the race-course at P., whither W. I. and other persons had gone; it was held, that, on the trial of A., evidence was receivable that W. I. had at an earlier part of the same day directed other persons to go to the race-course; and it being proved that W. I. and an armed party of the persons assembled went from the New Inn, it was held, that evidence might be given of what W. I. said at the New Inn, it being all one transaction.[b]

§ 706. It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his act or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is the act or declaration of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. It is not material what the nature of the indictment is, provided the offence involve a conspiracy. Upon an indictment for murder, for instance, if it appear that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, would be evidence against the rest.[c]

Where the accessary is tried alone before conviction of the principal, acts

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[y] 1 Phil. Evid. 94; R *v.* Salter, 5 Esp. 125; 2 Stark. 141; R. *v.* Roberts, 1 Campb. 399; State *v.* Poll, Hawks. 442; State *v.* Hanney, 2 Dev. & Batt. 390; Kirby *v.* State, 7 Yerger, 259; see ante, § 696.

[z] R. *v.* Hunt, 3 B. &. Ald. 566.

[a] R. *v.* Murphey, 8 C. & P. 297.

[b] R. *v.* Shellard, 9 C. & P. 277.

[c] R. *v.* Stone, 6 T. R. 528.

and conduct of the principal, immediately following the commission of the offence, and tending to show that he committed it, are competent evidence to prove the guilt of the principal.[cc]

The subject of the general evidence of conspiracy is considered under a future head.[d]

VII. Presumptions.

1st. Presumption of innocence, and herein of presumption of sanity, § 707.
2d. Presumption of intent, § 712.
3d. Presumption that everything is rightfully done until the contrary appears, § 713.
4th. Presumption arising from attempts to escape or evade justice, or from deportment when charged with offence, § 714.
5th. Presumption arising from forgery of evidence, § 715.
(a) With a view to self-exculpation, § 716.
(b) Maliciously, with the intention of injuring the accused or others, § 718.
(c) In sport, or in order to effect some moral end, § 721.
6th. Presumption arising from suppression or destruction of evidence, § 722.
7th. Presumption arising from antecedent preparations and previous attempts, § 725.
8th. Presumption arising from declarations of intentions and threats, from which the presumption of guilt may be drawn with great strength when there is preliminary ground laid, § 727.
9th. Presumption arising from possession of fruits of offence, § 728.
10th. Presumption arising from extrinsic and mechanical inculpatory indications, § 731.

1st. Presumption of innocence, and herein of presumption of sanity.

§ 707. Every man is presumed to be innocent until the contrary be proved, and if there be reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt. There is a ground of distinction in this respect, between civil and criminal cases: in the former, the jury weigh the testimony, and after striking a fair balance, decide accordingly; but in criminal cases the testimony must be such as to satisfy the jury beyond a rational doubt, that the prisoner is guilty of the charge alleged against him in the indictment, or it is their duty to acquit.[dd] Such doubt, however, should be actual and substantial, not mere possibility or speculation.[e] "It is not mere possible doubt; because," says Chief Justice Shaw,[f] "everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction to a moral certainty, of the charge."[g]

[cc] State *v.* Rand. 33 N. H. 216.

[d] Post, § 2351.

[dd] Hiller *v.* State, 4 Blackf. 552; State *v.* Thompson, Wright's R. 617; Sumner *v.* State, 5 Black. 579; Emmons *v.* Stahlnecker, 1 Jones' Pa. R. 369, Coulter, J.; Shultz *v.* State, 13 Texas, 40.

[e] Com. *v.* Harman, 4 Barr, 270; Pate *v.* People, 3 Gilman, 644; U. S. *v.* Foulke, 6 M'Lean, C. C. R. 349; Giles *v.* State, 6 Georgia, 285; Winter *v.* State, 20 Alab. 39.

[f] Bemis' Webster case, 190; Com. *v.* Webster, 5 Cush. 320.

[g] See, also, 1 Phillips' Ev. 156; 1 Starkie on Ev. 478; 3 Greenl. Ev. § 29; Donnelly *v.* State, 2 Dutch (N. J.) 601; French *v.* State, 12 Ind. 670.

In an ordinary issue, before the jury, when the defendant sets up in defence no distinct and independent fact, but contends that upon the facts and circumstances, as proved by the evidence on both sides, constituting the transaction charged as criminal, he is not guilty, the burden of proof is on the government to satisfy the jury that its whole case is made out. Thus on an indictment for assault and battery, when such a course of trial is pursued, the burden is on the prosecution to show that the assault was unjustifiable.[h] So where a blow is admitted, the prosecution must satisfy the jury that it is intentional,[i] though where an intentional killing is proved, it is presumed to have been malicious.[j] So, in an indictment for seduction, the chastity of the prosecutrix must be *proved*, not *presumed*.[jj] And the principle may be broadly stated that when the defendant relies on no separate, distinct, and independent fact, but confines his defence to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution.[k] Each item

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[h] Com. *v.* McKie, 1 Gray, 61; see Com. *v.* Kimball, 24 Pickering, 373; Com. *v.* Dana, 2 Metc. 340; R. *v.* Allen, 1 Moody C. C. 154; see Bennett & Heard Lead. Cas. § 356.

[i] U. S. M'Clare, 7 Bost. Law Rep. (N. S.) 439.

[j] Post, § 710.

[jj] West *v.* State, 1 Wisc. 209.

[k] Com. *v.* M'Kie, 1 Gray, 61. In this case, after stating the general rule as to the burden of proof, Bigelow, J., said:—

In the application of these familiar principles to particular cases, many nice distinctions have arisen, which it is unnecessary now to consider; because we are all of opinion that the case at bar falls clearly within the general rule. However the rule may be in cases where the defendant sets up, in answer to a criminal charge, some separate, distinct and independent fact or series of facts, not immediately connected with and growing out of the transaction on which the criminal charge is founded, there can be no doubt that in a case like the present the burden of proof remains on the government throughout, to satisfy the jury of the guilt of the defendant. It appears by the evidence, as stated in the bill of exceptions, that the justification, upon which the defendant relied, was disclosed partly by the testimony introduced by the government and in part by evidence offered by the defendant; and that it related to and grew out of the transaction or *res gestæ*, which constituted the alleged criminal act. The defendant did not set up any distinct, independent fact in defence of the charge; he neither alleged, nor assumed to prove, anything aside or out of the case on the part of the government; but he contended, taking the facts and circumstances, as proved by the evidence on both sides, constituting the transaction itself on which the case for the prosecution rested, that he was not shown to be guilty, because they did not prove, beyond a reasonable doubt, that he had committed the offence laid to his charge. An assault and battery consists in the unlawful and unjustifiable use of force and violence upon the person of another, however slight. If justifiable, it is not an assault and battery: 1 Hawk. c. 62, § 2; 1 Russ. on Crimes (7th Amer. ed.) 750; 3 Bl. Com. 121; Bac. Ab. Assault and Battery, B.; 5 Dane Ab. 584; Com. *v.* Clark, 2 Metc. 24.

Whether the act, in any particular case, in an assault and battery, or a gentle imposition of hands or a proper application of force, depends upon the question whether there was justifiable cause: 2 Metc. 25. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves the question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal. To illustrate this, it is clearly settled, that when an injury to the person is accidental, and the party defendant is without fault, it will not amount to an assault and battery. Rose. Crim. Ev. 289. Now in a case of this sort, if the evidence offered by the government leaves it doubtful whether the injury was the result of accident or design, there can be no question of the right of the defendant to an acquittal, because it is left doubtful whether any criminal act was committed. But can the government, in such a case, on proving simply the injury to the person, rest their case, and call on the defendant to assume the burden of the proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant, by a careful

of the charge must be proved in the same manner as if the whole issue rested on it.[kk]

§ 708. It has already been briefly considered,[1] whether, in cases where the defendant, conceding the facts of the prosecution, sets up a matter of excuse or avoidance, doubts as to the validity of such matter of defence are to continue to weigh in his favor: or whether, on the other hand, a preponderance of evidence is not necessary to satisfy, in such respects, the jury. Thus, for instance, where, on an indictment under the license laws, the defendant is shown to have retailed liquor; the question is, whether on his setting up as a defence a license to sell, the jury must acquit if they find reasonable doubt as to the existence of the license, or whether they are justified in convicting unless a preponderance of evidence shows such a license to exist. The law seems to be, that in such cases the presumption of innocence no longer works for the defence; and that as the defendant sets up an affirmative fact by way of confession and avoidance, he must satisfactorily prove such fact by a preponderance of testimony.[m] It may be that in such cases, as the existence of the license lies peculiarly within the defendant's knowledge, its non-establishment, by satisfactory evidence, may make against him by force of another rule of evidence already referred to, viz., that the non-production by a party of evidence immediately in his power is a presumption against him. But the

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management of the case on the part of the government; so as to withhold that part of the proof which may bear in his favor. But further; the rule of the burden of proof cannot be made to depend upon the order of proof, or upon the particular mode in which the evidence in the case is introduced. It can make no difference, in this respect, whether the evidence comes from one party or the other. In the case supposed, if it is left in doubt, on the whole evidence, whether the act was the result of accident or design, then the criminal charge is left in doubt. Suppose a case, where all the testimony comes from the side of the prosecution. The defendant has a right to say that upon the proof, so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offence charged, namely, the wrongful, unjustifiable, unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestæ*.

Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offence alone, it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstance attending the homicide. Com. *v.* York, 9 Met. 116; Com. *v.* Webster, 5 Cush. 305.

There may be cases, where a defendant relies on some distinct, substantive ground of defence to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted upon the defendant. But in cases like the present (and we do not intend to express an opinion beyond the precise case before us), where the defendant sets up no separate independent fact in answer to a criminal charge, but confines his defence to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful. Com. *v.* M'Kie, 1 Gray R. 63, 64, 65.

[kk] Henderson *v.* State, 14 Texas, 503.

[1] Ante, § 614-5.

[m] Ante, § 614, State *v.* Morrison, 3 Dev. 299; State *v.* Crowell, 25 Maine, 171; Wheat *v.* State, 6 Mis. 455; R. *v.* Turner, 5 Maule & Sel. 206; Smith *v.* Jeffries, 9 Price, 257; Sheldon *v.* Clark, 1 Johnson, 513; U. S. *v.* Hayward, 2 Gallison, 485; Gening *v.* State, 1 M'Cord, 573; Paley on Convictions, 45; Bentley's case, R. & M. 159; Farrel *v.* State, 31 Alab. 557; Hopper *v.* State, 19 Ark. 143; contra, Mehan *v.* State, 7 Wisc. 670.

language of Lord Tenterden, in a leading case, goes much further: "No one is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof is given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof leads be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"[n] Such, also, is the reasoning of Story, J., in an early case; and he illustrated his position by the case of an indictment for a violation of the game laws, where the *onus* of proving the necessary qualifications would clearly rest with the defence.[o] He did not cite any authorities in support of the doctrine, but the illustration which he gave is ustained by a case subsequently reported in England.[p] So, also, it has been ruled in Pennsylvania that so far as the making out an *alibi* is concerned, the burden is upon the prisoner; but a resort to this sort of defence does not change the burden of proof in other questions in the cause.[pp] So in California, the court went the questionable length of saying that an instruction asked for, on a trial for murder, "that if the jury have a reasonable doubt whether the killing was in the heat of passion, created by great provocation, &c., or in self-defence, they should acquit," was properly refused, because as the *onus probandi* is in the defendant, the guilt cannot be disproved by a doubt, but only by preponderance of testimony.[q]

§ 709. In Massachusetts it was originally stated that the burden of proof continues with the commonwealth through the whole case.[r] In the cases where this principle was first announced, the defence denied the *existence of the offence;* and, in such a state of facts, the judges went no further than to proclaim what is acquiesced in on all sides, when they held that if the jury, on the whole of the facts on both sides, doubts, the doubt is to be given to the prisoner. More lately, however, this general position has been qualified by the recognition of the doctrine that when an excuse is set up, it must be proved by a preponderance of evidence. Thus, on a trial for homicide, Hubbard, J., charged the jury, in language said to have been drawn up by Shaw, C. J., in answer to the question, "Were the jury instructed by the court that the prisoner was to prove provocation, or mutual combat, and was he to have the benefit of any doubts upon the subject?" as follows: "It is impossible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing farther is shown, the presumption of law is, that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse

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[n] R. *v.* Burdett, 4 Barn. & Ald. 140; see Blatch *v.* Archer, Cowper, 65; R. *v.* Branner, 6 Car. & Payne, 326.

[o] U. S. *v.* Hayward, 2 Gallison, 485.

[p] R. *v.* Turner, 5 Maule & Sel. 206.

[pp] Fife *v.* Commonwealth, 29 Penn. State R. 429.

[q] People *v.* Stonecifer, 6 Cal. 405.

[r] Com. *v.* Eddy, 9 Bost. Law Rep. (N. S.) 611; Com. *v.* Kimball, 24 Pick. 366; Com. *v.* Dana, 2 Metc. 329, 340; though see per contra, Com. *v.* How, 1 Mass. 54.

or extenuation lies on the accused, and this may appear either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact upon which the excuse or extenuation depends, *according to the preponderance of evidence.* Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof on one side or the other. But if the case or the evidence should be in *equilibrio*, the presumption of innocence will turn the scale in favor of the accused, that is, in a case like the present, in favor of the lesser offence. *But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance.*" The jury returned a verdict of guilty of murder, and on motion for a new trial, Shaw, C. J., delivered the opinion of a majority of the court, sustaining the charge; Wilde, J., dissenting.[s] And it seems now to be holden by the same court, that insanity, being in the nature of confession and avoidance, must be shown by a preponderance of testimony on the whole case.[t]

In Webster's case, Shaw, C. J., said: "The implication of malice arises in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity, or informality are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are in fact circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule, that it applies only to cases where the killing is proved, and *nothing further is shown*, for if the circumstances disclosed tend to extenuate the act, the prisoner has the full benefit of such facts."[u]

In 1855, in the same court, in a case where the deceased was struck down in a fight by the defendant, both being at the time under strong drink, and where the defendant a few minutes after struck the deceased on the head when he was down, the defendant's counsel proceeded to argue to the court in support of the dissenting opinion of Wilde, J., in York's case, "when he was interrupted by the chief justice, who remarked that the decision of York's case was that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending this homicide were fully shown by the evidence. And on this point the chief justice instructed the jury as follows:

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[s] Com. *v.* York, 9 Metc. 93; see this case reported and revised in 2 Benn. & Heard's Lead. Cases, 504.

[t] Com. *v.* Eddy, 9 Bost. Law Rep. (N. S.) 611; see Com. *v.* Rogers, 7 Metc. 500.

[u] Com. *v.* Webster, 5 Cush. 320; see State *v.* M'Allister, 11 Shepley, 139; State *v.* Upham, 38 Maine, 261; Satterthwhite *v.* State, 28 Alab. 65; see post, § 711.

The murder charged must be proved; the evidence is on the commonwealth to prove the case; all the evidence, on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification being shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder; otherwise they will find the defendant guilty of manslaughter."[uu]

In 1859, the following statute was enacted:—

Burden of proof on defendant relying on written license.—In all criminal prosecutions in which the defendant shall rely for his justification upon any written license, appointment or certificate of authority, he shall prove the same; and until such proof, the presumption shall be that he is not so authorized. (Stat. April 4, 1859).[v]

In other cases where the defence was clearly one of excuse, the doctrine of the shifting of the burden of proof was emphatically announced. Thus, it was held that on the trial of an accessary, if the record of the conviction of the principal be produced, the burden is on the prisoner to disprove the principal's guilt beyond reasonable doubt.[vv] On the other hand, in a prior case, under a statute enacting that every peddler exposing to sale any goods, &c., shall forfeit, &c., "*provided, however*, that nothing herein shall prohibit any person from carrying abroad and selling or exposing for sale, &c., any goods, &c., of the produce and manufacture of the U. S.," it was declared that it was incumbent on the government to prove affirmatively that the goods were of foreign produce or manufacture.[w]

In Maine and Iowa, the rule settled in Massachusetts, in Hawkins' case, and York's case, is declared to be law.[ww]

§ 710. It has been held, that when an intentional killing is proved, the law presumes it is malicious;[x] but when there are doubts with the jury, on such a state of facts, in which of two degrees the case falls, they are bound, it has been said, on the strength of those doubts, to find for the lighter grade.[y]

In Tennessee, in a leading case, the question was brought up by a decision

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[uu] Com. *v.* Hawkins, 3 Gray, 463.

[v] Supplement to Revised Statutes, 1859, chapter 160, p. 625.

[vv] Com. *v.* Knapp, 10 Pick. 477; see, also, Com. *v.* How, 1 Mass. 54.

[w] Com. *v.* Samuel, 2 Pick. 103; see Com. *v.* Eddy (1856), 9 Bost. Law Rep. (N. S.) 611.

[ww] Tweedy *v.* State, 5 Iowa (Clarke), 334; State *v.* Knight, 43 Maine, 11.

[x] Com. *v.* York, 9 Metc. 93; Foster, 255; 1 East, P. C. 340; State *v.* Peters, 2 Rice's Digest, 106; State *v.* Town, Wright's R. 75; Woodsides *v.* State, 2 How. Miss. R. 656; Conner *v.* State, 4 Yerger, 137; State *v.* Irwin, 1 Hayward, 112; People *v.* M'Leod, 1 Hill's N. Y. R. 277; U. S. *v.* Connell, 2 Mason, 91; Com. *v.* Drew, 4 Mass. 391; Resp. *v.* Bob. 4 Dallas, 146; Penns. *v.* Honeyman, Addison, 148; State *v.* Zellers, 2 Hale, 220; State *v.* Merrill, 2 Dev. 269; State *v.* Smith, 2 Strobh. 77; R. *v.* Martin, 3 C. & P. 211; R. *v.* Pitts, C. & M. 284; R. *v.* Cheeseman, 7 C. & P. 455; R. *v.* Shaw, 6 C. & P. 372; Com. *v.* Webster, 5 Cush. 320; Com. *v.* Hill, 2 Grattan, 594; see U. S. *v.* Mingo, 2 Curtis, C. C. 1, 7 Bost. Law Rep. 435; People *v.* March, 6 Cal. 543; State *v.* Knight, 43 Maine, 11; Riggs *v.* State, 30 Miss. (1 George) 635; Mitchell *v.* State, 5 Yerger, 340; State *v.* Johnson, 3 Jones (N. C.) 266; Green *v.* State, 28 Miss. (6 Cush.) 687; and post, § 944.

[y] Mitchell *v.* State, 5 Yerger, 340; Davis *v.* State, 10 Georgia, 101; State *v.* Turner, Wright, 20; Com. *v.* Hill, 2 Gratt. 594; People *v.* Milgate, 15 Cal. 127; post, § 944.

of an inferior court that, when the fact of homicide was made out, and evidence produced in mitigation led the jury to doubt whether the offence was murder or manslaughter, they were bound to find murder. The judgment was reversed, the Supreme Court holding, "the judge should have told the jury that, if upon the whole circumstances of the case, they were satisfied of his (the prisoner's) guilt, they ought to find him guilty; but if their minds, taking all the evidence together, could not come to any satisfactory conclusion, as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only."[z]

In Mississippi, a deadly weapon does not by itself prove malice.[zz]

In Ohio, Judge Wright went so far as to say that where, as in cases of homicide, the legislature had created degrees of guilt, the doctrine of doubts did not apply to any but the higher grades. "Counsel have addressed you," it was said, "at length on the subject of your doubts. If you entertain a reasonable doubt as to any one of the essential facts which constitute the crime of murder in the first degree, you should acquit the prisoner of that crime, as it is the humane rule of the law, that no one shall forfeit his life for a crime, when there exists a reasonable doubt whether the crime has been committed. But that is a rule of law adopted in favor of life, and is, therefore, in this case, only applicable to the charge of murder in the first degree —it does not apply to either of the other offences embraced in the indictment. It is impracticable to attain to absolute certainty in human affairs. In the nature of things, we can only attain a reasonable certainty. A juror is not authorized to raise an artificial or captious doubt, in order to acquit the accused; the doubt he relies upon should be real, and honestly and fairly entertained, after all reasonable efforts have been made to find out the facts. Although the rule of the law on the subject of doubts does not apply to crimes not punishable with death, yet, in all criminal cases, the jury should scrupulously examine all the circumstances and facts in proof for and against the accused, and hold him innocent until he is proved guilty; and if, upon a candid examination of the evidence, the conviction results that he is guilty, a jury should so find—in so doing they will discharge their duty."[a] It cannot be doubted, however, that, in making such a distinction, the learned judge was in error. Doubts as to a defendant's guilt are to weigh in his favor, because the law presumes him innocent until he is shown to be guilty; and if such a presumption exists at all, it exists in every case alike.[aa]

§ 711. *Burden in insanity.*—This topic has been already noticed, and it has been shown that the preponderance of authority is that if the defence be insanity, it must be substantially proved as an independent fact, and that the burden is on the defendant to prove it.[b] On the other hand, it has been

[z] State *v.* Coffee, 3 Yerger, 283; 2 Russ. on Crimes, 731.

[zz] Cotton *v.* State, 31 Miss. (2 George) 504.

[a] State *v.* Turner, Wright, 29.

[aa] Wasden *v.* State, 18 Geo. 264.

[b] R. *v.* Stokes, 3 C. &. K. 188; R. *v.* Taylor, 4 Cox C. C. 155; State *v.* Bringer, 5 Ala. 244; State *v.* Starke, 1 Strobhart, 479; State *v.* Huting (6 Bennett), 464; State *v.* Starling, 6 Jones, N. C. 471; State *v.* Spencer, 1 Zabriskie, 202; *contra*, People *v.* McCann, 16 N. Y. (2 Smith) 58; ante, § 55.

ruled in Massachusetts, that the defence is made out if the prisoner satisfies the jury by a preponderance of evidence that he is insane;[c] and in New York the burden is in the prisoner's favor.[cc]

In Spencer's case, in 1846, Chief Justice Hornblower stated the law as follows:—

"I will remark, then, in the first place, that the law presumes a man sane until the contrary is proved.[d] Hence it has been repeatedly decided that the evidence of the prisoner's insanity at the time of the act, ought to be clear and satisfactory. If the evidence leaves it only a doubtful question, the presumption of the law turns the scale in favor of the sanity of the prisoner. In such case the law holds the prisoner responsible for his actions.

"If it were doubtful whether the prisoner *committed the act*, then the jury ought to find in his favor; for where the jury find a reasonable ground for doubts, whether the accused *committed* the homicide, they ought to acquit. *There*, the presumption of law is in favor of the innocence of the party; every man is presumed to be innocent until he is proved guilty.

"But where it is admitted or clearly proved, that he committed the act, but it is insisted that he was insane at the time; and the evidence leaves the question of insanity in *doubt;* there the jury ought to find against him. For there, the other presumption arises, namely, that every man is presumed sane until the contrary is clearly proved.

"I do not mean to say that the jury are to consider him sane, if there is the least shadow of doubt on the subject; any more than I would say they must acquit a man where there is the least shadow of doubt of his having committed the act. What I mean is, that when the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, there a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, *being strong*, and there is but a *slight* doubt of it—then the jury would have a right, and ought to say, that the evidence of his insanity *was good. The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty.*"[e]

After the introduction of evidence of the defendant's insanity, the commonwealth may introduce in rebuttal evidence of his sanity.[ee]

2d. Presumption of intent.[f]

§ 712. The natural and probable consequences of every act deliberately

[c] Com. *v.* Rogers, 7 Metc. 500; Com. *v.* Eddy, 7 Gray, 583.

[cc] People *v.* McCann, 16 N. Y. (2 Smith) 58.

[d] See ante, § 55; to this point may be cited in addition, U. S. *v.* Lawrence, 4 Cranch C. C. 514; Att'y Gen. *v.* Parnther, 3 Brown C. C. 441; Lee *v.* Lee, 4 M'Cord, 183; State *v.* Stark, Strobhart, 479; People *v.* Robinson, 1 Parker C. C. 495; R. *v.* Layton, 4 Cox, C. C. 149; U. S. *v.* M'Glue, 1 Curtis; Graham *v.* Com. 16 B. Monroe, 587.

[e] State *v.* Spencer, 1 Zabriskie, 202; see Lake *v.* People, 1 Harris, C. C. 495.

[ee] Com. *v.* Eddy, 7 Gray, Mass. 583.

[f] See as to *evidence* of intent, ante, § 631-2-3-4-5, 639, 647-8-9.

done are presumed to have been intended by the author.[g] Thus upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred, even though the instrument be so framed as not to impose upon him, and the intention to defraud be general, and not confined, or in any way pointed to the person by whom, if genuine, the instrument would be paid.[h] Uttering a forged paper implies the same intent.[i] So the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, was holden sufficient evidence of an intent to defraud, notwithstanding the belief of the party to whom it was uttered, that the prisoner had no such intention.[j] So, where a man was indicted under the repealed statute 43 G. III. c. 58, for setting fire to a mill, with intent to injure the occupiers, it was holden that the intent might be inferred from the act.[k] In murder, as has just been seen, malice is presumed from the act of killing.[l] Where a man has in possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there be no evidence that he was the maker.[m]

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[g] Com. *v.* Drew, 4 Mass. 391; R. *v.* Dixon, 3 M. & Sel. 15; People *v.* Herrick, 13 Wend. 87; R. *v.* Harvey, 3 D. & R. 464; Miller *v.* People, 5 Barb. 203; People *v.* Cotteral, 18 Johns. 115; State *v.* Cooper, 1 Green (N. J.) 361; State *v.* Mitchell, 5 Ired. 350; State *v.* Jarrott, 1 Ired. 76; State *v.* Council, 1 Overt. 305; Com. *v.* Snelling, 15 Pick. 337; 2 Russ. on Crimes, 231; 1 Greenleaf on Evid. § 18. Psychologically, there can be no *sudden* crime among sane persons. "I may state," says Dr. Gooch, "that there is no 'passion,' without arousing mental phenomena. Lust has its images of dalliance; hate its malevolent emotions; avarice its crooked, grasping thoughts and mean persistencies; ambition and honor their issues, the nobility and worth of which are measured by motives. Whether these active 'affections' are accompanied by bodily sensations or not, is not the question. The point is, whether the appetites and passions exist without that mental armature which in the sane state we are certain forms their very essence, and is necessary to their fruition. The suddenness of an impulse may be granted. We know, however, only two conditions of mind in which this suddenness appears; viz., in the impulses of the madman, and in those of the criminal. The moment the insane entertain 'suspicion,' that moment the sequences of passion follow; first fear, then hatred of the objects of that fear, and on the earliest occasion, destruction of that which, in his insane belief, the maniac thinks will relieve him of the burden of terror; there is no lack of motive, therefore, in accounting for the impulses of madness.

"When we see one who outwardly had hitherto stood well in the world's opinion, suddenly leap into the gulf of crime, our first desire is to examine the inner life of the man, and the investigation results in our finding either the evidences of madness, or the manifestations of mental depravity, in a long dalliance with criminal thoughts which have recurred again and again, entertained and repelled, with lessening horror, till the understanding becomes bewildered, the conscience silenced, and the will overpowered by the vehement temptation of the hour. Mentally the man had long been a criminal."

[h] See ante, § 631-2-3-4-5, 639, 647-8-9; People *v.* Bradford, 1 Wheeler, C. C. 219; R. *v.* Mazagora, R. & R. 291; Henderson *v.* State, 14 Texas, 503; Hoskins *v.* State, 11 Geo. 92; State *v.* Mix, 15 Mis. 153.

[i] U. S. *v.* Shelmire, Bald. 370; R. *v.* Hoatson, 2 Car. & K. 777; R. *v.* Hill, 8 C. & P. 274; R. *v.* Cook, 8 C. & P. 582; R. *v.* Marcus, 2 Car. & K. 356.

[j] R. *v.* Sheppard, R. & R. 169.

[k] R. *v.* Farrington, R. & R. 207.

[l] See ante, § 710.

[m] R. *v.* Fuller. R. & R. 308; ante, 631, &c.

3d. Presumption that everything is rightfully done until the contrary appears.

§ 713. Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. In these cases the ordinary rule is *omnia præsumuntur rite et solemniter esse ecta donec probetur in contrarium.*[n] Everything is presumed to be rightfully and duly performed until the contrary is shown. The following may be mentioned as general presumptions of law, illustrating this maxim: That a man acting in a public capacity, is duly authorized so to do;[o] that the records of a court of justice have been correctly made,[p] according to the rule, *res judicata pro veritate accipitur;*[q] that judges and jurors do nothing carelessly and maliciously;[r] that the decisions of courts of competent jurisdiction are well founded, and their judgments regular and legitimate;[s] and that facts, without proof of which the verdict could not have been found, were proved at the trial.[t]

4th. Presumption arising from attempts to escape or evade justice, or from deportment when charged with offence.

§ 714. Attempts to escape, if shown, lend a strong presumption of guilt. It is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape,[u] or that he offered to bribe one of his guards.[v] Evidence of an attempt to bribe or intimidate witness gives rise to the same presumption. So with flight, to which no proper motive can be assigned,[w] and with the acts of disguise, concealment of person, family or goods, and many other *ex post facto* indications of mental emotion. By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted. These several acts in all their modifications, are indicative of fear, which, however, may spring from causes very different from that of conscious guilt.[x] Mr. Justice Abbott, on the trial of Donnall for the murder of Mrs. Downing, observed in his charge to the jury, that "a person however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary

[n] Co. Litt. 232; Van Omeron *v.* Dowick, 2 Camp. 44; Doe d. Phillips *v.* Evans, 1 Cr. & M. 461; 2 Russ. on Crimes, 732.

[o] Per Lord Ellenborough, C. J. R. *v.* Verelst, 3 Camp. 432; Monke *v.* Butler, 1 Roll. R. 83; State *v.* Gregory, 2 Murphey, 69; State *v.* Hascall, 6 N. Hamp. 352; Jacob *v.* U. States, 1 Brock. 520; post, § 1041.

[p] Reed *v.* Jackson, 1 East, 355.

[q] Co. Litt. 103.

[r] Sutton *v.* Johnstone, 1 T. R. 503.

[s] Lyttleton *v.* Cross, 3 B. & C. 327.

[t] Best on Presumptions, 68.

[u] People *v.* Rathburn, 21 Wend. 509; Byles on Bills, 449; Fannin *v.* State, 14 Mis. 386.

[v] Whaley *v.* State, 11 Geo. 123.

[w] Mittermaier, Deut. St. sec. 12; Fannin *v.* State, 14 Miss. 386.

[x] Wills on Circumstantial Evidence, 70.

to consult his safety by flight."[y] Due consideration should also be given to the influence which might have been exerted upon the mind of the accused, by the character of the tribunal before whom, and the mode of criminal procedure in the country where the trial is to take place.[z]

It is not competent for the defendant to show, that though he had opportunities of escape, he did not avail himself of them.[a] It should be noticed, however, that conduct exhibiting satisfactory indications of guilt is not sufficient evidence to sustain a conviction, unless there be satisfactory evidence also, that a crime has been committed; as in cases of alleged larceny, that the property has been feloniously taken and carried away.[b]

Confusion and embarrassment on the defendant's part, when charged with the crime, may always be proved; though it is not admissible for him to show that several days after the *corpus delicti* was discovered, he appeared surprised when it was announced to him.[bb]

The prisoner will not be permitted to give evidence to account for his flight unless the prosecution prove the flight as tending to establish guilt.[c]

Evidence of subsequent public excitement to justify an anticipation of violence after a homicide, and thus rebut a presumption of guilt from flight, is admissible, but the excitement must exist before the flight.[cc]

It is not to be presumed that a master will cause his slave to fly upon his being accused of a capital offence, and, therefore, the flight of a slave, under such circumstances, operates against him as well as against a white man.[d]

5th. PRESUMPTION ARISING FROM FORGERY OF EVIDENCE.[dd]

§ 715. This is frequently done for the purpose of attracting suspicion in a direction different from the true one, and when proved is properly considered as a moral indication entitled to great weight. It may arise, as is remarked by Mr. Bentham, from one or more of the following causes: 1. From a view of self-exculpation. 2. Maliciously, with the intention of injuring the accused, or others. 3. In sport, or in order to effect some moral end.

§ 716. (*a.*) *With a view to self-exculpation.*—A striking illustration of this is found in the late trial of Dr. Webster, for the murder of Dr. Parkman, where letters were received by the Police Marshal of Boston, purporting to reveal the location of the body, which upon the trial were proved to have been written by the prisoner, in order to divert suspicion from himself, and to prevent a rigid examination of the premises where the murder was actually

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[y] Trial of Robert Saule Donnall, London, 1817.

[z] Best on Presumptions, p. 322.

[a] People *v.* Rathburn, 21 Wend. 509; Campbell *v.* State, 23 Alab. 28. Still, an argument may be fairly drawn from such refusal, by both counsel and court. See Palmer's case, W. & S. Med. Jur. § 1110.

[b] Tyner *v.* State, 5 Humphrey, 383; see post, § 745.

[bb] Campbell *v.* State, 23 Alab. 44.

[c] State *v.* Hays, 23 Mis. (2 Jones) 287.

[cc] State *v.* Phillips, 24 Mis. (3 Jones) 475.

[d] State *v.* Nat, 6 Jones' Law, N. C. 114.

[dd] See on this point, Amos' "Great Oyer," &c., 267; post, § 865.

committed.[e] Under this head also may be mentioned a forged defence of *alibi*. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated *alibi*, by assigning the events of another day to that on which the offence was committed; so that the events being true in themselves, are necessarily consistent with each other, and false only as they are applied to the day in question.[f] A case is reported where a gentleman was robbed, and swore positively to the prisoner, who, nevertheless, was acquitted, the completest alibi being proved. About a year afterwards, the prisoner confessed to the prosecutor that he had committed the robbery, and that the alibi was concerted.[g] It has hence been held that the getting up by the defendant of a false and fictitious affidavit by false personation, was admissible against him on trial.[h]

§ 717. The fact of a forgery of evidence having taken place is not, however, a conclusive presumption against the defendant. Lord Hale, after observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, tells us of a case tried, as he says, before a very learned and wary judge, where a man was convicted and executed for horse stealing, on the strength of his having been found on the animal on the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief, who acknowledged that, on finding himself closely pursued by the officers of justice, he had requested the unfor tunate man to walk the horse for him while he turned aside on a necessary occasion, and thus escaped. Such forgery, however, is not confined to actual criminals. Frequently an innocent man, who is sensible that, although guiltless, appearances are against him, and not duly weighing the danger of his being detected in clandestine attempts to stifle proof, has endeavored to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else. A case to the point is mentioned by Sir Edward Coke.[i] "In the county of Warwick," says he, "there were two brethren; the one having issue a daughter, and being seised of lands in fee, devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. When she was about eight or nine years of age, her uncle, for some offence correcting her, she was heard to say, 'Oh, good uncle, kill me not!' after which the child, after much inquiry, could not be heard of; whereupon the uncle, being suspected of the murder of her, the rather for that he was her next heir, was, upon examination, anno 8 Jac. Rep., committed to the jail for suspicion of murder, and was admonished by the justices of the assize to find out the child, and thereupon bailed until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child, as like unto her both in person and years as he could find, and apparelled her like unto the true child, and brought her to the next assizes; but upon view and examination

[e] Bemis' Rep. of Webster case, 210.
[f] Wills on Circumstantial Evid. 116.
[g] London Med. Gazette, vol. viii. p. 36.
[h] State *v.* Williams, 1 Williams (Vt.) 274.
[i] 3d Inst. 104, p. 232.

she was found not to be the true child; and upon these presumptions he was indicted, found guilty, had judgment, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to school, ran away into the next county; and being well educated, she was received and entertained of a stranger; and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proved to be the true child."[j] Mr. Bentham also gives a pointed illustration of a case of this kind, taken from the Arabian Nights' Entertainments, where the body of a man who had died by accident in the house of a neighbor, was conveyed by him, under the apprehension of suspicion of murder, in the event of the corpse being found in his house, into the house of another, who, finding it there, and acting under the influence of similar apprehensions, in like manner transmitted it to a third, who in his turn shifted the possession of the corpse to a fourth, with whom it was found by the officers of justice.[k]

§ 718. (*b.*) *Maliciously, with the intention of injuring the accused, or others.*—It may be that the forgery of real evidence has been effected either with the purely malicious intent of bringing down suffering upon an innocent person, or with the double motive of self-exculpation and of inducing suspicion on another. The most obvious instance of this is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with a view of exciting suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in a like manner.[l] And of this species of forgery the following extraordinary case, said to have occurred in France, will serve as an apt illustration. An old widow, reputed to have a large sum of money by her, lived in a small shop facing a street, with a back chamber, which served as her bedroom. Her entire family consisted of herself and a man servant, who slept on the fourth story of the same house, but whose room had no communication with those of his mistress, except through the door of the front shop, which it was his usual practice to lock outside when going away at night, and take the key to his own room.

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[j] Wills on Circum. Evid. 113.

[k] On an ejectment involving the title to large estates in Ireland, the question whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder; it was held that these circumstances created a violent presumption of the defendant's knowledge of title in the plaintiff; and the jury were directed that the suppressor and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presnmed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and they might expect satisfaction from him that his brother died without issue. Craig on Dem. of Annesley *v.* Earl of Anglesea, 17 St. Tr. 1416; and see the Tracy Peerage, 11 C. & F. 154; Clumnes *v.* Pezzy, 1 Camp. 8; Lawton *v.* Sweeny, 8 Jurist, 964; 1 Greenleaf's L. of Evidence, sec. 37; Wills' Circum. Ev. p. 72.

[l] Theory of Pres. Proff. App. case 10, p. 102.

One morning this door was observed open, but without any marks of violence or breaking upon it, and the old woman was discovered lying on her bed murdered, apparently by a bloody knife, which was found on the floor at some distance from her, while the strong box in the room was open and had been rifled. One hand of the corpse grasped a quantity of hair ascertained by comparison to be that of the servant, and the other a cravat, which turned out to be his property; while the key of the shop was found in its usual place. On the strength of these presumptions of his being the murderer of his mistress, the unfortunate man was put to the torture, confessed the crime, and was broken on the wheel. In process of time, however, it was discovered that the murder and robbery had been committed by a man who was the servant's favorite companion, who, in order to avert suspicion from himself, and cast it on his friend, had furnished himself with a knife and cravat belonging to him. He also availed himself of an opportunity to take a wax impression of the shop key, and as he was in the habit of dressing the servant's hair, had saved from time to time a considerable portion of the combings, which, after perpetrating the murder, he placed, together with the cravat, in the hands of the deceased.[m] Of a like character was a case which occurred a few years ago in Mississippi. A young man named Boynton had been for some days staying at the house of a friend on a plantation on the Mississippi River. One morning the deceased, the master of the house, was found murdered in a race brake; by his side were seen Boynton's pistols, and in Boynton's hat in the room where he was then sleeping, was found a paper which was known to have been a short time before in the pocket of the deceased. On this evidence Boynton was convicted and executed; persisting to the end in his ignorance of the perpetrator of the act, and breaking wildly from the sheriff when the hour of execution arrived, proclaiming his innocence with an earnestness that shook the confidence of the bystanders in his guilt. Not many months after, a man who had been prowling about the neighborhood at the time, was arrested, tried and sentenced in another State for a murder subsequently occurring, and when at the gallows he confessed that he had been the perpetrator of the murder for which Boynton had suffered; that he had taken the pistols from Boynton's pillow, and had in return placed a paper from the dead man's pocket in Boynton's hat.

§ 719. To the same point is a trial related by Mr. Bentham where the officers of justice were accused of having altered a common key found in the possession of the defendant into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess.[n] A singular case is given in the Causes Célèbres, of a Flemish curate, Francis S. Reimbauer, charged with the murder of Anna Eichstader, by a girl named Catharine Frauenknecht, residing in the house with him at the time. In answer to her evidence, which seemed conclusively to point to him as the guilty individual, he replied by a counter statement designating the sister of his accuser, Magdalena, then dead, as the murderess, detailing

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[m] 3 Benth. Jud. Ev. 255.

[n] 3 Benth. Jud. Ev. 60.

circumstances identical with those given by Catharine, while at the same time he sought to substantiate his statement by writing letters to several of his acquaintances endeavoring to prevail on them to give evidence that Magdalena had, during her lifetime, confessed the murder. Notwithstanding the detection and exposure of this correspondence, he managed his cause with such consummate ability that after it had been prolonged for *four years*, during which time he underwent *one hundred* examinations, he was convicted of the murder only upon his own confession.[o] In 1642, at the York Summer assizes, Thomas Harris, an innkeeper, was convicted of the murder of James Gray, a lodger. A servant of the prisoner, named Morgan, testified that he saw his master strangle the deceased; but the charge being denied, and no marks of violence appearing upon the body, the prisoner was upon the point of being discharged, when the maid servant having desired to be sworn, testified that the prisoner had hidden a large sum of gold belonging to the deceased in the garden. This being found, and the prisoner's explanations being considered unsatisfactory, the jury found a verdict of guilty, and Harris was executed. It afterwards appeared that Gray had died a natural death, that Morgan having had a quarrel with his master, took the opportunity of charging him with the murder; that Harris being an avaricious man, had, from time to time previously, hidden sums of money in the garden, which being known to Morgan and the maid servant, they had resolved to secure it when it should amount to a sum of sufficient magnitude, but that upon the trial, finding Morgan unsuccessful in his charge, the maid had resolved to sacrifice the money and her master to save her lover from the punishment of perjury, and had accordingly testified to its whereabouts.[p] In the great case of Annesley *v.* the Earl of Anglesea, the circumstances which pressed most against the defendant were, that he had caused the plaintiff, who claimed the title and family estates as heir, to be kidnapped and sent to sea, and afterwards endeavored to take away his life on a false charge of murder, —facts which one of the learned judges said, spoke more strongly in proof of the plaintiff's case than a hundred witnesses.[q]

The subject of this species of forgery, it is to be observed, may be accomplished by force as well as by fraud; as where three men unite in a conspiracy against an innocent person; one laying hold of his hands, another putting into his pocket an article of stolen property, which the third, running up, as if by accident, during the scuffle, finds there, and denounces him to justice as a thief.[r]

§ 720. Another common circumstance of the kind in question, is the pretence of having taken part of the draught from which death has ensued.[s] So, it is not unusual to endeavor to induce the suspicion of suicide, by placing some instrument of destruction in the hand of the murdered party. In the year 1764, a citizen of Liege was found shot, and his own pistol was

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[o] 5 Causes Célèbres, 442.
[p] Celebrated Trials, 591.
[q] 17 Ho. St. Tr. 1430, per Mounteney, B.
[r] 3 Benth. Jud. Ev. 39.
[s] R. *v.* K. Wescombe, Annual Register for 1829, p. 142.

discovered lying near him; from which circumstance, together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but upon examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol, and the real murderers were ultimately discovered.[t] Green, Berry, and Hill were tried in the year 1678, for the murder of Sir Edmundbury Godfrey, who was strangled by a handkerchief, in Somerset House, on a Saturday night; and after remaining concealed until the following Wednesday, he was carried at midnight into the fields beyond Soho, and thrown into a ditch, and his own sword thrust through his body, in order to excite a belief that he had committed suicide.[u] But in cases of this kind consistency is often overlooked, as by placing the weapon in the left hand, a curious instance of which took place in the case of Margaret Webb, for whose murder John Fitler was tried at the Warwick Summer Assizes, 1834, before Mr. Justice Taunton.[v]

§ 721. (*c.*) *In sport, or in order to effect some moral end.*—As an instance of this, Mr. Bentham refers to the story of the patriarch Joseph, who, with the view of creating alarm and remorse in the minds of his guilty brothers, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested as thieves, and brought back.

6th. Presumption arising from suppression or destruction of evidence.

§ 722. "The suppression or destruction of pertinent evidence," it is remarked by Mr. Starkie, "is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is."[w] A chimney sweeper having found a jewel, took it to a goldsmith's shop to inquire its value, who having got the jewel into his possession, under pretence of weighing it, took out the stone and offered the finder three half pence for it, and upon his refusing to receive it, returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stone, Pratt, C. J., directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages.[x] The most prejudicial fact in the trial of Captain Donnellan was that he had rinsed the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death.

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[t] Medical Jurisprudence, by Paris and Fonblanque, vol. iii. p. 34.
[u] State Trials, vol. vii. p. 159.
[v] Annual Register for 1834, p. 115; Wills' Circum. Ev. p. 112.
[w] Starkie's Evidence, vol. i. p. 437.
[x] Armory *v.* Delamirie, 1 Strange, 505.

In the case of Donnall, already adverted to, a fact of the same kind was offered in evidence. The deceased was supposed to have been poisoned by the prisoner; and the contents of the stomach which had been placed in a jug for examination, were clandestinely thrown by him into a vessel containing a quantity of water. The prisoner was acquitted on the ground of the insufficiency of the evidence of the *corpus delicti*; but besides the tampering with the contents of the stomach, evidence was given of other suspicious facts and declarations, strongly indicative of conscious guilt.[y]

§ 723. A boatman was tried at Warwick Spring Assizes, 1836, before Mr. Justice Bosanquet, for stealing a quantity of rum, which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liverpool, as was his custom, had taken a sample of the spirit, and tested its strength. Upon the delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat where the prisoner was, to require explanation; but, as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke the jars and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted.[z]

Filing away the engraving from articles of plate, cutting out the marks on linen, shoeing a horse backwards, as was the case in a very remarkable arson case in New Jersey, so as to reverse the track, and the removal, or endeavor to remove from the person or clothes, stains of blood, or other marks, together with other instances of obliteration or distorting of marks of identity, may be enumerated under this head. Having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it.[a]

§ 724. In the great number of poison cases so industriously collected by Hitzig,[b] there is hardly one in which it was not attempted, by the premature interment of human remains, to smother the offence, the pretext being that this is rendered necessary by the state of the body. In the case of violent death, and especially when caused by poison, it cannot but be known that the post-mortem examination will always furnish important, and generally conclusive information, as to the cause of death.[c] In one strange case, the presumption arising from a hurried burial was sought to be rebutted by the antedating the time of death, and a most ingenious but perilous network of

[y] The Trial of Robt. Saule Donnall, Wills' Circum. Ev. 103; see Wh. & St. Med. Jur. § 1069–790, &c.

[z] R. *v.* Thomas, Reported Wills' Circum. Ev. 75.

[a] R. *v.* Jarvis, 33 Eng. Law & Eq. 567.

[b] Neue Pitaval, von Dr. J. C. Hitzig and Dr. W. Haring.

[c] See Traité des Examinations Juridiques, par MM. Orfila et Lesuer; Wills' Circumstantial Evid. 105.

letter and funeral notices was spread while the deceased was still in full health. He stumbled unawares upon his own funeral paraphernalia, and was fortunately able, not only to read the mourning notes, but to prevent their necessity. Dr. Hitzig gives in full the trial of a woman who, under the pretext of a family custom, was enabled to attend no less than seven precipitate interments in her own immediate household, no one suspecting that the usage which she thus so rigorously followed, was but a trick to cover the violent death of victims whom she appeared so tenderly to lament. Illustrations of the same effect are to be found in the Pennsylvania trials of Chapman and Earle for poisoning. So powerful, in fact, was the working of remorse and fear of exposure, as to lead a guilty mother—such was the strong tendency of the evidence in a case not reported—after strangling her own child, to change it for a living one in a neighboring dormitory, and to insist upon her maternal relations to the latter with the utmost pertinacity.

7th. PRESUMPTION ARISING FROM ANTECEDENT PREPARATIONS AND PREVIOUS ATTEMPTS.[d]

§ 725. These have already been more than once referred to, under other heads, and are classified by Mr. Best as follows: The purchasing, the collecting, the fashioning instruments of mischief, of which numerous cases have been already given,[e] and in which the evidence is always admissible, provided it go to connect the defendant with the particular crime. A familiar illustration of this is to be found in the production of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instrument.[f] Under the same head fall cases where the evidence shows a repairing to the spot destined to be the scene of crime; acts done with the view of giving birth to productive or facilitating causes, for removing obstructions in execution of the design; for obviating suspicion, &c. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed in 1806, for the murder of his friend and patron, Isaac Blight. The prisoner and the deceased lived in the same house, and the latter was one evening shot, while sitting in his parlor, by a pistol from an unseen hand. A strong and well connected chain of circumstantial evidence fixed Patch as the murderer, in the course of which it appeared that, a few evenings before that on which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the same room. This shot the prisoner represented at the time as fired at him; but there were strong grounds, especially from the course of the ball through the shutter, for believing that it must have been done by himself, in order to avert suspicion, and induce the deceased and his servants to suppose that assassins were prowling about the building. Of the same character is

[d] The admissibility of evidence on this point has been already fully considered. Ante, § 631-2-3-4-5, 639, 648-9-50, &c.

[e] Ante, § 647, &c.

[f] People v. Larned, 3 Selden (N. Y.), 445; see Com. v. Wilson, 2 Cushing, 590.

the case related by Dr. Hitzig, of the woman who, in order to prepare her friends for an intended poisoning, sent once a week for arsenic to the apothecaries, for the alleged purpose of killing rats.

§ 726. Possession of the instruments or means of offence, under circumstances of suspicion, are important facts in the judicial investigation of imputed crime. Where a man had in his possession a large quantity of counterfeit coin unaccounted for, and there was no evidence that he was the maker, the presumption is, that he had procured it with intent to utter it.[g] Facts of the kind referred to become more powerful indications of guilty purpose, if false reasons are assigned to account for them; as, for instance, in the case of procuring poison, that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases. A female convicted at the Warwick Summer Assizes, August, 1831, of the murder of her uncle by poison, alleged that she had bought arsenic to poison mice, and pointed to a mouse which she said had been killed by it, whereas it was proved that the mouse had not died from poison.[h]

To this class of facts may be referred the case of false representations as to the state of another person's health, with the intention of preparing the connections for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence,[i] as was done by Captain Donnellan respecting Sir Theodosius Boughton.[j] It has been remarked that murderers, especially in the lower walks of life, are frequently found busy for some time previous to the act, in throwing out dark hints, spreading rumors, or uttering prophecies relative to the impending fate of their intended victims.[k] In the case of Susannah Holroyd, who was convicted at the Lancaster assizes of 1816, for the murder of her husband, her son, and the child of another person, about a month before committing the crime, the prisoner told the mother of the child, that she had had her fortune read, and that, within six weeks, three funerals would go from her door, namely, that of her husband, her son, and of the child of the person whom she was then addressing. And so, on the trial of Zephon, in Philadelphia, in 1845, it was shown that the prisoner, who was a negro, had got an old fortune-teller in the neighborhood, of great authority among the blacks, to prophesy the death of the deceased. Great caution, however, should be used, particularly when the person against whom the presumption is pointed, are ignorant and superstitious, since among such, the habit of loose talk of this nature is too prevalent to make an instance of it, when standing alone, any just ground for suspicion.

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[g] See ante, § 631-2-3-4-5, 639, 647-8-9, 712.

[h] R. *v.* Mary Ann Higgins, London Medical Gazette, vol. ix. p. 896, and Annual Register for 1831.

[i] Wills on Circums. Evid. p. 112; Wh. & St. Med. Jur. § 1069-70.

[j] See Gurney's Report of the Trial.

[k] 1 Stark. Evid. 565, 566, 3d edit.

8th. PRESUMPTION ARISING FROM DECLARATIONS OF INTENTION AND THREATS, FROM WHICH THE PRESUMPTION OF GUILT MAY BE DRAWN WITH GREAT STRENGTH WHEN THERE IS PRELIMINARY GROUND LAID.[1]

§ 727. As, where the prisoner, a negro, said he intended "to lay for the deceased if he froze the next Saturday night," and where the homicide took place that night;[m] where it was said, "I am determined to kill the man who injured me;"[n] where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;[o] and where the language of the defendant was, "I will split down any fellow that is saucy."[p] Several considerations, however, have already been adverted to, which divert the applications of evidence of antecedent preparations, and which apply with equal force to this head. In addition to these, it is important to observe: 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misremembered. 2d. It does not necessarily follow, because a man avows an intention or threatens to commit a crime that such intention really existed in his mind. The words may have been uttered through bravado, or with a view of intimidating, annoying, extorting money, or other collateral objects. Thus a man, such as Dr. Parkman, may have frequently been the object of threats or curses of this kind from irritated tenants, and yet it was from a man who used neither, that his death proceeded. 3d. Another person, really desirous of committing the offence, may have profited by the occasion of the threat, to avert suspicion from himself. A curious instance of this is given in the Causes Célèbres.[pp] A woman of extremely bad character and violent temper, one day, in the open street, threatened a man who had done something to displease her, that she would "get his hams cut across for him." He was found dead a short time afterwards with his hams cut across. This was, of course, sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. A person was, however, soon after taken into custody for some other offence, who confessed that he was the murderer: that, happening to be passing when the threat was uttered, he conceived the idea of committing the crime, as he knew the woman's bad character would be sure to tell against her. 4th. It must be recollected that the tendency of a threat or declaration of this nature, is to frustrate its own accomplishment. By threatening a man you put him on his guard, and force him to have recourse to such means of protection as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording him. Still, however, such threats, as observed by Mr. Bentham, "by the testimony of experience, are but too often sooner or later realized. To the intention of producing the terror and nothing but the terror, succeeds under favor of some special opportunity, or under the spur of some fresh

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[1] Moore *v.* State, 2 Ohio St. Rep. 500.

[m] Jim *v.* State, 5 Humph. 174.

[n] Com. *v.* Burgess, 2 Va. Cases, 494.

[o] Com. *v.* Smith, 7 Smith's Laws, 697.

[p] Com. *v.* Mulatto Bob, 4 Dallas, 146.

[pp] 5 Causes Célèbres, 437.

provocation, the intention of producing the mischief, and (in pursuance of that intention) the mischievous act."[q]

Perhaps the sound view of this species of evidence is, that while it ought not to be received to establish the fact of guilt, it is proper to indicate the grade of the offence.

9th. Presumption arising from possession of fruits of offence.

§ 728. As a general rule possession, by the defendant, of stolen goods raises a reasonable presumption of his having been guilty of stealing them. The possession, however, to have this effect, must be recent,[r] must be unexplained,[s] and must involve the defendant's exclusive control.[t] If the explanation be such as to falsely dispute identity, or to involve any other suspicious points, it increases the presumption of guilt.[u] And so if the evidence be connected with that of a series of thefts found in the defendant's custody.[v] The same presumption applies to the appropriation of property of a large amount, or a sudden glut to a person previously poor.[w] In homicide it is in like manner admissible to trace to the defendant such articles of personal property as are identified.[x] A very remarkable case of this kind occurred in Philadelphia, in 1845, on the trial of a German named Papenburg for murder. Towards the close of the case a handkerchief was accidentally drawn from a coat which it was proved he had worn on the night of the offence. On this handkerchief was pencilled, apparently in blood, the profile of a broken hatchet, with which it was proved the fatal blow must have been struck. Still this was dangerous evidence, deriving all its force from the improbability of the counter-presumption that the coat had been so placed between the homicide and the trial, as to admit the handkerchief being slipped in by a third person—a feat which Boynton's case, already stated, shows to be not unprecedented.

§ 729. Where the charge is burglary, it is alleged that mere possession of

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[q] Best on Presumptions, 315, to which work a large portion of the preceding analysis is to be credited.

[r] Hughes *v.* State, 8 Humph. 75; State *v.* Bennett, 2 Const. R. 692; Jones *v.* State, 30 Miss. (1 George) 653; State *v.* Merrick, 19 Maine, 398; R. *v.* Evans, 2 Cox C. C. 270; State *v.* Adams, 1 Haywood, 463; Warren *v.* State, 1 Greene (Iowa) 106; R. *v.* Cockin, 2 Lewin C. C. 235; Engleman *v.* State, 2 Carter, 91; R. *v.* Partridge, 7 C. & P. 551; R. *v.* ——, 2 C. & P. 459; R. *v.* Adams, 3 C. & P. 600; R. *v.* Dewhurst, 2 Stark. Ev. 614; R. *v.* Pichman, 2 East, P. C. 1035; Com. *v.* Millard, 1 Mass. 6; State *v.* Wolff, 15 Mis. 168; State *v.* Floyd, 15 Mis. 349; Davis *v.* People, 1 Harris, C. C. 447; Jones *v.* State, 26 Missis. 247; though see Hunt *v.* Com. 13 Gratt. (Va.) 757.

[s] State *v.* Merrick, 19 Maine, 398; R. *v.* Evans, 2 Cox C. C. 270; R. *v.* Dibley, 2 C. & K. 818; Sertorius *v.* Smith, 24 Missis. 602; Jones *v.* People, 12 Illinois, 259.

[t] R. *v.* Mansfield, C. & M. 142; R. *v.* Hinley, 2 Mood. & R. 524; State *v.* Williams, 2 Jones, Law, N. C. 194; Hall *v.* State, 8 Ind. 439. See on this subject generally a valuable note in 1 Bennett & Heard's Lead. Cas. 360.

[u] R. *v.* Evans, 2 Cox C. C. 270; R. *v.* Dibley, 2 C. & K. 818; State *v.* Bennett, 2 Const. R. 692.

[v] R. *v.* Bowman, Allison C. L. 314; ante, § 631–5, 652–5.

[w] Com. *v.* Montgomery, 11 Metc. 234.

[x] R. *v.* Burdett, 4 Barn. & A. 122; R. *v.* Courvoisier, Wills on Cir. Ev. 241; Williams *v.* Com. 29 Pa. St. R. 102.

the stolen goods, unaccompanied with other suspicious circumstances, is not enough to give *prima facie* evidence of the burglary.[z]

§ 730. Under another head,[a] in examining what points in preparing for trial it is necessary to survey, this topic will be considered in other respects. It remains now only to observe that standing by itself this species of presumption, except in cases of receiving stolen goods, is too slender to support a conviction. In this view the remarks of Mr. Wills[b] are entitled to much consideration. "If the party have secreted the property—if he deny that it is in his possession, and such denial is discovered to be false—if he cannot show how he became possessed of it—if he give false, incredible, or inconsistent accounts of the manner in which he acquired it—if he has disposed of, or attempted to dispose of it at an unreasonably low price—if he has absconded or endeavored to escape from justice—if other stolen property, or pick-lock keys, or other instruments of crime be found in his possession—if he were seen near the spot at or about the time the act was committed—or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offence—if the impression of his shoes or other articles of apparel correspond with the marks left by the thieves—if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or officers of justice—these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for."

10th. Presumption arising from extrinsic and mechanical inculpatory indications.

§ 731. This head, which is drawn from Mr. Wills' admirable treatise,[c] is considered by him as comprehending identification of person, of property, of hand-writing, and of time, and is illustrated with great fulness and perspicuity. Perhaps, also, in practical operations, each one of the points thus stated may be found in the late trial of Professor Webster; and, indeed, to the admirable and dramatic report of that remarkable case by Mr. Bemis, the practitioner may be referred for illustrations far more forcible than any text book can give, of the manner in which the ordinary incidents of guilt defy all the efforts for their obliteration by a mind ingenious, accomplished, and desperate.

It should be observed that indications such as these can always be permitted to go to the jury for what they are worth. Thus it was held admissible to put in evidence a memorandum made in pencil in the pocket-book of the accused, and this without proof of hand-writing.[d]

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[z] Davis *v.* People, 1 Harris C. C. 447.

[a] See post, § 829.

[b] Circums. Evid. 57.

[c] Wills on Circums. Evid. 90.

[d] Whaley *v.* State, 11 Georg. 123; though see ante, § 696.

VIII. Circumstantial evidence.

§ 732. This head, which is intimately connected with the last, and which may be taken in connection, also, with that portion of the succeeding pages which treats of the collection of evidence for trial, has of late years been the subject of much popular interest. The term "circumstantial" has led to the impression that the evidence in question is inclusive and imperfect; and that, consequently, verdicts resting upon it are hazardous and unsatisfactory. The real character, however, of this kind of testimony, has been so recently and so ably exhibited in this country, by some of its most able jurists, that it is unnecessary to do more here, for the purpose of aiding to a right understanding of this important question, than to insert their views in their own language.[e]

§ 733. On the trial of a prisoner indicted for murder, the evidence against him being circumstantial, it was shown that on the second morning after the murder, he was seen coming from the direction of a house, where two women, mother and daughter, resided, the daughter being unmarried, yet having two children; that he had frequently been seen there before, at one time shaving and changing his clothes; that on the evening of same day,

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[e] The general bearing of circumstantial evidence may be well illustrated by the following observations of Mr. Greenleaf on the manner of its development in homicide cases; 3 Greenl. on Evid. sec. 137: "After proving that the deceased was feloniously killed, it is necessary to show that the prisoner was the guilty agent. And here, also, circumstances in the conduct and conversation of the prisoner, tending to fix upon him the guilt of the act—such as the motives which may have urged him to its commission, the means and facilities for it which he possessed, his conduct in previously seeking for an opportunity, or in subsequently using means to avert suspicion from himself, to stifle inquiry, or to remove material evidence—are admissible in evidence. Other circumstances, such as possession of poison, or a weapon wherewith the deed may have been done, marks of blood, the state of the prisoner's dress, indications of violence, and the like, are equally competent evidence. But it is to be recollected, that a person of weak mind or nerves, under the terrors of a criminal accusation, or of his situation as calculated to awaken evidence against him, and ignorant of the nature of the evidence, and the cause of criminal procedure, and unconscious of the security which truth and sincerity afford, will often resort to artifice and falsehood, and even to the fabrication of testimony, in order to defend and exonerate himself. (2 Hale, P. C. 290; 3 Inst. 202; 2 Stark. Evid. 521, 522.) In order, therefore, to convict the prisoner upon the evidence of circumstances, it is held necessary not only that the circumstances all concur to show that he committed the crime, but that they all be inconsistent with any other rational conclusion. (Hodge's case, 2 Lew. Cr. Cas. 227, per Alderson, B; 1 Stark. Ev. 507–512." See, also, Algheri *v.* State, 25 Miss. 584; Mickle *v.* State, 27 Alab. 520.)

Section 138: "But in order to prove that the prisoner was the guilty agent, it is not necessary to show that the fatal deed was done immediately by his own hand. We have already seen, that if he were actually present, aiding and abetting the deed, or were constructively present, by performing his part in an unlawful and felonious enterprise, expected to result in homicide—such as by keeping watch at a distance, to prevent surprise, or the like, and a murder is committed by some other of the party, in pursuance of the original design; or if he combined with others to commit an unlawful act, with the resolution to overcome all opposition by force, and it results in murder; or if he employ another person, unconscious of guilt, such as an idiot, lunatic, or child of tender age, as the instrument of his crime—he is guilty, as the principal and immediate offender, and the charge against him, as such, will be supported by evidence of these facts. (Ante, vol. i. 111; supra, tit. Accessary, passim; supra, 9; Foster, 259, 350, 353; R. *v.* Culkin, 5 C. & P. 121; 1 Hale, P. C. 461; 1 Russ. on Crimes, 26–30; Reg. *v.* Tyler, 8 C. & P. 616.)"

witness went to the house, and found the daughter alone, washing a man's shirt, which had splotches or stains on the bosom and the cuff of the right sleeve; that "said splotches looked more like the stain from chestnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked, whether any one inquired of him if he knew what would take stains out of shirts; to which he replied that the young woman asked him such a question, and he gave his answer to it. The prisoner objected both to the question and answer, and also moved to exclude from the jury all that the witness had said about the shirt and the stains on it, but the court refused to do so. The young woman was afterwards introduced as a witness for the defence, and testified, on cross-examination, that the prisoner stayed at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. It was held that the evidence objected to by the prisoner was properly admitted.[f]

§ 734. "It is probable," said the late Judge Story, "that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence of offences which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts constituting the guilt of the party accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for conviction? That would be to subvert the whole foundations of the administration of public justice. If, on the other hand, such cases are addressed as a mere admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden conclusions and slight suspicions, there is certainly nothing objectionable in the course, although under the solemn circumstances of the present case, it seems hardly necessary to enforce an appeal, the importance of which is so deeply felt by all who sit on this trial."[g]

§ 735. To the same effect was the language of Chief Justice Whitman, of Maine, when charging the jury in a late case of great interest. "Circumstantial evidence," he said, "is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. It was not strange," he said, "that in the vast number of persons who had suffered the penalities of the law, some should have suffered wrongfully."[h]

§ 736. "The eye of Omniscience," said Mr. Justice Park, a most wise and experienced crown judge, "can alone see the truth in all cases; circumstan-

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[f] Campbell *v.* State, 23 Ala. 44.

[g] U. States *v.* Gilbert et al., 2 Sumner's U. S. R. 27. See Mickle *v.* State, 27 Ala. 20; Moore *v.* State, 2 Ohio St. Rep. (N. S.) 500.

[h] People *v.* Thorne, 6 Law Reporter, 54.

tial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelope human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears that he has seen a fact committed."[i]

§ 737. "Circumstantial evidence," said Gibson, C. J., in a capital case, in his charge to the jury, "is in the *abstract* merely, though perhaps not altogether as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of unblemished character, is not so satisfactorily proved, as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of doubtful credibility. Indeed, I scarcely know whether there is any such thing as evidence purely positive. You see a man discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse, and you INFER from all these circumstances that there was a ball discharged from the gun which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is thereby only inferential—in other words, circumstantial. It is *possible* that no ball was in the gun, and we INFER that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearances verified by post-mortem examinations, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. I remember to have heard it doubted in this court-room, whether the death of a man, whose brains oozed through a hole in his skull, was caused by the wound or a misapplication of the dressing.[j] To some extent, however, the proof of the cause which produced the death, rested on circumstantial evidence.

§ 738. "The only difference between positive and circumstantial evidence is, that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends, must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other pro-

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[i] Wills on Circum. Evid. 188.

[j] A remarkable illustration of this will be found in Mitchum *v.* State, 11 Georg. 615.

duction of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief—that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eye-witness of the fact, you are bound to find her guilty."[k]

§ 739. On the trial of Webster, Shaw, C. J., said: "The distinction, then, between direct and circumstantial evidence is this. Direct or positive evidence is where a witness can be called to testify to the precise fact which is the subject of the issue in trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and, of course, no one can be called to testify to it, is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

§ 740. "The necessity, therefore, of resorting to circumstantial evidence, if it be a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men conscious of criminal purposes, and about the execution

[k] Com. *v.* Harman, 4 Barr, 269; see, also, M'Cann *v.* State, 13 Sm. & Marsh. 471.

of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on, as leading to safe and satisfactory conclusions; and—thanks to a beneficent Providence—the laws of nature, and the relations of things to each other, are so linked and combined together, that a medium of proof is often furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

"On this subject, I will once more ask your attention to a remark in the work already cited, East's Pleas of the Crown, chap. 5, § 11. 'Perhaps,' he says, 'strong circumstantial evidence, in cases of crime like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen, that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.'

"Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that you have the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and the case may not afford the means of detecting his falsehood.

§ 741. "But, in a case of circumstantial evidence, where no witness can testify directly to the fact to be proved, you arrive at it by a series of other facts, which by experience we have found so associated with the facts in question, as, in the relation of cause and effect, that they lead to a satisfactory and certain conclusion; as when foot-prints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and from the form and number of the foot-prints, it can be determined with equal certainty, whether it was a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of cirsumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected, and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

§ 742. "From this view, it is manifest that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and

natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law that certain facts proved shall be held to be evidence of another fact, as where it was provided by statute, that if the mother of a bastard child give no notice of its expected birth, and be delivered in secret, and afterwards be found with the child dead, it shall be presumed that it was born alive, and that she killed it. This is a forced and not a natural presumption, prescribed by positive law, and not conformable to the rule of common law. The common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from all the facts must be a reasonable and natural one, and to a moral certainty a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

§ 743. "The next consideration is, that each fact which is necessary to the conclusion, must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen, that in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it, and not repugnant, and go to rebut any contrary presumption."[l]

In cases where the fact of guilt is not proved by positive and satisfactory testimony, the most authoritative text writers unite in suggesting the following cautions:—

1st. THE ONUS OF PROVING EVERYTHING ESSENTIAL TO THE ESTABLISHMENT OF THE CHARGE LIES ON THE PROSECUTOR, THOUGH THE NON-PRODUCTION OF EXPLANATORY EVIDENCE, CLEARLY IN THE POWER OF DEFENDANT, MUST WEIGH AGAINST HIM.[m]

§ 744. In every criminal case, as has been seen, the defendant's guilt must be made out by evidence sufficiently conclusively to exclude any reasonable supposition of his innocence.[n]

The neglect of a defendant to produce evidence of good character does not, it should be observed, afford ground for a presumption of law against him, and it should not be so left to the jury by the court.[o]

2d. THERE MUST BE CLEAR AND UNEQUIVOCAL PROOF OF THE CORPUS DELICTI.

§ 745. The fact of the commission of the offence must necessarily be the

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[l] Com. v. Webster, 5 Cush. 535; Bemis' Webster case, p. 462–464.

[m] R. v. Bendett, 4 Barn. & Ald. 140; Starkie on Evid. 436; Dranquet v. Prudhomme, 3 Louisiana R. 83, 86; Jones v. Kennedy, 11 Pick. 125, 132; Wills on Circum. Ev. 183.

[n] See ante, § 707; State v. Newman, 7 Ala. 69; Tomkins v. State, 32 Alab. 573.

[o] See ante, § 637.

foundation of every criminal suit, and until that fact is proved, most dangerous would it be to convict.[oo] "I would never," says Lord Hale, "convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."[p] Equally emphatic was the language of another great judge. "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."[q] And the civil law is the same: "*Diligenter cavendum est judici, ne supplicium præcipitet, antequam de crimine constiterit.*"[r] "*De corpore interfecti necesse est ut constet.*"[s] The death in such a case should be distinctly proved, either by direct evidence of the fact, by inspection of the body,[t] or, perhaps, by circumstantial evidence strong enough to leave no ground for reasonable doubt.[tt] The proof must be clear and distinct: thus in a case of horse-stealing, a mere declaration in evidence that the horse had been stolen, is not sufficient evidence of the *corpus delicti.* The facts must appear, so that the judge and jury may see whether such facts in point of law amounted to a felonious taking and carrying away of the property in question.[u]

[oo] State *v.* Davidson, 30 Vt. 100.

[p] 2 Hale, P. C. 290; and see Tyner *v.* State, 5 Humphrey, 383; and see two very interesting cases on the corpus delicti in Forgery, R. *v.* Burton, 24 Eng. Law & Eq. 551; R. *v.* Dredge, Ibid. 552; Wh. & St. Med. J. § 988.

[q] Lord Stowell, in Evans *v.* Evans, 8 Hagg. C. R. 105.

[r] Matth. de Crim. in Dig. lib. 48, tit. 16, ch. 1.

[s] Matth. Probat. ch. 1, n. 4, p. 9.

[t] 1 Stark. Evid. 575, 3d, c. 5.

[tt] People *v.* Rulloff, 3 Parker, C. R. (N. Y.) 401.

[u] Tyner *v.* State, 5 Humphrey, 383; see Mitchum *v.* State, 11 Geor. 615. The reference to facts, which, having in themselves no bearing upon the guilt or innocence of the party, are important as leading to inferences in regard to it, is called in Germany, "Indicatory evidence." On this point, the curious are referred to Mittermaier, von Beweise, p. 402; Martin, in Demme's Annalen des Criminalrechts, vol. iii. p. 215; Bauer, Theorie des Anzeigenbeweises; Quistorp Grunds, sec. 676; Henke Darstellung, sec. 99; Tittman Handb. iii. p. 495; Kitka Beweisler, p. 13. Of the old Jurists, see Blanci de indiciis, Venet, 1545; Bruni Guido de Suzaria de indiciis et tortura Lugd. 1546; Crusuis de Tortura et indiciis Francof. 1704; Menochius de præsunit, Colon. 1686; Tabor de indiciis delict. Giess. 1767; Cocieji de fallæ, Crim. indic. in ejus exeri. cur. p. l, uro. 75; Reinhardt de eo quod circa reum ex Præsumt. Convinc et Cond. Just est Erford, 1732; Woltaer femiol, Crim. quæd Capita Ital. 1790; Puettman de Lubrico indic. Iudol. Lips. 1785; Nani de indiciis eorumque Ususu, Ticin. 1781; Pagono logica de Probabili Applicata a Guidizi Crimin. Milan, 1806; Heinroth in Hitzig's Zeitzchrift, No. 42, p. 257; Wills' Essay on the Rationale of Circumstantial Evidence. The term "Circumstantial Evidence," is objected to by the German jurists (see Bauer, p. 1214). Indications are divided into, 1st, those which are drawn from the *particular* relation of the circumstance to the fact in issue, so as to implicate a particular person, either as a participant in the crime, or as a possessor of information in regard to it; *e. g.*, where a knife, the possessor of which is known, is found at the locus in quo. 2d. Those which set out, from general observations of human nature, inducing suspicion against particular individuals, by reason of particular moral qualities, motives, information, skill, or demeanor; *e. g.*, suspicions on the grounds of enmity toward the deceased, or interest; see, also, Archiv. des Criminals, xiv. p. 587. The first species justifies the inquisitor in arresting and hearing the person implicated, and demanding an explanation; while in the latter case, he dare not go further than to cause the person to be watched, or examine him as a witness. There is also a distinction between *immediate* indications (Bayl Beitrage zum Criminale, p. 215; Bentham,

§ 746. In most cases the proof of the crime is separable from that of the criminal. Thus, the finding of a dead body, or a house in ashes, indicates the probable crime, but does not necessarily afford any clue to the perpetrator, and here it is necessary to draw a distinction relative to the effect of presumptive evidence. The *corpus delicti* in such cases is made up of two things: first, certain facts forming its basis; and secondly, the existence of criminal agency as the cause of them. With respect to the former of these, it is the established rule that the facts which form the basis of the *corpus delicti* ought to be proved either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind. This is particularly necessary in cases of murder,[uu] where the rules laid down by Lord Hale seem to have been generally followed, namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or if found in a state of decomposition, or reduced to a skeleton, that it should be identified by dress or circumstances, as in the Webster case, where the teeth formed the chief means of identification, and in a leading English case, where the same test was successfully applied to a body exhumed after a lapse of twenty-three years.[v] There are some old cases which go far to establish the sound policy of this rule. One given by Sir E. Coke has been already cited, where an uncle being unable to account for the disappearance of a niece of whom he had the bringing up, was executed for her murder, though it afterwards appeared that she had fled from home, to which, in fact, after a lapse of some years, she returned; and Doctor Hitzig gives several illustrations to the same effect.[w] Lord Hale even tells us that in his own time, after a murderer was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.[x] In our own country, the alleged victim in one case made his appearance just in time to save him who had been indicted for murdering him, and who actually had made a confession of guilt, from being hung.[y]

Should the decease be proved by eye-witnesses, the inspection of the body after death may of course be dispensed with. Thus, in a case in England,[z] the prisoner, a seaman on board of the ship Eolus, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by a blow from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that while the ship was lying off the coast of Africa, where there were several other vessels near,

traité i. p. 313), which authorize the inference in regard to the fact, without the intervention of other circumstances; and *mediate* ones, which only prove such facts from which a further inference can be drawn, in regard to the very matter in issue; *e. g.*, approval of the crime, which leads to the inference of a disposition to commit it. The doctrine of presumptions of law and presumptions of fact, are inapplicable to criminal investigations, these being matter of *intention*.

[uu] See Ruloff *v.* People, 4 E. P. Smith (N. Y.) 179.

[v] R. *v.* Clewes, 4 C. & P. 22; Wh. & St. Med. Jur. § 988.

[w] Der neue Pitoval, &c.

[x] 2 Hale, P. C. 290; see, also, Best's Theory, App. Case 5.

[y] Boorn's case, 1 Greenl. Ev. sec. 214.

[z] R. *v.* Hindmarsh, 2 Leach, C. L. 569.

the prisoner was seen one night to take the captain up in his arms, and throw him into the sea, after which he was never seen or heard of; but that near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels; but the court, although they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.[zz]

A brother of the deceased on a trial for murder, testified, that five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; he testified to several points of resemblance. He was asked by the government whether it was, in his opinion, the body of the murdered man. It was held that the question was incompetent, the question being for the jury, the body having been much decomposed and he having stated all the points of resemblance.[a]

§ 747. It is not pretended that in every case the dead body must be found, or the owner of the property alleged to be stolen discovered. Mr. Bentham suggested the illustration of the decomposition of the body in lime, or by any other of the known chemical menstrua, or of its being submerged in an unfathomable part of the sea, and asks whether in such a case, when the homicide is proved *aliunde*, the defendant is to be acquitted.[aa] Unsuccessful attempts of such a kind have undoubtedly been made, and that the result may have been obtained, appears probable from a recent melancholy instance in Philadelphia, where a gentleman of the highest professional standing, who had won the respect and kind feelings of all, and to whose professional and personal worth I take this opportunity of paying tribute, was in less than eight hours so entirely consumed by the fire in a cellar of a burning house, into which he had fallen, as to leave scarcely a vestige of bone or flesh behind.

The cases cited by Mr. Bentham, Dr. Hitzig, and Mr. Wills, it is not practicable now to consider; and perhaps the necessity is somewhat obviated by the very thorough examination which the question underwent in the Webster case. It will be recollected that there, in the furnace attached to the defendant's laboratory, were found portions of lime and blocks of mineral teeth. These fragments, together with others elsewhere found, having been collected, were identified as those of Dr. Parkman, the teeth having been declared by a dentist to be parts of a set made for the deceased. It was evident that an attempt had been made to destroy the body by fire or other chemical agency, and the testimony of experienced medical gentlemen was taken with reference to this point. Dr. Strong testified that he had fre-

[zz] See also Stocking *v.* State, 7 Ind. 326.
[a] People *v.* Wilson, 3 Parker, C. R. (N. Y.) 199.
[aa] Bentham, Jud. Ev. 234; Wh. & St. Med. Jur. § 970.

quently found it necessary to get rid of the remains of a subject by fire; and that upon one occasion wishing to consume the flesh of the body of a pirate, he had placed it upon a large wood fire, and succeeded in concluding the operation in the course of one night and the forenoon of the next day, although called upon during that time by the police to know what made such a smell in the street.[b] Dr. Jackson says "that the flesh of a human body, if cut up into small pieces and boiled in potash, might be dissolved in two or three hours. Next to this, the best substance used in dissolving or disposing of a human body would, I should think, be nitric acid, and the difficulty or danger attendant upon its use so far as the evolution of noxious vapor is concerned, would depend upon the degree of heat applied. If a gentle heat were used, very little nitrous acid would be given off; but if the acid were boiled there would be a great deal, though the dissolution of the body would be most rapid at a boiling temperature."[c]

§ 748. The cases which present the greatest difficulty in establishing the *corpus delicti* are those of infanticide, poisoning, and suicide.

The weight of authority now clearly is that, in cases of alleged infanticide, it shall be clearly proved that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth;[d] and a very eminent and humane American judge extended the same test—though with questionable propriety—to the case of a child some months old, whom the mother, during an attack of puerperal fever, had thrown out of the window of a steamboat.[e] If, however, a child has been wholly born, and is alive, it is not essential, as will be fully discussed hereafter, that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth.[f]

§ 749. In trials for poisoning it should be observed that it does not necessarily follow, even where poison has been administered, that death has resulted from other than natural causes.[g] The presence of poison may be ascertained by the symptoms during life, the post-mortem appearances, the moral circumstances, and by far the most decisive and satisfactory evidence, the discovery by chemical means of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken.[h]

§ 750. Suicide and accident are sometimes artfully suggested and plausibly urged as causes of death, where the allegation cannot receive direct contradiction; and in such cases the truth can be ascertained only by a comparison of all the attendant circumstances, some of which, if the defence be

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[b] Wh. & St. Med. Jur. § 993; Bemis' Report of Webster case, 69. [c] Ibid. 75, 76.

[d] Wills, p. 205; R. *v.* Poulton, 5 Car. & Paine, 399; see post, § 942; Wh. & St. Med. Jur. § 991.

[e] U. S. *v.* Hewson, 7 Boston Law Rep. 361, Story, J.; though see Com. *v.* Harman, 4 Barr; post, § 990.

[f] See R. *v.* Brain, 6 Car. & Paine, 350.

[g] Wills on Circum. Ev. 209. [h] See post, § 837, &c.

false, are commonly found to be irreconcilable with the cause assigned.[i] It may also happen that the supposed *corpus delicti* is the result of accident or carelessness. In one unhappy instance, in France, a respectable man was convicted and executed, on the strength of the presumption that he alone had access to the place in which a number of missing articles of silver had been found, but which were afterwards discovered to have been deposited there by a magpie.[j]

§ 751. The somewhat fanciful defence of somnambulism, also, which in this country was attempted in Tyrrell's case, may derive sometimes a plausibility from the following curious illustration, which is given by a writer of the last century.[k] Two persons who had been hunting during the day, slept together at night. One of them was renewing the chase in his dream, and imagining himself present at the death of a stag, cried out aloud, "I'll kill him! I'll kill him!" The other, awakened by the noise, got out of bed, and by the light of the moon beheld the sleeper give several deadly stabs with a knife on the part of the bed his companion had just quitted. Another instance is related of a somnambulist who was twice prevented from an apparent attempt to murder his wife, by strangling her with his hands, and by a blow from the bar of a door.

CHAPTER III.

WITNESSES.

I. WANT OF DISCRETION, § 752.
II. INFAMY, § 758.
III. RELATIONSHIP, § 767.
IV. PRIVILEGE, § 773.
V. INTEREST, § 778.
VI. ACCOMPLICES AND CO-DEFENDANTS, § 783.
VII. WANT OF RELIGION, § 795.
VIII. NUMBER OF WITNESSES NECESSARY, § 801.
IX. WHEN A WITNESS WILL BE EXCUSED FROM ANSWERING, ON THE GROUND OF SELF-CRIMINATION OR DISGRACE, § 805.
X. HOW CHARACTER OF WITNESSES MAY BE ATTACKED, § 814.
XI. HOW WITNESS MAY BE CONTRADICTED, § 817.
XII. HOW WITNESS MAY BE SUSTAINED, § 817.

I. Want of discretion.

1st. Idiots and lunatics, § 752.
2d. Intoxicated persons, § 753.
3d. Deaf and dumb persons, § 754.
4th. Infants, 755.

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[i] Wills on Circum. Ev. 239; Wh. & St. Med. Jur. § 833, 946.
[j] 3 Benth. Jud. Ev. 94.
[k] Hervey's Meditations on the Night, note 35. See fully on this subject, Wh. & St. Med. Jur. § 149.

1st. IDIOTS AND LUNATICS.

§ 752. It was once thought that an idiot is inadmissible;[l] and so of a lunatic.[m] It is now settled, however, that in all cases either lunatic or idiot may be received if in the discretion of the court he appears to have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct answer to the questions put.[n] The question of competency is to be determined by the judge trying the case, upon the examination of the witness himself, or upon the testimony of third persons.[o]

In Ohio it is provided by statute as follows:—

The 314th section of the act entitled "An act to establish a code of civil procedure," be so amended as to read as follows: Sec. 314. The following persons shall be incompetent to testify. 1st. Persons who are of unsound mind at the time of their production for examination; 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3d. Husband and wife for or against each other, or concerning any communication made by one or the other during the marriage, whether called as a witness while that relation subsisted, or afterwards, except in actions where the wife, were she a feme sole, would be plaintiff or defendant; in which action the wife may testify. Either the husband or wife may testify, but not both; 4th. An attorney, concerning any communication made to him by his client, in that relation, or his advice thereon, without the client's consent; 5th. A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the party making the confession; 6th. No person who would, if a party, be incompetent to testify under the provisions of section 313, shall become competent by reason of an assignment of his claim.[oo]

Section 314 of the said act to establish a code of civil procedure, as said section was amended by the act of April 12th, 1838, be, and the same hereby is repealed.[p]

2d. INTOXICATED PERSONS.

§ 753. Intoxication, when established to the satisfaction of the court, which may be done by their own inspection, is a ground of exclusion.[pp] It would seem, however, where the issue requires it, the court will adjourn the case so as to enable the testimony of the witness to be secured.

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[l] Co. Litt. 6 b.; Gilb. Ev. 144.

[m] Ibid.; see Armstrong *v.* Simmons, 3 Harring. 342; Robinson *v.* Dane, 16 Ver. 474.

[n] R. *v.* Hill, 5 Cox C. C. 259; 2 Den. C. C. 254; 5 Eng. Law & Eq. 547; Campbell *v.* State, 23 Alab. 44; see Livingston *v.* Kierstadt, 10 Johns. 362; Evans *v.* Hittich, 7 Wheat.

[o] R. *v.* Hill, 5 Cox C. C. 259; 2 Den. C. C. 254; 5 Eng. Law & Eq. 547; as to nature of testimony to prove insanity, see ante, § 51-2-3-4-5, &c.

[oo] Act of Feb. 14th, 1859, sect. 1.

[p] Ibid. sect. 2.

[pp] Hartwell *v.* Palmer, 16 Johns. 143; Gould *v.* Crawford, 2 Barr, 89; State *v.* Underwood, 6 Iredell, 96.

3d. Deaf and dumb persons.

§ 754. A person who is *deaf and dumb* merely, is not incompetent if otherwise capable; and he may be examined through the medium of a sworn interpreter who understands his signs.[q] If, however, he be able to express himself more clearly in writing, that medium will be required as the most accurate and the most satisfactory.[r] He should be examined through the medium he can best understand.[rr]

4th. Infants.

§ 755. An infant of any age may be a witness, provided such infant appear sufficiently to understand the nature and moral obligation of an oath; for competency is held to depend not upon age, but understanding.[s] In this country, the testimony of an infant of *seven* years, corroborated by circumstances, has been held sufficient to justify a conviction of a capital offence. The credibility of such witness is properly left to the jury.[t] But in several instances the evidence of a child of four years has been rejected.[u] Where on an indictment for rape, the injured person is of sufficient age, though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may be sworn as a witness, and examined through the medium of a person who can understand her, who is to be sworn to interpret between her and the court and jury.[v]

"If the child, of how tender age soever," says Mr. Sergeant Talfourd,[w] "comprehends the difference between truth and falsehood, and believes that falsehood is a crime, and will be punished by God in a future state, he may be sworn and examined; whereas, if he has no such sense, though of an age when such knowledge might reasonably be expected, he cannot be sworn."[x] In cases of great importance, where a child, who is a necessary witness to support the charge, is found unfit to give evidence from the mere absence of instruction, a judge will sometimes postpone the trial till the next assizes, in order that the child may be properly taught in the interval.[y]

When, however, in a case of carnally knowing a girl under ten years, it

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[q] R. *v.* Huston, 1 Leach, 408; R. *v.* Wade, 1 Mood. C. C. 86; Snyder *v.* Nations, 5 Blackf. 295; Com. *v.* Hill, 14 Mass. 207; State *v.* De Wolf, 8 Connect. 93; see Wh. & Stillé, Med. Jur. § 140.

[r] Morrison *v.* Leonard, 3 C. & P. 127.

[rr] Ibid.

[s] R. *v.* Powell, 1 Leach, 110; R. *v.* Brazier, Id. 199; R. *v.* Williams, 7 C. & P. 320; 2 Hale, 278, 284; R. *v.* Travers, 2 Str. 700; 1 Greenl. on Ev. sec. 366; State *v.* De Wolf, 8 Conn. 98; Com. *v.* Hill, 14 Mass. 207; Jackson *v.* Gridley, 18 Johns. 98; State *v.* Morea, 2 Ala. 275; 2 Russ. on Crimes, 969.

[t] Com. *v.* Hutchinson, 10 Mass. 225; State *v.* Le Blanc, 3 Brevard, 339; State *v.* Whittier, 21 Maine (8 Shep.) 341; Reg. *v.* Perkins, 2 Mood. C. C. 135.

[u] R. *v.* Pike, 3 C. & P. 598; People *v.* M'Nair, 21 Wend. 608; R. *v.* Brazier, 1 East, P. C. 443.

[v] People *v.* Magee, 1 Denio, 19.

[w] Dickens. Q. S. 6th ed. 533.

[x] 1 Stark. Ev. 2d ed. 93; 2 Id. 407; 1 Leach, 237, Brazier's case.

[y] See note to R. *v.* White, 1 Leach, 480.

appeared, on application on part of the prosecution to pospone the trial, that the girl was only six years old, and by reason of her age quite incompetent to take an oath, Pollock, C. B., said: "I have great doubts as to the course you propose, as I think the safety of the public might be endangered by the postponement of a trial till a child is taught the obligation of an oath. More would probably be lost in memory than would be gained in any other way. I think, therefore, that in this case I ought not to postpone the trial. Still, I can easily conceive that there may be cases where the intellect of a child is much more ripened, as in the case of children of nine, ten, or twelve years old; for example, where their condition has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper; but where the infirmity arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than counteract the gain in point of religious instruction."[z]

§ 756. While there should be every caution observed as to the possibility of a child being tampered with by parents, or by those to whose influence they are particularly subjected, it should be observed, that so far as their own action is concerned, the ideas they receive are much more apt to be transferred unchanged to a third person, than those received by adults. "To them," it is well observed by Mr. Amos,[a] "it is a matter of interest to pay particular attention to the precise words which people utter in their presence. They are usually passive recipients of other persons' ideas and expressions, whereas a grown person, when he hears a statement, is apt to content himself with the substance of it, and to modify it in his own mind, and may be afterwards unable to trace back his ideas to the original impressions."

§ 757. By the general law of Germany, seven years is fixed as the period of capacity. This, however, as is observed by Mittermaier, is a matter resting very much on the discretion of the judge. Even when the attention of a child has been unbroken, he argues, the want on its part of sufficient associations to give it a fixed standard by which to adjust its impressions, its liability to have its impressions effaced or varied by others, and excess of its imaginative faculties, combine to prevent the establishment of an absolute rule. By the Roman law no one could be a witness till twenty; by the canon law, not until fourteen.[b]

The Ohio Statute on this point has been just given.[bb]

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[z] R. *v.* Nicholas, 2 Car. & K. 246.

[a] Great Oyer, 277.

[b] 1 Mittermaier, Deut. St. s. 169; Wiesand de ætate ad Jurand. in Caus. Crim. &c. Vit. 1791.

[bb] Ante, § 752.

II. Infamy.

1st. What convictions disable, § 758.
(a) Home convictions, § 759.
(b) Foreign convictions, § 762.
2d. Verdict without judgment, § 763.
3d. Defective conviction, § 764.
4th. Pardon, § 765.

1st. What convictions disable.

§ 758. Persons convicted of crimes which render them infamous are excluded from being witnesses. But it is a difficult point to determine precisely the offences which render the perpetrator of them infamous; the usual and more general enumeration of them being *treason*, *felony*, and the *crimen falsi*.[c]

In Massachusetts, no witness is now excluded by reason of crime or interest, but a conviction may always be proved to affect credibility.[d] Under St. 1852, c. 312, § 60, convicts in the State prison, brought into court by writ of habeas corpus, are competent witnesses.[dd]

§ 759. (*a.*) *Home convictions.*—The extent and meaning of the term *crimen falsi* is nowhere laid down with precision, but from an examination of the different decisions, it may be deduced that the *crimen falsi* of the common law, not only involves the charge of falsehood, but, also, is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. Thus a witness will be rendered infamous by a conviction, in the courts of his own country, of forgery,[e] perjury,[f] subornation of perjury,[g] suppression of testimony by bribery, conspiracy to procure the absence of a witness,[h] or conspiracy to accuse another of crime,[i] and barratry.[j] But it is said not to be so with the mere attempt to procure the absence of a witness.[k]

In the courts of the United States, and of the States of Pennsylvania and Virginia, a person convicted of perjury, or subornation of perjury, is by *statute* disqualified from being a witness.[l]

§ 760. It is the infamy of the crime, and not the nature or mode of the punishment, that destroys competency,[m] and, therefore, though a man had

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[c] Phil. & Am. on Ev. p. 17; 6 Com. Dig. 353; Testm. A. 4, 5; Co. Litt. 6 b; 2 Hale, P. C. 277; 1 Stark. Evid. 94, 95; 1 Greenl. on Evid. sec. 372, 373.

[d] Sup. Rev. Stat. 707, 893.

[dd] Newhall *v.* Jenkins, 2 Gray (Mass.), 562.

[e] R. *v.* Davis, 5 Mod. 74; Poage *v.* State, 3 Ohio St. Rep. (N. S.)

[f] Green. Ev. § 673; R. *v.* Teal, 11 East, 307.

[g] Co. Lit. 6 b; 6 Com. Dig. 353; Testm. A. 5; Sawyer's case, 2 Hale & D. 141.

[h] Clancy's case, Fortesc. R. 208; Bushell *v.* Barratt, Ry. & M. 434.

[i] 2 Hale P. C. 277; 2 Hawk. P. C. c. 46, s. 101; Co. Lit. 6 b; R. *v.* Priddle, 2 Leach, C. C. 496; Crowther *v.* Hopwood, 3 Stark. Rep. 21; 1 Stark. Evid. 95; Ville de Varsovie, 2 Dods. 191.

[j] R. *v.* Ford, 2 Salk. 690; Bull, N. P. 292.

[k] State *v.* Keyes, 8 Vermont, 57.

[l] U. S. Statute, April 30th, 1790, s. 19; Act April 3d, 1804, s. 1; 4 Smith's Laws of Penn. 200; Virg. R. C. ch. 148, s. 1.

[m] Pendock *v.* Mackinder, 2 Wils. 18; Gilb. Evid. 140; Com. *v.* Shaver, 3 Watts & Serg. 338.

stood in the pillory for a libel, or for seditious words or the like, he was not thereby disabled from being a witness.[n] Outlawry in a civil suit does not render a man incompetent as a witness;[o] nor has the mere commission of any offence that effect, unless the party have been actually convicted of it.[p] In New York, conviction for a felony, and for that alone, incapacitates a person from being a witness.[q] In Pennsylvania, a person convicted of arson in the night-time, of buildings or board-yards in any city or incorporated district, is incompetent to testify.[r]

A conviction of grand or petit larceny disqualifies.[s] In New York, however, the latter only goes to the credibility of the witness,[t] and such is now the general statutory law.[u]

If a statute declare the perpetrator of a crime "infamous," this, it seems, will render him incompetent to testify.[v]

§ 761. In Massachusetts, it is said that a person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness.[w] In Pennsylvania, however, the contrary doctrine has lately been held by a learned judge.[x]

No disqualification, it was said by Judge Washington, attends a conviction of assault and battery with intent to kill;[y] nor, it was ruled by the Supreme Court of Pennsylvania, the conviction of a sheriff of the offence of bribing a voter previous to his election to the office.[z]

A conviction of the offence of obtaining goods by false pretences does not render the party an incompetent witness,[a] nor does a conviction for obstructing the passage of cars on a railroad;[b] nor for being a common prostitute;[bb] nor for keeping a gaming or bawdy house;[c] nor for cutting timber;[d] nor for conspiracy to defraud by spreading false news or otherwise;[e] though the last point has been ruled to the contrary by the U. S. Circuit Court, in the District of Columbia.[f]

Under the Mississippi statute, which provides that no conviction for any offence except perjury and subornation of perjury, shall disqualify a witness to testify, but that it shall go to his credibility only, a person "condemned to be hung," for murder, is a competent witness.[g]

§ 762. (*b.*) *Foreign convictions.*—How far a foreign judgment of an infa-

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[n] Gilb. Evid. 140, 141; 3 Lev. 426.

[o] Co. Lit. 6 b; 2 Hawk. c. 46, s. 21.

[p] Kel. 17, 18; 1 Sid. 51; Cowp. 3; see 11 East, 309.

[q] 2 R. S. ch. 701, s. 23.

[r] Act April 16th, 1849, Pamph. L. 664.

[s] Pendock *v.* Mackinder, Willes' R. 665; Com. *v.* Keith, 8 Metc. 538; State *v.* Gardner, 1 Root, 485; Lyford *v.* Farrar, 11 Foster (N. H.), 314.

[t] Carpenter *v.* Nixon, 5 Hill, 260.

[u] R. *v.* Davis, 5 Mod. 75; Pendock *v.* Mackinder, Willes, 665; Uhl *v.* Com. 6 Gratt. 706.

[v] Phil. & Am. on Evid. p. 18; 1 Phil. Evid. p. 18; 1 Gilb. Evid. by Lofft, 256, 257.

[w] Com. *v.* Rogers, 7 Metcalf, 500.

[x] Com. *v.* Murphy, 5 Penn. Law J. 220.

[y] U. S. *v.* Brockius, 3 Wash. C. C. R. 99.

[z] Com. *v.* Shaver, 3 Watts & Serg. 338.

[a] Willey *v.* Merrick, 11 Metc. 302.

[b] Com. *v.* Dame, 8 Cush. 384.

[bb] State *v.* Randolph, 24 Conn. 363.

[c] R. *v.* Grant, 1 Ry. & M. 270; Deer *v.* State, 14 Missouri, 348; Bickel *v.* Fasig, 9 Casey, 463.

[d] Holler *v.* Ffirth, Penning. 531.

[e] 1 Green. Ev. § 373.

[f] U. S. *v.* Porter, 2 Cranch C. C. R. 60.

[g] Keithler *v.* State, 10 S. & M. 192.

mous offence disables a witness, has been the subject of much conflict of authority. In Massachusetts, it has been determined that such conviction does not attach disability; and, after an argument of remarkable learning and vigor, the court came to the conclusion that it was not bound to respect the criminal judgments of the courts, either of neighboring States or of a foreign country, though the record is admissible to discredit.[h] Such seems, also, to be the opinion of the late Mr. Justice Story,[i] and of Mr. Greenleaf.[j] In Virginia, the record is rejected altogether.[k] The contrary opinion was held in North Carolina, after an elaborate examination, Hall, J., dissenting.[l] In New Hampshire, a conviction in another State, of a crime which by the laws of such State disqualified the party from being heard as a witness, and which if committed in New Hampshire would have operated as a disqualification, is sufficient to exclude the party from being a witness.[m] The practice, in most of the States, undoubtedly is, where it is intended to introduce a witness laboring under such disability, to procure a pardon from the executive of the State where the conviction took place, and thus avoid all question. In a civil case in the Supreme Court of Pennsylvania, a witness was offered who had been convicted of forgery, in the United States Circuit Court for the Eastern District of Pennsylvania. A pardon had, however, been previously obtained from the President, by stress of which the witness was admitted, and the question whether by force of conviction he was rendered incompetent avoided.[n] In the United States Circuit Conrt for the Eastern District of Pennsylvania, April Term, 1830, during the trial of Wilson and Poteet, for mail robbery, before Judges Baldwin and Hopkinson, Abraham Porter was called as a witness, and was objected to by the defence, on the ground of his conviction in the Baltimore City Court of several offences, two of which were larcenies, of which the records were produced. The court, on the question being raised, doubted the admissibility of the witness, when Mr. Dallas, the District Attorney, offered a pardon for the larcenies, on which, after argument, he was admitted.[o] But it is difficult to see how one State can enforce the penal laws of either another State or of a foreign country, and such, in fact, appears to have been held to be the law in the only two cases where the question was regularly mooted.[p]

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[h] Com. *v.* Green, 17 Mass. 515, 540; see, also, Campbell *v.* State, 23 Alab. 44.

[i] Conflict of Laws, s. 91–93, 104, 620, 625.

[j] 1 Greenl. on Ev. s. 376; see, also, State *v.* Ridgely, 2 Har. & M'Hen. 120; Clark's Lessee *v.* Hall, Ib. 378; Cole's Lessee *v.* Cole, 1 Har. & Johns. 572. The force of the three last cited cases, however, is much weakened hy the fact, that in them the rejected witnesses were persons sentenced in England for felony, and transported as such to Maryland, before the revolution.

[k] Uhl *v.* Com. 6 Gratt. 706.

[l] State *v.* Chandler, 3 Hawks, 393.

[m] Chase *v.* Blodgett, 10 N. H. 22.

[n] Hoffman *v.* Coster, 2 Wharton, 453.

[o] See Baldwin's R. 90.

[p] Com. *v.* Green, 17 Mass. 515; Jackson *v.* Rose, 2 Virg. Cas. 34.

2d. Verdict without judgment.

§ 763. Conviction without judgment works no disability.[q]

Prisoners who have pleaded guilty, but on whom no sentence has been passed, are constantly admitted in practice as witnesses; and in one of these cases, Baron Wood told the man that he would pass sentence upon him, upon his plea of guilty, because he fenced with the questions.[r]

In Virginia, upon the trial of a convict from the penitentiary for a felony committed there, another convict confined there for felony, is made by statute a competent witness for the prosecution.[s]

3d. Defective conviction.

§ 764. A conviction of larceny before a justice of the peace in a case within his jurisdiction, and a performance of the sentence, render a witness incompetent, although the complaint was so defective that judgment might have been reversed or arrested on error.[t]

It is not, however, in every case that the testimony of an infamous person is exclnded. Where he is a party, in order that he may not be wholly remediless, he may make an affidavit necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;[u] but it is said that his affidavit shall not be read to support a criminal charge.[v] The same principle which makes a wife admissible against her husband in case of violence committed on herself, would perhaps render a convict competent to obtain redress for personal injury, when no other evidence could be obtained.

4th. Pardon.

§ 765. Disability by infamy, may be removed by the production of a pardon under the great seal.[vv]

Unless the testimony of a person thus made competent is corroborated, the better opinion is that it will be insufficient to convict.[w]

Where a pardon remitted to the convict "the residue of the punishment he was sentenced to endure," it was held that his competency as a witness was not restored.[x]

Where the disability is attached to the conviction of a crime by the express

[q] 6 Com. Dig. 354, Testm. A. 5; R. v. Castel Careinon, 8 East, 77; Lee v. Gansell, Cowp. 3; Bull, N. P. 392; Fitch v. Smallbrook, T. Raymond, 32; People v. Whipple, 9 Cow. 707; People v. Hevrick, 13 Johns. 82; Cushman v. Loker, 2 Mass. 108; Skinner v. Perot, 1 Ash. 57; State v. Valentine, 7 Ired. 225; U. S. v. Dickinson, 2 M'Lean, 325; Dawley v. State, 4 Indiana, 128.

[r] Alderson, B., R. v. Hinks, 2 C. & K. 464, S. C.; 1 Den. C. C. 84; see post, § 792-3.

[s] Johnson's case, 2 Gratt. 581.

[t] Com. v. Keith, 8 Metc. 531.

[u] Davis and Carter's case, 2 Salk. 461; R. v. Gardiner, 2 Burr. 1117; Atcheson v. Everitt, Cowp. 382; Skinner v. Perot, 1 Ashm. 57.

[v] Walker v. Kearney, 2 Stra. 1148; R. v. Gardiner, 2 Burr. 1117.

[vv] State v. Blaisdell, 33 N. H. 388.

[w] U. S. v. Jones, 2 Wheel. C. C. 451.

[x] Perkins v. Stevens, 24 Pick. 277; State v. Blaisdell, 33 N. H. 388.

words of a statute, the pardon will not, according to the better opinion, restore the competency of the offender, the prerogative of the government being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury at common law, a pardon will restore his competency; but the contrary is the case if the conviction is founded on the statute of 5 Eliz. c. 9.[y]

A pardon granted *after* the sentence of the court has been complied with, *e. g.* the fine paid, or the imprisonment expired, purges the disability, and restores competency.[z]

§ 766. Pardons are to be construed like grants, most favorable to the grantee.[a] Thus an instrument issued by the President of the United States, directing the immediate discharge of one sentenced for mail robbery, was held to be a pardon.[b]

The pardon must correctly recite the offence; and a mis-recital will render it inoperative.[c]

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[y] R. *v.* Ford, 2 Salk. 689; Dover *v.* Maestaer, 5 Esp. 92, 94; Houghtating *v.* Kelderheuse, 1 Parker, C. C. 241; 2 Russ. on Crimes, 595, 596; R. *v.* Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Phil. & Am. on Ev. 21, 22.

"The power of pardon in criminal cases," it was held by the Supreme Court of the United States, "has been exercised from time immemorial, by the executive of that nation, whose language is our language, and to whose judicial institutions ours bears a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." (U. S. *v.* Wilson, 7 Peters, 150.) "It is a constituent part of the judicial system, that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles; and would overturn those rules which have been settled by the wisdom of ages. There is nothing peculiar in a pardon, which ought to distinguish it in this respect from other facts; no legal principle known to the court will sustain such a distinction. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and, if it be rejected, we have discovered no power in a court to force it on him. It may be supposed, that no being condemed to death would reject a pardon; but the rule must be the same in capital cases, and in misdemeanors. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." (Ibid.)

[z] U. S. *v.* Jones, 2 Wheel. C. C. 151; U. S. *v.* Stetter, post.

[a] Hunt's case, 5 Eng. (Ark.) 284; Wyvil's case, 5 Co. 492; 2 Hawk. P. C. § 13.

[b] Jones *v.* Harris, 1 Strob. 160.

[c] U. S. *v.* Stetter, U. S. Cir. Ct. Phil'a, Feb. 1852, Kane, J. "When this indictment was on trial at the last session of the court, one Lewis George was offered as a witness for the prosecution, and was objected to as incompetent, because convicted of felony; but on the production of a pardon, he was allowed to be sworn, and thereupon testified to a fact material in the cause. The prisoner was found guilty; and a new trial having been moved for, it is now contended that George was improperly admitted as a witness.

"The facts, as developed by the record, are these: George was tried at the May sessions of 1850, in this court, on an indictment containing two counts; the first for unlawfully, feloniously, and falsely making, forging, and counterfeiting ten pieces of coin, in the resemblance and similitude of the silver coin which has been coined at the mint

Where a pardon is obtained by fraud, it is void.[d]

[d] 2 Hawks. P. C. 533; § 8, 9; R. *v.* Maddocks, 1 Sid. 430.

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of the United States, called a half dollar; the second, for unlawfully and feloniously passing, uttering and publishing ten false, forged, and counterfeit pieces of coin, such as were described in the first count. The verdict was a general one of guilty; and on the nineteenth of August, 1850, he was sentenced to pay a fine of —— dollars and to suffer an imprisonment of one year, to be computed from the second day of June preceding.

"The pardon was in these words:—

"'Millard Fillmore, President of the United States of America, to all whom these presents shall come, greeting:

"'Whereas, it appears that at the June Term, 1850, of the United States District Court for the Eastern District of Pennsylvania, Lewis George was convicted of counterfeiting the silver coin of the United States, and sentenced to be imprisoned for the term of one year; and whereas it has been made satisfactorily to appear to me that the said George is a fit subject for the exercise of the executive clemency:

"'Now therefore, be it known that I, Millard Fillmore, President of the United States of North America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, have granted, and do hereby grant unto him, the said Lewis George, a full and unconditional pardon, to take effect from and after the first day of July next.

[Seal.] "'In witness, &c. Done at Washington, this fourth day of June, A. D. 1851, &c.'

"The exceptions, as they have been expanded in argument, embrace the following points:—

"1. That it is not competent in the President to grant a pardon after the expiration of the term of sentence.

"2. That the pardon contemplated by the Constitution, is of *offences*, not of the *offender;* and that this pardon is inoperative, because it does not set forth the offence pardoned.

"3. That if the pardoning words of the instrument are to be referred by implication to the offence recited in the preamble, the recital is itself indefinite, and variant from the record of conviction.

"1. I intimated my opinion on the first point, before the argument closed. I cannot doubt the constitutional authority of the President to pardon an offence, so long as any of its legal consequences remain. I do not enter upon the question, whether it is in the power of Congress to attach consequences to a conviction which a pardon cannot remove. There are constitutional views of that question, which are not met in the reasonings of Mr. Hargrave (2 Jur. Arg. 221), nor in any of the cases which recognize the English doctrine. But here the disability was only consequential, not statutory; and I can see no reason for restricting the President's power of pardoning to the time during which the convict is undergoing sentence. In very many cases, the consequential disability is the most painful incident on the conviction. In some, the offence, though a grave one in its legal aspect, is morally venial, perhaps involving no turpitude whatever, and calling for a merely nominal sentence. It would be strange if such a sentence were to disqualify forever, because it did not allow time to invoke the President's clemency. For clearly Congress could not relieve. Were such the law, a nominal sentence, to be effectively merciful, must bear a relation to the distance between the court and the capitol: and a Californian, to ransom his civil rights, must invoke some months of imprisonment beyond the rightful penance of his crime. But I need not pursue the argument. There is nothing before the court, to show that the sentence of George was complied with, by the payment of the fine, which formed part of it; and, besides, the question of law has, I apprehend, been determined by the late Mr. Justice Thompson, in U. S. *v.* Jones (2 Wheeler, Cr. Cas. 151).

"2. The second point of exception involves in its terms the question of a general pardon, the power to grant such a pardon, and its effect, if granted, on the legal competency of the convict. This power is one which can hardly be regarded as established in England, notwithstanding the numerous dicta in the ancient books (see the remarks of Sergeant Hawkins on the several cases, P. C. book 2, ch. 37, sec. 9); and which, in our country, might admit of a less embarrassed dissention under the terms of the Federal Constitution. It is certain that such pardons have not been granted by the Crown for some centuries past, and I am not aware that they have ever been known in the United States. But, at any rate, no question regarding them can arise upon the facts before the court. The pardon here is full and unconditional, but not general.

The subject of conditional pardons does not come up here for consideration. It is sufficient to say, that where the condition is that the defendant shall leave the State, and he either does not leave, or having left, returns, the original sentence revives and may be enforced.[e] It was said, however, where the condition was merely that the defendant should "depart without delay," that the sentence did not revive on the defendant returning, after having once left.[f] When the time for departure is specified in the pardon, it will not begin to run during sickness or incapacity.[g] A pardon with a condition precedent does not operate until the condition is performed.[h]

In Massachusetts, conditional pardons are expressly sanctioned by statute, and provisions are given by which the conditions may be enforced.[i]

The word pardon includes the idea of release; and a pardon by the governor, of one convicted of conspiracy, even after sentence, will operate a release of all fines imposed for the offence, though these fines were due, not to the commonwealth, but to the country.[ii]

In Pennsylvania, the Revised Code (1860) provides: Where any person

Whatever may be the effect of the preamble, reciting as it does a single offence, it must be held to limit, in some degree, the general words of the grant.

"3. The third exception is better taken. A comparison of the instrument of pardon with the conviction on which it is supposed to operate, shows, as it seems to me, a fatal diversity. The pardon speaks of a conviction at 'June Term,' of the offence of 'counterfeiting the silver coin,' and a sentence thereon of 'imprisonment.' The record is of a conviction at the 'May sessions,' of two felonies, one 'forging and counterfeiting ten pieces of coin,' &c., the other, 'uttering and passing' them, on which there is a sentence of 'fine,' as well as imprisonment. Neither the time of conviction, nor the offences, nor the judgments correspond.

"The cases which are digested in Hawkins (*ubi supra*, sec. 8, &c.), and in Chitty (ch. 19, p. 770*, 771*), and the concurrent opinion of the commentators on this title of the law, all go to this, that wherever it may be reasonably intended that the king, when he granted the pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is 'void.' And this being so, what are we to say, where the pardon misrecites the time of conviction, or recites rather an impossible time—for we have no June term—and the conviction was in this court; and referring to one felony as its implied subject, and omits another, of which the party was equally convicted, and omits, besides, a portion of his sentence. Is this a case in which it can reasonably be intended that the executive was fully apprised of the crime of the party, or the action of the court upon it?

"There is nothing of which we can take hold, to connect the pardon with the conviction, and thus to make them commensurate. We must begin by assuming that June term means May sessions; next, that the offence of counterfeiting includes the independent felony of 'uttering,' and then that a sentence to fine and imprisonment is sufficiently described as a sentence of imprisonment; and if either of these assumptions is too broad, there is nothing left for us but an interpretation of the instrument, *ex visceribus suis*, without reference to anything beyond. We cannot, by judicial construction, expand the pardon of one felony into a pardon of two; and unless we do this, the pardon, though it be not void, has no application to the felony of which George was convicted under the second count of the indictment against him.

"I must therefore hold, that the witness, notwithstanding the pardon, was incompetent, *proper delictum*, and that the prisoner is entitled to a new trial."

[e] Flavell's case, 8 W. & S. 197; State *v.* Smith, 1 Bailey, 283; State *v.* Chancellor, 1 Strob. 347; People *v.* Potter, 1 Parker, C. C. 47; State *v.* Fuller. 1 M'Cord, 173; State *v.* Addington, 2 Bailey, 516; R. *v.* Foxworthy, 7 Mod. 153; Roberts *v.* State, 14 Missouri, 138; R. *v.* Thorpe, 1 Leach, 391, R. *v.* Aickless, 1 Leach, 390; opin. of Att. Gen. 341-5; Ib. 368; Wells, *Ex parte*, 18 How. U. S. 307.

[f] Hunt's case, 5 Eng. (Arkansas) 284.

[g] People *v.* James, 2 Caines, 57.

[h] Flavel's case, 8 W. & S. 197.

[i] Sup. Rev. Stat. 32.

[ii] Cope *v.* Com. 28 Penn. State R. 297.

hath been, or shall be convicted of any felony, not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured, or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor, as to the felony or misdemeanor whereof such person was so convicted: *Provided*, That nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony or misdemeanor, and that the provisions of this section shall not extend to the case of a party convicted of wilful and corrupt perjury.[j]

III. Relationship.

1st. Husband and wife.

§ 767. Husband and wife cannot be witnesses for one another; nor regularly against one another;[jj] nor against any other person indicted jointly with the husband or wife.[k] Thus, in conspiracy, the wife of one of the defendants should not be allowed to testify against any of the others, as to any act done by him in furtherance of the common design; particularly after evidence given connecting the husband with the defendant in the general

[j] As to this the Revisers say: "This section is new, and proposes a fundamental alteration in the general law of evidence, but which is calculated to promote the discovery of truth, and advance the purposes of justice. While the decisions of courts in civil cases have been continually narrowing the rules which exclude witnesses from being heard, the old principle which closes the lips of a party convicted of an infamous crime, has been left untouched and unimproved. The testimony of a witness in a criminal accusation is the right of the community, not of the witness. In crime, it is the public peace that has been disturbed, the public order which has been infracted, and the means through which the offender is to be brought to justice is peculiarly the property of the public. To say that because a man has once committed a crime, his lips are forever to be sealed in a criminal court, is in effect punishing the public he has wronged, not the individual excluded from testifying. The practical effect of the rule of exclusion is to give immunity to subtle knaves, who cunningly employ instruments who they know can never betray them, because a supposed legal policy has guaranteed their silence. The pardoning power, it may be supposed, would reach this evil. But experience demonstrates this remedy not to be particularly effective. It frequently happens, from the natural reluctance a man has of communicating more of his infamy than arises from the particular transaction, and the hope that the fact of his previous conviction may have escaped notice, that this discovery is for the first time made, when the exception is taken to his testimony on the trial. The result frequently is the triumph of villany and the defeat of justice. By abolishing the absolute rule of excluding such witnesses from testifying, but permitting the fact of his conviction to be given in evidence to affect his credibility, the public right to the testimony of the witness is preserved, and every fair opportunity is given to the accused to impeach his credibility before the jury. It may be well to add that England, from whom we originally borrowed this rule of exclusion, has by her recent statute for improving the law of evidence, 6 and 7 Victoria, chapter 85, abolished it, and declared that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime."

[jj] 2 Hawk. c. 46, s. 16; Com. *v.* Marsh, 10 Pick. 57; Snyder *v.* Snyder, 6 Binney, 488; Corse *v.* Patterson, 6 Har. & Johns. 153; Lucas *v.* State, 23 Conn. 18.

[k] R. *v.* Smith, 1 Mood. C. C. 289; R. *v.* Hood, 1 Mood. C. C. 281; State *v.* Smith, 2 Iredell, 402; Com. *v.* Robinson, 1 Gray, 555.

conspiracy.[l] In the case of an indictment against several defendants, for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness.[m]

§ 768. But where the grounds of defence are several and distinct, and in no way dependent on each other, as is observed by Mr. Greenleaf, "no reason is perceived why the wife of one defendant should not be admitted as a witness for another;"[n] and where the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one defendant, where the trials are separate, is a witness for the other.[o]

H., D., S., Z. and T. were jointly indicted for murder, and a separate trial awarded to T. Upon the trial of T. he offered to prove an alibi by the wives of H. and S. It was held, that they were competent witnesses. The court, after reviewing the authorities upon the question, say: "The mere fact that the husband is a party to the record, does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife."[oo]

The wife is not competent to prove non-access of the husband; but she may from necessity, in a case of bastardy, be examined to prove her criminal intercourse with another.[p]

§ 769. A married woman cannot be called to prove a conversation between the prisoner and her husband, which goes to show that her husband and the prisoner committed the felony for which the prisoner is tried.[q] But the wife of a person already convicted for the same offence is a competent witness against the prisoner;[r] and if the conviction of the prisoner against whom she is called will strengthen the hope of pardon for her husband, who is already convicted, this only affects her credibility.[s]

Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence.[t] On the trial of a man for the murder of his wife, her dying declarations are evidence against him.[u] And in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other.[v] On this rule, however, the Supreme Court of North Carolina has grafted the qualification that the assault must amount to an attempted felony, or to a lasting injury, or great bodily harm.[w]

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[l] R. *v.* Sergeant, 1 R. & M. 352.

[m] State *v.* Burlingham, 3 Shep. 104.

[n] 1 Greenleaf on Evid. sec. 335.

[o] State *v.* Anthony, 1 M'Cord, 286; Com. *v.* Manson, 1 Ashmead, 31; Com. *v.* Easland, 1 Mass. 15; though see Pulten *v.* People, 1 Dougl. 48.

[oo] Thompson *v.* Commonwealth, 1 Metcalf, Ky. 13.

[p] State *v.* Pettaway, 3 Hawks. 623; Com. *v.* Shepherd, 6 Binney, 283–290; Com. *v.* Connelly, 1 Br. App. 47.

[q] R. *v.* Gleed, Harrison's Dig. 849; R. *v.* Williams, 8 C. & P. 284.

[r] R. *v.* Williams, 8 C. & P. 284.

[s] R. *v.* Rudd, 1 Leach, 135.

[t] State *v.* Davis, 3 Brevard, 3; U. S. *v.* Smallwood, 5 Cranch C. C. R. 35.

[u] Woodcock's case, 2 Leach, C. C. 363; John's case, 1 East, P. C. 357; 1 Phil. Evid. 75, n. 1; Penn. *v.* Stoops, Addison, 332.

[v] R. *v.* Jagger, 1 East, P. C. 455; R. *v.* Pearce, 9 Car. & P. 295, 667.

[w] State *v.* Hussey, 1 Busbee, 123. In this case, Nash, C. J., said: "Mr. Greenleaf, 1st vol. sec. 343, in enumerating the cases in which a wife may be examined as a wit-

§ 770. If a woman be takan away by force and married, she may be a witness against her husband, indicted on stat. 9 Geo. IV. c. 31, s. 19, against the stealing of women; for a contract obtained by force has no obligation in law.[x] So upon an indictment on the same act, section 22, for marrying a second wife, the first being alive, though the first cannot be a witness, yet the second may, after proof of the first marriage, the second marriage being void.[y] In Lord Audley's case, his wife was allowed to be a witness to prove that he assisted in a rape upon her.[z]

In all cases where hnsband and wife are admissible witnesses against each other, they are admissible for each other.[a] Thus, on an indictment of a husband for an assault and battery on his wife, she is a competent witness for him to disprove the charge.[b]

§ 771. If a woman be divorced *a vinculo matrimonii*, she cannot prove a contract, or anything else which happened during the coverture. Any fact arising after the divorce, she may prove.[c]

On an indictment for fornication and adultery, one who had been the husband of the *feme* defendant, but had been divorced from her on account of her adultery, was held in North Carolina incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted. And if the testimony be received at the trial, after objection made to it, and the defendant be found guilty, and the man

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ness, states some which are for felonies, or acts leading to felonies, and refers to one for assault and battery on her. For this he refers to Agire's case, 1st Strange, 633, where it is reported in about as many words as Mr. Greenleaf has used in stating the principle. Nothing is said of the facts or the natnre and extent of the assault and battery, and for it is only cited Lord Audley's case, which was for an atrocious felony upon her person. Now it is utterly impossible that the principle can be true, as stated. We know that a slap on the cheek, let it be as light as it may, indeed, any touching of the person of another in a rude or angry manner, is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state; it would break down the great principle of mutual confidence and dependence; throw open the bed-room to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign. It must be remembered that rules of law are intended to act in all classes of society. In Sedgwick *v.* Watkins, 1st Ves. Sen. 49, which was an application of a wife for a nea exeat against her hnsband, Lord Thurlow said she may make application for it, but the question is, by what evidence she can support it; and whether her affidavit can be read to affect her husband? He admits that for security of the peace, ex necessitate rei, she may make an affidavit against her husband, but cannot be a witness to sustain an indictment, and closes by observing, 'I have always taken it to be a rule, that a wife never can be a witness against her husband, except in the case I have alluded to.' The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not. In this case, there is no pretence that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary." *Contra*, U. S. *v.* Smallwood, 5 Cranch, C. C. R. 35.

[x] R. *v.* Reading, R. T. Hard. 83; B. N. P. 286.

[y] Griggs' case, Sir T. Raym. 1; 4 St. Trials, 754; B. N. P. 287; 2 Hawk. c. 46, s. 72; R. & M. 354.

[z] 1 St. Tri. 393; and see 1 Hale, P. C. 301; 1 Phil. 84.

[a] R. *v.* Sargeant, R. & M. 352.

[b] State *v.* Neill, 6 Ala. 685.

[c] Monroe *v.* Twistleton, Peake's Evid. Ap. 39; Aveson *v.* Ld. Kinnaird, 6 East, 192, 193; Stein *v.* Bowman, 13 Peters, 209; Coffin *v.* Jones, 13 Pick. 441-443; Edgell *v.* Bennet, 7 Ver. 536; Williams *v.* Baldwin, 7 Ver. 503, 506.

alone appeals, it is not thereby rendered competent against him.[d] On the other hand, it has been ruled in Wisconsin, that after a divorce a vinculo, the husband is a competent witness to prove the marriage with his divorced wife, on an indictment of another person, for adultery alleged to have been committed during coverture with such divorced wife.[a]

The husband of the woman with whom the defendant was alleged to have committed the offence, was a witness for the prosecution, and testified to the fact of the adultery. He testified without objection that he cohabited with his wife for some five years after their marriage and down to near the time when the crime was alleged to have been committed; and further stated that he did not live with her at the time of the trial. To this last statement the defendant objected, but it was held to have been properly admitted.[b]

A widow cannot be asked to disclose conversations between her and her late husband.[e]

In Vermont, it was held that a woman divorced *a vinculo matrimonii*, is a competent witness upon an indictment against her former husband for a forgery committed during coverture.[f] This point, however, was subsequently reconsidered, and the witness, in another case, excluded by a majority of the court.[g] But a wife, after the death of her husband, has been held competent to prove facts coming to her knowledge from other sources, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband.[h]

It has been doubted whether the rule incapacitating a wife from being a witness in a case where her husband is concerned, does not extend to the case of a woman cohabiting with a man, and passing as his wife,[i] but perhaps the current of authority is against such a position.

The Ohio statute on this point has been already given.[ii]

As marriage among slaves consisted of cohabitation merely, by permission of their owners, the wife of a slave can be a witness against him.[j]

2d. Other relations.

§ 772. A father or mother may be a witness for or against a child;[k] a child for or against a parent;[l] a servant against a master, or a master against a servant.[m] And in this country the general opinion seems to be, that a mas-

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[d] State *v.* Jolly, 3 Dev. & Bat. 110.

[a] State *v.* Dudley, 7 Wis. 664.

[b] State *v.* Marion, 35 N. H. 22.

[e] Doker *v.* Hasler, R. & M. 198; but see Beveridge *v.* Minter, 1 C. & P. 364; Stein *v.* Bowman, 13 Peters, 209.

[f] State *v.* J. N. B., 1 Tyler, 36.

[g] State *v.* Phelps, 2 Tyler, 375.

[h] Coffin *v.* Jones, 13 Pick. 445; Williams *v.* Baldwin, 7 Ver. 506; Wells *v.* Tucker, 3 Binney, 366.

[i] Campbell *v.* Twemlow, 1 Price, 81; see, also, Divoll *v.* Ledbetter, 4 Pick. 220.

[ii] Ante, § 752.

[j] State *v.* Samuel, 2 Dev. & Bat. 177; Smith *v.* State, 9 Ala. 990.

[k] R. *v.* Mayor, 1 Wils. 333; Archbold's C. P. 9th ed. 140.

[l] Gilb. Evid. 135; State *v.* Thompson, 10 La. R. 122.

[m] Ibid.

ter can be a witness for or against a slave,[n] though it has been said he would not be compelled to testify in a capital case for the prosecution.[o]

IV. Privilege.

1st. Attorney or counsel, § 773.
2d. Medical attendants, § 774.
3d. Clergymen, § 775.
4th. Public officers, § 776.
5th. Judges and Jurors, § 777.

1st. Attorney or counsel.

§ 773. Cases of privilege frequently arise from professional association. Thus an attorney or solicitor ought not to be examined against his client, because he is obliged to keep his secrets, but of his own knowledge, before retainer, that is, before he was addressed in his professional character, he may be examined as a witness, if served with a snbpœna.[p] Where an attorney is consulted on business within the scope of his profession, the communications between him and his client are strictly confidential; and the attorney shonld not be required nor permitted by any judicial tribunal to divnlge them against his client, if the latter object to his evidence.[q] The privileged communications are confined to such as are made in strictly professional intercourse.[r] The privilege extends to information derived from the client by oral communications, or from books or papers shown to him by his client or placed in his hands.[s] But it does not extend to information derived from other parties or other sources, although obtained while acting as counsel or attorney.[t] And the general rule must be observed notwithstanding no fee was asked or expected by the counsel.[u] Such immunity, however, does not extend to the case of an agent or steward.[v]

The special Ohio statute on this point has been already given.[vv]

2d. Medical attendants.

§ 774. By a judge of great learning and sagacity, it was lamented that the law of privilege is not extended to cases in which medical persons are

[n] State v. Elijah, 1 Humphrey, 102; State v. Isham, 6 Howard's Miss. R. 35; Anstin v. State, 14 Arkansas, 555; Pleasant v. State, 15 Arkansas, 625.

[o] State v. Chanty, 2 Devereaux, 543.

[p] Wood's Inst. b. 4, o. 4; Cutts v. Piokering, Vent. 167, 1 Chit. C. L. 605; 12 Vin. Abr. Evid. B. a; Wilson v. Rastall, 4 T. R. 753; R. v. Withers, 2 Campb. 578; Wilson v. Troup, 7 Johnson, ohap. 25; 2 Cowen, 195; Mills v. Oddy, 6 C. & P. 728; Anon. 8 Mass. 370; Walker v. Wildman, 6 Madd. R. 47; Story's Eq. Plea. 458–461; Jackson v. Burtis, 14 Johns. 391; Foster v. Hall, 12 Pick. 89; Chairac v. Reinicker, 11 Wheaton, 295; R. v. Shaw, 6 B. & P. 372; Greenough v. Gaskill, 1 My. & K. 102, 103; 2 Russ. on Crimes, 902; 1 Greenl. on Evid. seo. 237; Maroh v. Ludlam, 3 Sand. Ch. R. 35.

[q] Jenkinson v. State, 5 Blaok. 465.

[r] Pierson v. Steortz, 1 Morris, 136.

[s] Crosby v. Berger, 11 Paige, 377.

[t] Ibid.

[u] March v. Ludlam, 3 Sandf. Ch. R. 35.

[v] Vaillant v. Dodemead, 2 Atk. 625; Falmouth v. Moss. 11 Prioe, 455.

[vv] Ante, § 752.

obliged to disclose the information they acquire by attending in their professional characters.[w] This point was very much considered in the Duchess of Kingston case, before the House of Lords, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence.[x] By the Revised Statutes of New York,[y] and of Missouri,[z] "No person duly authorized to practise surgery or physic, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient, as a physician, or to do any act for him as a surgeon." Similar statutes exist in Wisconsin, Iowa, Indiana, and Michigan.[zz]

But though the statute is thus express, yet it seems the party himself may waive the privilege, in which case the facts may be disclosed.[a] A consultation as to the means of procuring abortion in another is not privileged by this statute.[b]

3d. Clergymen.

§ 775. The communications of clergymen, by the common law, were not considered privileged,[c] though the rule has been somewhat qualified. "I, for one," said an eminent judge, "will never compel a clergyman to disclose

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[w] Buller, J., Wilson *v.* Rastall, 4 T. R. 760; Dixon *v.* Parmalee, 2 Verm. Rep. 185; Sherman *v.* Sherman, 1 Root, 486.

[x] 20 Howell's State Tri. 613; and see 1 Phill. Evid. 144, 7th ed.; R. *v.* Gibbons, 1 C. & P. 97; Broad *v.* Pitt, 3 C. & P. 518.

[y] Vol. ii. p. 406, sec. 73. The revised statutes of this State establish the same law of privileged communication between physician and patient as exists between attorney and client. Nor is it necessary that the relation of physician and patient should actually exist, if the visit was made under such circumstances as to lead the party visited to suppose that the visit was professional, and to act on it as such. People *v.* Stout, 3 Parker C. R. (N. Y.) 610.

[z] Rev. Code of 1835, p. 623, sec. 17.

[zz] See Elwell's Malpractice, &c. 320.

[a] Johnson *v.* Johnson, 14 Wend. 637.

[b] Hewitt *v.* Prime, 21 Wend. 79; 1 Greenl. on Evid. sec. 248.

[c] R. *v.* Gilham, R. & M. 452; Broad *v.* Pitt, 3 C. & P. 519; 20 How. St. Tri. 612; Com. *v.* Drake, 16 Mass. 161; State *v.* Bastick, 4 Harr. 564; ante, § 692. In 1860, this principle was re-affirmed in an English case, not yet reported, which led to the following proceedings in the House of Commons:—

Mr. Bowyer wished to ask a question regarding the committal of a Roman Catholic priest at the Durham Assizes, for refusing to disclose statements made to him in confession. It appeared that the reverend gentleman had received a watch, in confession, in order that he might make a restitution of it to the owner, and had subsequently handed it to a policeman. Upon the trial of a party for stealing the watch, the Roman Catholic priest was asked by Mr. Justice Hill, from whom he received the watch. The Rev. gentleman refused to answer the question, and was thereupon committed for contempt of court. He (Mr. Boyer) thought the case was a mistaken and a very oppressive one, and that, by the old common law, the seal of confession constituted a privileged communication. He wished to ask whether the Rev. gentleman had been set at liberty, and if not, whether the government would take steps that he might be immediately released.

Sir G. C. Lewis said his information differed from that of the Hon. gentleman with regard to the law of England. He believed it would be found that while any communication between a counsel, solicitor, or attorney, with a client respecting a suit in which the latter was engaged, was a privileged communication, with regard to a clergyman of any denomination or a physician, no such privilege existed. He, therefore, contended the learned judge had not gone beyond the law. In fact, the question was pressed by counsel, and the court had no option but to commit the witness under the

communications made to him by a prisoner, but if he chooses to disclose them, I shall receive them in evidence."[d] But the present opinion is that there is no distinction between clergymen and laymen, but all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice. Neither penitential confessions, made to the minister, nor secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communication.[e] So the confessions of a party voluntarily made to members of the same church, may be given in evidence on his trial for the crime of misdemeanor so confessed by him.[f] But by a statute of New York,[g] "no minister of the gospel or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri,[h] and in Ohio.[hh] The evidence of a clergyman, under the New York statute, however, is only privileged when it relates to communications in the course of discipline.[i]

4th. Public officers.

§ 776. Where the disclosures of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the court will not compel a witness to disclose it.[j] In Hardy's case,[k] a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer.[l] In this country it has been ruled that an officer, who apprehends a prisoner, is not bound to disclose the name of the person from whom he received the information which led to the prisoner's detection.[m]

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circumstances. He believed, however, that the Rev. gentleman only remained in custody a few minutes, and had been discharged in the course of of the day.

Mr. Ingham defended the course pursued by the learned judge, and fully agreed with the Right Hon. gentleman, the Home Secretary, in his interpretation of the law.

Sir F. Kelly also corroborated the statement of the law, as made by the Right. Hon. gentleman.

[d] Per Best, J., Broad *v.* Pitt, 3 C. & P. 519.

[e] Wilson *v.* Rastall, 4 T. R. 753; Butler *v.* Moore, M'Nally's Evid. 253–255; Anon. 2 Skin. 404; Per Holt, C. J., Du Barree *v.* Livette, Peake's Cas. 77; Simon *v.* Gratz, 2 Pa. R. 417; though see 2 Rogers' Rec. 79.

[f] Com. *v.* Drake, 15 Mass. R. 161. On this point, says Mittermaier (vol. i. p. 256): "Other persons are freed from the duty of testifying, because their testimony would be in conflict with an obligation to secrecy undertaken in conformity with law; and to this class belong, first, political officers, so far as concerns the secrets of State, whose publication would be disadvantageous to the State, when the State does not require their testimony. 2d. The defendant's counsel, in reference to the communications confidentially made to them by their clients. 3d. Confessors, and according to the Catholic process, without any distinction between the character of the offence and between the past and future crimes; according to the Protestant views, that which is communicated under the seal of professional secrecy."

[g] 2 Rev. Stat. 406, sec. 72.

[h] Rev. Stat. of 1835, 623, sec. 16.

[hh] Ante, § 752.

[i] People *v.* Gates, 13 Wendell, 323; 1 Greenleaf on Evid. sec. 247.

[j] 1 Greenleaf on Evid. sec. 250, 251.

[k] 24 Howell's St. Tri. 753.

[l] R. *v.* Watson, 2 Stark. 136.

[m] U. S. *v.* Moses, 4 Wash. C. C. R. 726; State *v.* Loper, 16 Maine, 295.

Communications between the governor of a colony and his attorney-general are confidential, and cannot be disclosed.[n] So is a letter written by an agent of the government to one of the secretaries of state.[o]

Officers of the executive department cannot be compelled to disclose information, when in their judgment such disclosure would be prejudicial to the public interests.[p]

5th. Judges and jurors.

§ 777. Judges and arbitrators cannot, it is said by high authority, be compelled to "state what occurred before them in court;"[q] though perhaps this should be restricted to such matters as concern their private deliberations, and such as can be satisfactorily proved by record.

The privileges of a petit jury in this respect will be examined in a subsequent chapter;[r] and those of a grand jury have been already noticed.[s] The same policy which protects the latter, protects the district attorney, and to the same extent.[t]

V. Interest.

§ 778. In Pennsylvania, it is provided by the Revised acts as follows:—

Witnesses entitled to restitution to be competent.—No person shall be deemed and adjudged an incompetent witness on the trial of any indictment, for or by reason of such person being entitled, in the event of the conviction of the defendant, to a restitution of his property feloniously taken, or the value thereof, or if fraudulently obtained, to a pecuniary remuneration or compensation therefor, or for or by reason of such witness being liable and subject to the payment of the costs of prosecution.[tt]

Restitution to be awarded in certain cases, and party aggrieved to be a witness.—On all convictions for robbery, burglary, or larceny of any goods, chattels, or other property, made the subject of larceny by the laws of this commonwealth, or for otherwise unlawfully and fraudulently taking or obtaining the same, or of receiving such goods, chattels, or other property, knowing the same to be stolen, the defendant shall, in addition to the punishment heretofore prescribed for such offences, be adjudged to restore to the owner the property taken, or to pay the value of the same, or so much thereof as may not be restored. And on all convictions on any indictment for forgery, for uttering, publishing, or passing any forged or counterfeit coin, bank notes, check or writing, or any indictment for fraudulently, by means of false tokens or pretences, or otherwise cheating and defrauding another of his goods, chattels, or other property, the defendant, in addition to the punishment hereinbefore prescribed for such offences, shall be adjudged to make

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[n] Wyatt *v.* Gore, Holt, 299; Cook *v.* Maxwell, 2 Stark. 184.

[o] Anderson *v.* Hamilton, 2 Brod. & B. 156; Marbury *v.* Madison, 1 Cranch, 144.

[p] 1 Burr's Trial, 186; Gray *v.* Pentland, 2 S. & R. 23; Cooper's case, 1 Whar. St. Tr. 662; see, as to privilege of members of Congress, &c., Ibid.

[q] 1 Greenleaf on Evid. sec. 249.

[r] Post, § 3155.

[s] Ante, § 508.

[t] Com. *v.* Tilden, 1 Bost. Law R. 4.

[tt] Rev. Act, 1860, Bill II. § 32.

similar restitution, or other compensation, as in case of larceny, to the person defrauded: *Provided*, That nothing herein shall be so construed as to prevent the party aggrieved, and to whom restitution is to be awarded, from being a competent witness on the trial of the offender.[u]

The issue in a criminal prosecution being between the government and the accused, it is but rarely that private or personal interests are allowed so far to interfere with the course of justice as to produce the exclusion of a witness. The testimony of the party injured is constantly admitted in evidence, because he cannot in any future suit derive any advantage from the record of a conviction.[uu] Thus on an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and the prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted.[v] A prosecutor is competent upon an indictment for tearing a promissory note, payable to him,[w] or for extorting a bond from him,[x] or for usury, although he was the borrower of the money, and has not repaid it, or for cheating him by false pretences,[y] or for fraudulently procuring him to execute a *cognovit*.[z] In a public prosecution for theft, an innkeeper, in whose inn, and from whose guest the goods were stolen, is a competent witness to prove the facts alleged in the information, as his liability to the owner cannot be affected by a conviction of the prisoner.[a] Even where a person is entitled to a reward on the conviction of the defendant, he is not rendered incompetent as a witness for either side, whether the reward be offered by public or by private authority.[b] Where an officer would be liable, as a trespasser, for arresting a prisoner, if arrested wrongfully, the objection to the officer as a witness goes to his credibility, and not to his competency.[c] So the prosecutrix, in an indictment for fornication and bastardy, is admissible to show the criminal connection,[d] and the woman on whom an abortion was produced, even though an accomplice, to prove the fact.[e] An informer is a competent witness, although he may receive a part of the penalty, though this is not strictly the rule of the common law. The law is, however, now fully established, and is founded on necessity and policy.[f]

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[u] Ibid. Bill I. § 179.

[uu] State *v.* Blennerhasset, 1 Walker, 7; Salisbury *v.* State, 6 Conn. 101; Com. *v.* Farley, Thacher's C. C. 654; State *v.* Wyatt, 2 Haywood, 56; U. S. *v.* Porter, 2 Cranch C. C. R. 60.

[v] Giliam *v.* Com. 4 Leigh, 688; Barker *v.* Com. 2 Virg. Cases, 352.

[w] R. *v.* Morse, Str. 595; R. *v.* Paris, 1 Sid. 431.

[x] 7 Mod. 118.

[y] R. *v.* Makartney, Salk. 286.

[z] R. *v.* Paris, 1 Sid. 431; Ventr. 4; Stark. Evid. p. iv. 772.

[a] Salisbury *v.* State, 6 Conn. 101.

[b] State *v.* Coulter, 1 Haywood, 3; R. *v.* Musoot, 1 Modern, 193; 1 Phil. Ev. 119, 127; R. *v.* Williams, 9 B. & C. 549, 560; Case of the Rioters, 1 Leach, Crim. Cases, 353, n. a; M'Nally's Ev. p. 61, Rule 12; U. S. *v.* Murphy, 16 Peters, 203; U. S. *v.* Wilson, 1 Bald. 90; Com. *v.* Moulton, 9 Mass. 30; R. *v.* Teasdale, 3 Esp. 68; Salisbury *v.* State, 6 Conn. 101; 1 Phill. Ev. 252; 1 Greenl. on Ev. sec. 412.

[c] Com. *v.* Merrill, Thach. C. C. 1.

[d] Com. *v.* Wentz, 1 Ashmead, 269.

[e] People *v.* Costello, 1 Denio, 88; People *v.* Lohman, 2 Barbour, 216.

[f] U. S. *v.* Patterson, 3 M'Lean, 53, 299.

§ 779. A witness who has made a bet on the event of a trial is not thereby made incompetent.[g]

§ 780. There may, however, be cases in which the prosecutor is so directly interested in the event as to be incompetent as a witness, unless where a statute conferring the interest, recognizes his competency either expressly or by implication.[h] Thus, where an informer by statute is to receive the penalty upon conviction, he is at common law incompetent,[i] unless it so be that the statute can receive no execution except the informer be a witness.[j] It has been doubted whether the owner of a reversion is competent to testify against the tenant for life in a capital case, though it is clear he may purge himself of his incompetency by any assignment.[k] A man who was swindled out of the possession of a slave which he had, as an agent to sell for another, was deemed by three judges to two, to be an incompetent witness, on an indictment against the swindler for stealing the slave, in order to prove that a bill of sale, purporting to be signed by the owner of the slave, and transferring the property and possession to the swindler, was a forgery, and not made by such witness.[l] One purchasing restitution money, it is said, is not a competent witness; though the party entitled to restitution is so from necessity.[m] It was formerly thought that, on an indictment for perjury, the party aggrieved by the deposition alleged to be false, could not be sworn on the trial, even though the record of conviction could not be given in evidence in his favor on any future occasion.[n] But it seems now to be fully settled that the party in question is competent, even without showing that he has satisfied the judgment obtained against him in the cause in which the perjury was committed, for the conviction of the defendant, founded on his evidence, is no ground of subsequent relief even in equity.[o] It is true it was ruled in North Carolina, in an early case, that on a trial for perjury, a person who is interested to prove the defendant guilty, because he will thereby exclude his testimony against him in a civil suit then pending, is incompetent; and that so is the party in the civil suit whose interest it is to support the defendant in the indictment.[p] In Virginia, subsequently, a contrary doctrine, after much consideration, was adhered to, and such would seem to be the settled law.[q]

§ 781. Formerly, on a prosecution for forgery, the party by whom an instrument purported to be made was not admitted to prove it forged, if he

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[g] U. S. *v.* Carrico, 5 Cranch C. C. R. 112.

[h] R. *v.* Williams, 9 B. & C. 550.

[i] Roscoe, Cr. Ev. 126; Greenleaf on Ev. § 403.

[j] Gilbert Ev. 114; Murphy *v.* State, 28 Mississippi, 637.

[k] State *v.* Keneborough, 2 Dev. 421.

[l] State *v.* Hope, 2 Brevard, 463.

[m] State *v.* Williams, 2 Harrington, 532.

[n] R. *v.* Nunez, 2 Stra. 1043; R. *v.* Ellis, 2 Stra. 1104; 2 Hawk. c. 46, sec. 118.

[o] 1 Greenleaf on Evid. sec. 414; 1 Chit. C. L. 597; R. *v.* Broughton, 2 Stra. 1230; Abrahams *v.* Bunn, 4 Burr. 2255; R. *v.* Boston, 4 East, 572; Reg. *v.* Yates, 5 Jar. 636; N. P. C.

[p] State *v.* Hamilton, 2 Haywood, 288. Lord Denman is reported to have ruled, at *nisi prius*, that where the prosecutor, in an indictment for perjury, expected that the prisoner would be called as a witness against him in a civil action about to be tried, he was incompetent as a witness to support the indictment; R. *v.* Hume, 7 C. & P. 8. The usual practice is, to continue the prosecution for perjury until the civil issue is determined; 5 P. L. J. 164.

[q] Com. *v.* Hart, 2 Robinson, 819.

would either be liable to be sued upon the instrument (supposing it genuine), or be thereby deprived of a legal claim against another.[r] And it was said that the endorser of a forged note, who admitted his signature to be good, was not a competent witness until he had paid or satisfied the holder.[s] But the rule was afterwards much relaxed, and it was held that, upon an indictment for forgery of a bank note, the cashier, whose name was forged, was a competent witness to prove the forgery.[t] So, on an indictment for forging the endorsement of the payee of a bill of exchange, the payee, who was to have paid the produce in discharge of a debt due from the drawer, but who, in fact, never received the bill, is a competent witness to prove the forgery.[u]

The rule in question, however, can hardly be said to have ever obtained in the United States. In almost every State, the party whose name is forged, has been held to be a competent witness to prove the forgery, and this, though a civil suit is pending against him, to which the proof of forgery may be a sufficient defence.[v]

§ 782. On an indictment against the payee of a bill for uttering a forged acceptance, the first endorsee was held a competent witness, though he had only advanced part of the amount of the bill, and though he released, during the trial, the person in whose name the acceptance was forged.[w] In North Carolina, however, it is said, that on the trial of a bill of indictment for forgery, the person whose name is charged to have been forged, and whose interest, supposing the instrument to be genuine, is affected by it, either as an obligation or acquittance, is not, while the instrument remains in force, a competent witness to prove the forgery.[x]

A master is admissible as a witness for a slave, even in a capital case.[y]

Upon an indictment founded on the statutes of forcible entry, whereby justices are empowered to give restitution of the possession of the lands entered upon by force, or holden by force, to the respective tenants thereof, the tenant whose land has been entered upon or holden by force is not a competent witness.[z] In this country, in such cases, the prosecutor has been held admissible to prove the force, but only the force.[a]

The Ohio statute as to interest has been already given.[aa]

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[r] R. v. Russell, 1 Leach, 8; Watt's case, Hard. 331; Rhodes' case, 2 Stra. 728; Caffy's case, 2 East's P. C. 995; post, § 1462.

[s] Resp. v. Ross, 2 Dallas, 241; 2 Yeates, 1.

[t] R. v. Newland, 1 Leach, 351.

[u] State v. Stanton, 1 Iredell, 424; R. v. Sponsonby, 1 Leach, 374.

[v] Com. v. Hutchinson, 1 Mass. 7; Com. v. Snell, 3 Mass. 82; Com. v. Waite, 5 Mass. 261; Com. v. Peck, 1 Metcalf, 428; State v. Phelps, 11 Vermont R. 117; Com. v. Read, Thatcher's C. C. 180; Noble v. People, Breeze, 30; Resp. v. Ross, 2 Dallas, 239; 2 Yeates, 1; Resp. v. Keating, 1 Dallas, 110; People v. Dean, 6 Cowen, 27; State v. Foster, 3 M'Cord, 442; U. S. v. Brown, 3 Cranch C. C. R. 268.

[w] R. v. Mott, R. & R. 435.

[x] State v. Stanton, 1 Iredell, 424.

[y] Austin v. State, 14 Arkansas, 555; Pleasant v. State, 15 Arkansas, 625; State v. Elijah, 1 Humph. 102; State v. Isham; 6 How. Miss. R. 35; though see State v. Cantry, 2 Dev. 543, as to whether in a capital case he can be compelled to testify for the prosecution.

[z] R. v. Williams, 9 B. & C. 569; R. v. Bevan, Ry. & M. 242; State v. Fellows, 2 Hay. 340; post, § 2045.

[a] Resp. v. Shryber, 1 Dallas, 68; see Kersh v. State, 24 Geo. 191.

[aa] Ante, § 752.

VI. ACCOMPLICES AND CO-DEFENDANTS.

1st. HOW FAR ACCOMPLICES ARE COMPETENT FOR THE PROSECUTION.

§ 783. An accomplice is a competent witness, although his expectation of pardon depend upon the defendant's conviction.[b]

Where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it is regular, before the witness is attacked, to call another witness to prove that the first had related the facts disclosed in his evidence, immediately after they happened, and to state other confirmatory facts.[c]

An accomplice who has testified to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime, proposed to him by the defendant, though proposed at the same time, and in the same conversation.[d]

It has been said in Virginia, that, though a *particeps criminis*, called as a witness for the commonwealth, on the trial of his accomplice, voluntarily give evidence, and fully, and candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt, as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and therefore no right to demand a continuance of his cause, until he can have an opportunity of applying to the executive for such pardon.[e] Judge McLean, however, has decided that, if an accomplice be admitted to testify, and appear to have acted in good faith in giving testimony, the government is bound in honor to discharge him.[f] The English practice, under such circumstances, is, where the witness makes a clean breast, to grant a pardon.[g]

The preponderance of authority in this country is that a jury may convict a prisoner on the testimony of an accomplice alone; though the court may at its discretion advise them to acquit, unless such testimony is corroborated on material points.[h] New trials, however, have been refused even when the verdict was obtained on such testimony uncorroborated.[i] It has been even said, that where the accomplice, on a former occasion, denied on oath all knowledge of the facts to which he testifies at the trial, yet this goes only to his credit; and if the jury find a verdict of conviction on his testimony, and the court before which the trial is had be satisfied with the verdict, an appellate court will not set it aside.[j]

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[b] Gilb. Ev. 136; 1 Hale, 303; 2 Hawk. c. 46, s. 94; Mead *v.* Robinson, Willes, 423.

[c] State *v.* Twitty, 2 Hawks. 449.

[d] Kinchelaw *v.* State, 5 Humph. 9.

[e] Dabney's case, 1 Robinson, 696.

[f] U. S. *v.* Lee, 4 McLean, 103.

[g] Ante, § 763.

[h] State *v.* Haney, 2 Dev. & Bat. 390; Com. *v.* Bosworth, 22 Pick. 397; Com. *v.* Grant, Thatch. C. C. 438; State *v.* Hardin, 2 Dev. & Bat. 407; see People *v.* Whipple, 9 Cowen, 707; People *v.* Vermilyea, 7 Cowen, 369; State *v.* Calvin, 1 Charlt. 151; U. S. *v.* Troax, 3 M'Lean, 224; People *v.* Davis, 21 Wendell, 309; Steinham *v.* U. S. 2 Paine C. C. R. 168; Stocking *v.* State, 7 Ind. 326; Upton *v.* State, 5 Iowa, 466.

[i] People *v.* Costello, 1 Denio, 83; Keither *v.* State, 10 S. & M. 192; Dawley *v.* State, 4 Indiana, 128; Com. *v.* Bosworth, 6 Gray (Mass.), 479.

[j] Brown *v.* Com. 11 Leigh, 769.

§ 784. There is no doubt, however, that the fact of the witness's being an accomplice, accessary or principal, detracts very materially from his credit;[f] and in England it is always customary, although in strict law it is not essential,[g] in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest.[h] At the same time it was once held, even in England, that if on an indictment against several, the accomplice be confirmed in the testimony he gives against some of the prisoners, but not as to the others, this is sufficient confirmation to warrant the conviction of all.[i]

§ 785. The present leaning of English authority is, to use the language of Mr. Serjeant Talfourd,[j] "for judges, in the exercise of a sound discretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion, not as to the whole case, for then the testimony would be needless, but as to such parts as satisfactorily show that he has not fabricated the story. And he should be confirmed in some facts affecting the individuals whom he accuses: for example, by showing the prisoner and the accomplice together under circumstances which were not likely to have occurred unless there had been concert between them;[k] because otherwise his whole narrative may be true in its circumstances, and abundantly confirmed, and yet false as to the alleged actors. But this is a mere matter for the discretion of the court; and there have been instances where, on consideration, it has been deemed proper to convict and to execute prisoners on the evidence of an accomplice who was confirmed as to others of the party, but not as to those executed."[l] On the other hand, in a case of great importance,[m] where an accomplice swearing positively to several prisoners was confirmed as to some, and not as to others, Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed.

"You may legally convict on the evidence of an accomplice alone," said Alderson, B., to a jury, "if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he be confirmed as to the particular person who is charged with the offence."[n] "I think it would be highly dangerous," said Gurney, B., shortly afterwards, "to convict any person of such a crime (larceny) on the evidence of an accomplice, unconfirmed with respect to the person accused."[o]

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[f] Gilb. Evid. 136. [g] See R. *v.* Hastings, 7 C. & P. 152. [h] See Cowper, 336.

[i] R. *v.* Dawber, 3 Stark. 34, and n; and see R. *v.* Jones, 2 Camp. 131; U. S. *v.* Lancaster, 2 M'Lean, 431.

[j] Dick. Quar. Ses. 9th ed. 504.

[k] R. *v.* Farler, 8 C. & P. 106; where, in a case of night poaching, on 9 G. IV. c. 69, s. 9, the only confirmation of the accomplice's testimony was, that he and the prisoner were drinking together at a public house, commonly frequented by the prisoner, and left the house together when shut up for the night.

[l] R. *v.* Dawber, 3 Stark. N. P. C. 34; R. *v.* Jones, 2 Campb. 133; R. *v.* Birkett, R. & Ry. 252.

[m] R. *v.* Fild and others, Berks Spring Assizes, 1828.

[n] R. *v.* Wilkes, 7 C. & P. 272. [o] R. *v.* Dyke, 8 C. & P. 262.

§ 786. Still more recently, in 1855, the law was thus stated by several learned judges in the Court of Criminal Appeals :—

Jervis, C. J.—We cannot interfere, though we may regret the result that has been arrived at, for it is contrary to the ordinary practice. It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may act on the unconfirmed testimony alone; and juries generally attend to the judge's direction, and require confirmation. But it is only a rule of practice. This is another point to be noticed. Where an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury that it is not safe to act on his testimony as to the third prisoner in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third prisoner for himself in his narrative of the transaction. In this case the jury have acted on the evidence, and we cannot interfere.

§ 787. Parke, B.—During all the time that I have been on the bench, I have usually laid down the rule as it has been stated by the Chief Justice Jervis. I have told the jury that they may find a prisoner guilty upon the unsupported testimony of an accomplice, but the judges have been in the habit of advising them not to act on such testimony unless corroborated. There has been a difference of opinion among the judges respecting the corroboration requisite.

My practice always has been to tell the jury not to convict the prisoner unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner.

Wightman, J.—It has not been the universal practice to require confirmation as to all the prisoners. In some of the cases cited in the note, 2 Starkie on Evidence, 13, it is said, if there be confirmation of the accomplice as to one of the prisoners the jury may convict as to all.

§ 788. Cresswell, J.—I have always acted upon the view of the subject taken by my brother Parke. You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts, but that has no tendency to show that the parties accused were there.

§ 789. Willes, J.—This is not a question of law, but of practice, and questions of law can only be reserved for our opinion.[p]

The distinction existing between the English practice and that obtaining in most of the American courts, is more apparent than real, and may be traced to the different methods of revision which exist in England and among us. There, even if a conviction be in the opinion of the judge manifestly incorrect, there is no redress except through that most tortuous and uncertain channel, an appeal to the mercy of the crown, by which, when successful, the infamy is not detached, but only the penalty removed. Here, in such

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[p] R. v. Stubbs, 33 Eng. Law & Eq. 552 and 553.

a case, the verdict would be instantly set aside, or at all events, the court in review, would not hesitate to grant a new trial. Among the many advantages belonging to our system, perhaps one questionable practice may have grown up, and that is of judges on trial reserving such points as the present, which it might be better for public example to summarily and definitely meet. If the question be still open, it may not be improper to suggest that, after all, the wiser and more humane course is always to tell the jury that if the accomplice be uncorroborated as to the *person* of the accused, they must acquit.

One who purchases intoxicating liquor, sold contrary to law, for the express purpose of prosecuting the seller for a unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller; but the jury should be instructed to receive his evidence with the greatest caution and distrust.[pp]

2d. Accomplices and co-defendants for the defence.

§ 790. One of several persons indicted, although he have pleaded and defended separately, is not a competent witness for his co-defendants, unless immediately acquitted by a jury, or a *nolle prosequi* entered; and the same rule applies to accessaries.[q] Whether the trial be joint or separate the rule is the same,[r] and wherever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial.[s] The contrary rule, however, has been laid down in Tennessee,[t] in Indiana,[u] and in Missouri,[v] where it is said that an accomplice is a competent witness, and may be examined, if he is willing, for his co-defendant in the same indictment, if tried separately, or if he has pleaded guilty, or been separately convicted, and judgment has not been rendered.

§ 793. How far the acquittal of a co-defendant, alleged to be a material witness for a defendant convicted, is a ground for a new trial, will be considered in a subsequent chapter, where the subject of new trials is discussed at large.[a]

By the code of Virginia, p. 752, § 21, it is provided that "no person, who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof."[b]

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pp Com. *v.* Downing, 4 Gray (Mass.), 29.

q State *v.* Mooney and others, 1 Yerger, 431; State *v.* Calvin, 1 Charlton, 151; see post, § 3193.

r 1 Greenl. Ev. § 363; State *v.* Mooney, 1 Yerger, 451; Com. *v.* Marsh, 1 Pick. 57; People *v.* Bell, 10 Johns. R. 95; People *v.* Williams, 19 Wend. R. 377; People *v.* M'Intyre, 1 Harris C. C. 372; State *v.* Smith, 2 Iredell, 402; State *v.* Edwards, 19 Mo. 674; though see U. S. *v.* Henry, 4 W. C. C. 228; U. S. *v.* Hanway, 2 Wall, Jr. 139; Moss *v.* State, 17 Ark. 327; Baker *v.* U. S. 1 Minnes. 207.

s State *v.* Smith, 2 Iredell, 402; Com. *v.* Robinson, 1 Gray, 555; see ante, § 763; see post, § 3195, how far a refusal to admit such witness is ground for new trial.

t Moffitt *v.* State, 2 Humph. 90; see, also, U. S. *v.* Henry, 4 Wash. C. C. R. 228.

u Marshall *v.* State, 8 Ind. 498; Hunt *v.* State, 10 Ind. 69.

v Garrett *v.* State, 6 Miss. 1; see as to Mississippi, Blennerhasset *v.* State, 1 Walk, 7.

a See post, § 3195.

b See Lazier's case, 10 Grattan, 717.

§ 794. On a joint trial, when a motion is made by the defendant for a direction to the jury to acquit another defendant on the ground there is no evidence against him, so that he can be a witness for the party making the motion, it is for the court to determine whether sufficient evidence exists.[c] And no exception lies to such refusal.[d]

A co-defendant or accomplice, who has been convicted, provided he is not thereby rendered infamous, is a competent witness for his co-defendants.[f]

VII. WANT OF RELIGION.

§ 795. A man who refuses to recognize a state of rewards and punishments, either for this world or the next, is excluded from being a witness.[g] It is not, indeed, essential that the witness should be a Christian, or believe in the Old Testament; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. Gentoos, Jews, Mahometans, Turks, and Moors, may be witnesses.[h] Atheists, however, and such like infidels, professing no religion that can bind their consciences to speak the truth, are inadmissible.[i] In this country, it is considered immaterial whether the witness believe that the punishment will be inflicted in this world or in the next; it is enough if he have the religious sense of accountability to the Omniscient Being, who is invoked by an oath.[j] In New York, by statute it is provided, that the test of the competency of a witness is his belief in the existence of a Supreme Being, who will punish false swearing.[k] In Pennsylvania, it was directly decided that the true test of the competency of a witness, on the ground of his religious principles, is, whether he believes in the existence of a God who will punish him if he swear falsely.[l] And the rule embraces those who believe future punishment not to be eternal.[m] In Ohio, it was held that a witness's belief that punishments for false swearing are inflicted in this life only, might go to his credibility.[n] In Connecticut, it was formerly decided that those who believe in a God, and in rewards and punishments in this world, are not competent witnesses.[o] The legislature of that State has since enacted that

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[c] Brister v. State, 26 Ala. 109; see post, § 3195.

[d] Com. v. Robinson, 1 Gray, 555; U. S. v. Marchant, 12 Wheat. 480.

[f] Ballard v. Noaks, 2 Pike, 45; Carpenter v. Crane, Blackf. 119; State v. Stotts, 26 Miss. (5 Jones) 307.

[g] B. N. P. 292; Omichund v. Barker, Willes, 549; 1 Atk. 44, S. C.; 2 Russ. on Crimes, 970.

[h] Willes, 549; Acheson v. Everett, Cowp. 390; Gomes Serra v. Munez, 2 Stra. 821; Fachina v. Sabine, Stra. 1104; 1 Atk. 19, S. C.; 1 Leach, 64.

[i] B. N. P. 292; Omichund v. Barker, Willes, 549; 1 Atk. 29, S. C.; Scott v. Hooper, 14 Verm. 535; Arnold v. Arnold, 13 Verm. 363; People v. M'Garren, 17 Wend. 460; Com. v. Barnard, Thach. Crim. Cases, 431; Blair v. Seaver, 23 Penn. (2 Casey) 274.

[j] People v. Matteson, 2 Cowen, 433; 2 Cowen, 573; and by Story, J.; in Wakefield v. Ross, 5 Mason, 18; 9 Dane's Abr. 317; Brock v. Milligan, 1 Wilcox (10 Ohio), 125.

[k] 2 R. S. C. 408, § 87.

[l] Cubbison v. M'Creary, 2 W. & S. 262.

[m] Cubbison v. M'Creary, 2 W. & S. 262; Butts v. Swartwood, 2 Cowen, 431; Blocker v. Bumes, 2 Ala. 254; U. S. v. Kennedy, 3 M'Lean, 175.

[n] U. S. v. Kennedy, 3 M'Lean, 175.

[o] Atwood v. Welton, 7 Conn. R. 66.

such persons shall be received as witnesses. In Massachusetts, it has been said that mere disbelief in a future existence goes only to the credibility.[p] In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards or punishments.[q] In Virginia, a belief in God and his providence has been held sufficient.[r] In Illinois, it is said that a person who has no religious belief, nor belief in a Supreme Being, and who, though recognizing his amenability to human law, in case he testify falsely, yet does not feel accountable morally, here or hereafter, cannot be admitted as a witness, and his unbelief may be established by the testimony of others, or the court may, on explanation by him, decide on his competency.[rr]

§ 796. A defect of religious faith, however, is never presumed, but the burden of proof is on the party objecting to the witness to show that he is a disbeliever.[s] And the proper time for showing the religious opinions of a witness is before he is sworn; after he is sworn it is too late.[t]

§ 797. The ordinary mode of proving the religious views of a witness, is to produce evidence of his declarations made to others.[tt] The weight of opinion is that the witness himself cannot be questioned or examined.[u] And if the witness has changed his opinions, such change must be proved by third persons, and that, although the change may be quite recent.[v]

§ 798. Thus, where the incompetency of a witness on account of a defect in his religious belief had been established by evidence of his declarations, it was held that the witness could not be sworn on his *voir dire* to restore his own competency by showing a change of opinion.[w]

In Vermont, however, it seems, that contrary to the rule so established, the witness himself may be examined.[x] And in the U S. Court, in the District of Columbia, he has been permitted to explain his views, but not under oath.[y]

"It has been sometimes allowed to a counsel," says Mr. Sergeant Talfourd,[z] "to question witnesses on their *voir dire* as to their religious belief; but it may be doubted whether a witness would not be justified in insisting, when so questioned, on the simple answer that he considers the oath administered in the usual form binding on his own conscience; and in declining to answer

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[p] Hunscom *v.* Hunscom, 15 Mass. 184.

[q] Stat. 1833, c. 58; Smith *v.* Coffin, 6 Shepl. 157.

[r] Jones *v.* Harris, 1 Strob. 160.

[rr] Central Military Tract Railroad Co. *v.* Rockafellow, 17 Ill. 541.

[s] 1 Greenleaf on Ev. § 370.

[t] Smith *v.* Coffin, 6 Shep. 157; Queen's case, 2 B. & B. 284.

[tt] Central Milit. Track R. R. *v.* Rockafellow, 17 Ill. 541.

[u] Smith *v.* Coffin, 6 Shep. 157; Wakefield *v.* Ross, 5 Mason, 19; Queen's case, 2 B. & B. 284; 2 Rev. Stat. (New York) c. 408, s. 87; 1 Swift's Digest, 739; Curtiss *v.* Strong, 4 Day, 51; Jackson *v.* Gridley, 18 Johns. 98; Com. *v.* Smith, 2 Gray, 516.

[v] Atwood *v.* Welton, 7 Conn. 66; Curtis *v.* Strong, 5 Day, 51; Com. *v.* Bachelor, 4 Am. Jur. 79; Jackson *v.* Gridley, 18 Johns. 98; Smith *v.* Coffin, 6 Shepley, 157.

[w] Com. *v.* Wyman, Thach. Crim. c. 432; State *v.* Townsend, 2 Harr. 543; U. S. *v.* White, 5 Cranch, C. C. R. 38.

[x] Scott *v.* Hooper, 14 Verm. 535; U. S. *v.* White, 5 Cranch C. C. R. 38.

[y] U. S. *v.* White, 5 Cranch C. C. R. 38; so also Central Military Track R. R. *v.* Rockafellow, 17 Ill. 541.

[z] 6 Dick. Q. S. 535.

further; for a confession, thus forced from him, of a disbelief in a state of retribution, would certainly be esteemed as disgraceful in a court of justice, and there seems no reason why a person should thus be taxed, perhaps to his own infinite prejudice, merely because he appears to perform a public duty in obedience to a subpœna. At all events, it is quite clear that a witness may properly refuse to answer any questions which go beyond an inquiry into his belief in a superior being to whom man is answerable; and that it is the duty of counsel to refuse, however urged, to put such questions, which are altogether impertinent and vexatious."

§ 799. The common and regular way of swearing by a Christian, is on the four Evangelists, viz. the New Testament.[a] All witnesses, indeed, must be sworn after a form, the obligation of which they acknowledge; as a Jew on the Pentateuch or Old Testament, with his head covered;[b] a Mahometan on the Koran;[c] a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest;[d] a Chinese, by breaking a china saucer;[e] a Scotch Covenanter, or member of the kirk, by holding up the hand without kissing the book;[f] but if a witness himself declares that he acknowledges the sanction of the oath in the usual form, there seems no just ground for troubling him with further questions. It is certain that in whatever form he consents to be sworn, *e. g.* if though a Christian he declines to be sworn on the New, but consents to be sworn on the Old Testament,[g] he may be afterwards asked whether he hold such oath binding on his conscience; but not whether he considers any other form of oath more binding, for he will be liable, if he gives false testimony, to the penalties of perjury.[h]

§ 800. It is for the jury to determine what weight is to be given to the testimony of one whose immoral and degraded life shows a want of religious sentiment, or a disregard to personal character or reputation.[i]

VIII. Number of witnesses necessary.

§ 801. At common law, one witness was sufficient in all cases with the exception of perjury, at every stage of the prosecution.[j]

§ 802. In high treason, two witnesses are required, both before the grand jury and at the trial; both of the witnesses to the same overt act or one of them to one overt act, and another of them to another overt act of the same

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[a] See per Lee, C. J., Strange, 1114, R. *v.* Bosworth; citing 1 El. c. 1, s. 19. The adjuration oath was "on the true faith of a Christian," till altered for the Jews by 10 G. I. c. 10, Sem., the swearing on a common prayer book with the four gospels in the same cover, will suffice in order to an indictment for perjury. Robely *v.* Langston, supra.

[b] Gomez Serra *v.* Munoz, Stra. 821; see Id. 1113, and Robely *v.* Langston.

[c] R. *v.* Morgan, 1 Leach, 54.

[d] Omichund *v.* Barker, supra.

[e] R. *v.* Entrehman, 1 C. & Mar. 248.

[f] R. *v.* Mildrone, Leach, 412; R. *v.* Walker, 2 Sid. 6, cited Cowp. 390; Mee *v.* Reid, Peake, C. N. P. 23; 1 Leach, 498, Dr. Owen's case.

[g] Edmonds *v.* Rowe, Ry. & M. C. N. P. 77.

[h] 2 Br. & B. 284; 3 Br. & B. 232.

[i] Bowman *v.* Smith, 1 Strobhart, 246.

[j] 2 Hawk. c. 46, s. 2; Fost. 233.

species of treason; unless the defendant shall willingly, without violence, confess the same.[k] If the jury do not give credit to both of the witnesses, the defendant shall be acquitted.[l] But one witness even, in England, is sufficient to prove a collateral fact;[m] as, for instance, to prove that the defendant is a natural born subject,[n] or the like. In this country, although the Constitution declares that two witnesses are necessary to produce conviction, it may not be so strictly and absolutely necessary to authorize an indictment being found a true bill. Although there must be two witnesses to the general charge of treason, for such purpose it seems enough that one witness prove one act, and another prove another act.[o]

It was formerly held that there must be two witnesses upon an indictment for perjury; that one alone is not sufficient, because there is in that case only one oath against another.[p] The strictness of this rule, however, has long since been greatly relaxed; the true principle being that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[q]

§ 803. The oath of the opposing witness, therefore, will not prevail, unless it be corroborated by other independent circumstances. But these circumstances need not be tantamount to another witness, it being sufficient if they are strongly corroborative of the accusing witness,[r] and it must corroborate him in something more than slight particulars;[s] and must not merely show that the account is probable, but must prove facts *ejusdem generis*, and tending to produce the same result.[t]

§ 804. If the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be brought forward, such evidence will supply the want of another witness.[u] Declarations of the defendant, inconsistent with the oath, are sufficient as corroboration.[v] A single witness is sufficient to prove that the defendant swore as is alleged in the indictment.[w]

IX. When a witness will be excused from answering on the ground of self-crimination or disgrace.

§ 805. In Pennsylvania, it is provided by statute: No witness shall be excused, under any allegation or pretence whatsoever, from giving evidence in any criminal proceedings, or investigations, or inquiry before any com-

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[k] 7 & 8 W. 3, c. 3, s. 2; 1 Ed. 6 c. 12, s. 22; 5 & 6 Ed. 6. c. 11, s. 12.

[l] Per Scroggs, C. J., in R. *v.* Palmer, 3 St. Tr. 56.

[m] Fost. 242.

[n] R. *v.* Vaughan, 5 St. Tr. 29.

[o] Burr's Trial, 196; U. S. *v.* Hanway, 2 Wall, Jr., 139.

[p] R. *v.* Muscot, 10 Mod. 195; 1 Starkie Ev. 443; 4 Hawk. P. C. b. 2, ch. 46, § 10; 4 Bla. Comm. 358; 2 Russ. on Crimes, 1791; post, § 2276.

[q] 1 Greenleaf on Ev. § 257; U. S. *v.* Wood, 14 Peters, 440; R. *v.* Roberts, 2 C. & K. 607.

[r] I Greenl. on Ev. § 257; State *v.* Molliere. 1 Dev. 263; State *v.* Hayward, 1 Nott & M'C. 547; R. *v.* Mayhew, 6 C. & P. 315; Roscoe on Crim. Evid. 686; Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch, 160.

[s] Yates' case, 1 Car. & Marsh. 139.

[t] Simmons *v.* Simmons, 11 Jur. 830.

[u] R. *v.* Lee, Archb. C. P. 9th ed. 148; see post, § 2276.

[v] State *v.* Moliere, 1 Dev. 213; Dodge *v.* State, 14 Zabr. 455.

[w] Com. *v.* Pollard, 12 Met. 225.

mittee of the legislature, of his knowledge of any violation of the act to which this is a supplement; but the evidence so given, or facts divulged by him, shall not be used against him in any prosecution under said act. Provided, That the accused shall not be convicted on the testimony of an accomplice, unless the same be corroborated by other evidence either circumstantial or positive.[w]

A witness is not bound to answer when the tendency of his evidence is to expose him to a penal liability, or to any kind of punishment, or to a criminal charge.[x] Thus, a witness cannot be compelled to answer a question which might subject him to an indictment for usury.[y]

§ 806. It is for a witness to avail himself of the privilege.[z] The public prosecutor has no right to object, that a question put to one of the witnesses calls for an answer tending to expose him to criminal punishment; this being an objection which the witness alone is authorized to make.[a] It is the province of the court to determine whether a direct answer to a question may criminate.[b]

§ 807. A greater latitude is allowed in asking a question the object of which is material either to the prosecution or the defence, than in putting one for the mere purpose of degrading the witness.[c] But in no case is a

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[w] Act of 13 March, 1855, § 1, P. L. 73; see post, § 2815.

[x] 1 Stark. Ev. 165, 166; Phil. & Am. on Ev. 913, 914; 1 Phil. Ev. 277; Cowen & Hill's note, 516, to 1 Phil. Evid. 277, and cases therein cited; see also, Paxton *v.* Douglass, 19 Ves. 225; Cates *v.* Hardacre, 3 Taunt. 424; Macbride *v.* Macbride, 4 Esp. 248; R. *v.* Lewis, 4 Esp. 225; R. *v.* Stanley, 5 C. & P. 213; R. *v.* Pegler, 5 C. & P. 521; Dodd *v.* Norris, 3 Campb. 519; Maloney *v.* Bartley, 3 Campb. 210; State *v.* K., 4 N. Hamp. 562; State *v.* Edwards, 2 Nott & M'C. 13; Brown *v.* Brown, 5 Mass. 320; People *v.* Mather, 4 Wend. 254; Burr's Trial, 244; Poole *v.* Perritt, 1 Spears, 128; Chamberlain *v.* Wilson, 12 Ver. 491; People *v.* Rector, 19 Wend. 569; Robinson *v.* Neal, 5 Monroe, 212; Lister *v.* Boker, 6 Black. 439; Warner *v.* Lucas, 10 Ohio, 336; Com. *v.* Kimball, 24 Pick. 366; Low *v.* Mitchell, 18 Maine, 272; Doran's case, 2 Porter, 467.

[y] Bank of Salina *v.* Henry, 2 Denio, 155; Curtis *v.* Knox, 2 Denio, 341; Henry *v.* Bank of Salina, 3 Denio, 593.

[z] State *v.* Foster, 3 Foster (N. H.), 348.

[a] Ward *v.* State, Hill's N. Y. R. 144; 2 Phil. Evid. 418; Thomas *v.* Newton, M. & M. 48, n.; 2 Russ. on Crimes, 931.

[b] Com. *v.* Braynard, Thacher, C. C. 146; People *v.* Mather, 4 Wend. 229; Territory *v.* Nugent, 1 Martin, 114; Grannis *v.* Brunden, 5 Day, 260; Jackson *v.* Humphrey, 1 John. R. 498; Galbraith *v.* Eichelberger, 3 Yeates, 515; Vaugh *v.* Perrine, 2 Penn. 728; Marbury *v.* Madison, 1 Cranch, 144; 1 Burr's Trial, 245; Southard *v.* Rexford, 1 Cowen, 254; Bellinger *v.* People, 8 Wendell, 595.

[c] Greenleaf on Ev. sec. 454, 455; Phil. & Am. on Ev. 917; 2 Phil. Ev. 422. Thus, in a case already cited, where a witness, in an investigation by a grand jury, was asked whether he knew of any person, excepting himself, who had bet at a faro table, within the last twelve months—the question being one in chief, for the purpose of supporting a prosecution—and the witness declined answering, on the ground of self-crimination, the subject was examined by a learned judge with great clearness. "The next inquiry is," he said, "was the witness right in refusing to answer the question, on the ground that the answer would implicate himself? The record shows that the game at faro is played with cards, by one person, as banker, against any number of persons, each person playing for himself, without any aid from the others, against the banker, and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is, 'Tell who bet at the game of faro, not naming yourself.' The answer of the witness is (supposing him to be A.), that 'if I tell that B., C., and D. played, it will be either full or partial evidence that

witness compelled to furnish a fact which might become a link in the chain of criminating evidence.[cc] In a very learned opinion by Marcy, J., in a

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I played.' This is the whole argument of the case. An argument which, I think, is totally untenable in law and reason; and I am very clear that the witness is bound to answer the question propounded by the grand jury. Suppose A. should swear, that on the 10th of March, in the market-house, he saw B. play at faro; then A. is indicted for playing at faro on the 10th of March, at the market-house, and on the trial, the prosecution should give in evidence, that on the trial of B., A. had sworn, that on that day, at that place, he saw B. play—would any one pretend that the indictment is proved? The answer is obvious. I understand the rule laid down by Chief Justice Marshall, in Burr's Trial, 245, to be the true rule of law. It is this, that it is the province of the court to judge whether any direct answer to the question that may be proposed, will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such case, the witness must himself judge what his answer will be; and if he say on his oath he cannot answer without accusing himself, he cannot be compelled to answer. Both parties rely on this rule. Apply the rule to the case before the court. The witness says he cannot answer without accusing himself of crimes. The question is, 'Who did you see betting at faro, except yourself?' It is believed that a direct answer in the negative to this would be, 'I saw no one bet at faro.' This answer, I think, all will allow, does not accuse him. But suppose that his answer must be, that he saw B. bet at faro, can it not be true, that though B. bet, yet he, the witness, did not? Does the mere fact, that one man saw another commit crime, prove in law and reason, that he who saw the crime committed, was a participator? The only irresistible fact that is contained in it is, that he who saw the fact, must have been in such position, with respect to the actors, that he could see or know the thing he swears to. The rule then is, that the court must judge whether a direct answer would furnish any matter for his conviction. If the witness answer, that he saw no one bet, or that he saw B. and C. bet, he furnishes no matter that would be a necessary link in the chain of testimony, to convict him of betting at faro. Suppose A. indicted for betting at faro, what, in law, must be the evidence? The first link would be, that there was a faro bank, that there was a banker, and that A. and the banker did play at the game, and that A. and the banker did bet on the event of the game. These several links would form a chain of testimony sufficient to convict A. Now, though it be true, that without proof of the existence of the bank and the banker, no crime can be predicated thereon, yet it is equally true, that the facts that the bank and the banker both existed, form no part of the offence of betting at faro. The essential links are, that there was a betting on the game: these two must be coupled together, otherwise no offence can exist; and these two must be coupled with a third link, that is, that A. bet on the game. Then his offence is complete, entirely so, without naming who was the banker, or who else bet at the same time. Can it be pretended, that if it is said by A. that B. bet at the game, that on the trial of A., it must be proved that B. bet, before A. can be convicted? I will answer, that it cannot be so pretended. This, I think, most clearly shows that there is nothing solid in the objection of the witness. Let us put a case where a direct answer to a question would implicate a witness. Thus, 'Did you set up, and keep a faro table?' Now, here the court can clearly see, that if the answer be yes, the witness would subject himself to the penalty, for setting up and keeping a faro table; and if the answer be no, he cannot so subject himself. But whether the answer be yes or no, is unknown to the court; and in this case, the witness must be the judge whether his answer will be yes or no, and he may say he cannot answer the question without implicating himself. But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact whether he bet: and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation, than on any sound principle of law. Will the law permit a man to keep offences and offenders secret, lest the offenders should, in their turn, give evidence against him? I have looked into the cases cited at the bar, and I am unable to perceive any principle in any of them, which ought to vary the foregoing opinion." Ward *v.* State, 2 Missouri, 98.

[cc] Bank of Salina *v.* Henry, 2 Denio, 205; Henry *v.* Bank of Salina, 1 Const. 83; see Short *v.* Mercier, 1 Eng. R., L. & E. 208.

leading case in New York, it was said: "Where the disclosures he may make can be used against him to procure his conviction for a criminal offence, or to charge him with penalties and forfeiture, he may stop in answering before he arrives at the question the answer to which may show directly his moral turpitude. The witness, who knows what the court does not know, and what he cannot communicate without being a self-accuser, is to judge of the effect of his answer, and, if it proves a link in the chain of testimony, which is sufficient to convict him, when the others are made known, of a crime, he is protected by law from answering the question. If there be a series of questions, the answers to all of which would establish his criminality, the party cannot pick out a particular one and say, if that be put the answer will not criminate him. If it is one step having a tendency to criminate him, he is not compelled to answer."[d] The same privilege that is allowed to a witness, is the right of a defendant in a court of equity, when called on to answer. In Parkhurst *v.* Lowten, 2 Swanst. 215, the chancellor held, that the defendant "was not only not bound to answer the question, the answer to which would criminate him directly, but not any which, however remotely connected with the fact, would have a tendency to prove him guilty of simony." The language of Chief Justice Marshall, on Burr's trial, is equally explicit on this point. "Many links," he says, "frequently compose that chain of testimony, which is necessary to convict an individual of a crime. It appears to the court to be the sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only possible, but a probable case that a witness, by disclosing a certain fact, may complete the testimony against himself, and, to every effectual purpose, accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom he is safe; but draw it from thence and he is exposed to prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."[e] My conclusion is, that

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[d] 16 Ves. 242.

[e] 1 Burr's Trial, 424. The question arose on Burr's Trial in the following shape: A paper being produced to the court in cipher, a witness (Mr. Willie), was asked, "Did you copy this paper?" He objected, that if any paper he had written would have any effect on any other person, it would as much affect himself. Mr. Wirt insisted, that as the witness had sworn, in a previous deposition, that he did not understand the cipher, the mere *act of copying* could not implicate him. Willie was then asked, "Do you understand its contents?" It was admitted by the witness, that the question *per se*, might be innocent, but should he answer, the prosecution might go on gradually, until it at last obtained matter enough to criminate him. The counsel for the prosecution admitted, that if they had followed with a question as to what were the contents of the letter, the objection might be valid. But they as yet had not. If he answered that he did understand the letter, his answer to the other question might amount to self-crimination; but if he did not understand it, it could not criminate him. The question was again changed, "Do you know this letter to be written by Aaron Burr, or any one under his authority?" Marshall, C. J., said that was a proper question. The witness still refused to answer, as it might criminate him. The question was then argued, when the chief justice remarked, that the proposition contended for on the part of the witness, that he was to be the sole judge of the effect of his an-

where a witness claims to be excused from answering a question, because the answer may disgrace him or render him infamons, the court must see, that the answer may, withont the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering, because his answer will have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the court are to determine whether the answer he may give to the question can criminate him directly or indirectly by furnishing direct evidence of his guilt, or by establishing one of many facts which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer may in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer, which the truth may oblige him to give. If the witness was obliged to show how the effect is produced, the protection would at once be annihilated. The means which he would in that case be compelled to use to obtain protection, would involve the surrender of the very object, for the security of which the protection was sought."[f]

§ 808. A witness will be compelled to answer whether or not he purchased liquor of a man charged with selling it by small measures; nor can he shelter himself from the question by the position, that by buying the liquor, he became an accessary to the misdemeanor of selling it, and thereby a principal.[g]

If the witness, however, voluntarily state a fact, he is bound to state how he knows it, although in so doing he exposes himself to a criminal charge.[h] If he waive his privilege so far as to answer one question, he is bound to answer everything relative to the transaction.[i]

An accomplice who has been led to give evidence for the government by an express or implied promise of pardon, contracts to make a full statement, can keep back nothing, and should be allowed no privileged communication.[ii]

The privilege extends only to cases in which a liability to punishment exists. Thus, if an offence be barred by the statute of limitations, it has been held, both in England and in New York, that a party can be compelled to answer touching his connection with it.[j]

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swer was too broad, while that on the other side, that a witness can never refuse, unless the answer will *per se*, convict him of a crime, was too narrow. He is not compellable, to disclose a single link in the chain of proof against him. If the letter contained evidence of a treason, a question determinable on other testimony, by his acquaintance with it when written, he might probably be guilty of misprision of treason; and the court ought not to compel his answer. If it relate to the misdemeanor (setting on foot an unlawful military expedition against Mexico), the court were not apprised that such knowledge would affect the witness. The conclusion was, that the question which respected the present knowledge of the cipher, as it could not affect him in any view, must be answered.

[f] See 4 Wend. 252, 253, 254.

[g] Com. *v.* Willard, 22 Pick. 476. Though see Doran's case, 2 Parsons, 467.

[h] State *v.* K. 4 New Hamp. 562.

[i] East *v.* Chapman, 1 M. & Malk. 46; 2 C. & P. 570, S. C.; Law *v.* Mitchell, 6 Shep. 18 Maine, 272; People *v.* Carroll, 3 Parker, C. R. 73; Foster *v.* Pierce, 11 Cush. (Mass.) 437; though see R. *v.* Garbett. 3 C. & Kir. 473.

[ii] Alderman *v.* People, 4 Mich. 414.

[j] People *v.* Mather, 4 Wend. 229; Roberts *v.* Allett, 1 Mood. & Mal. 192; Close *v.* Olney, 1 Denio, 319. Though see Bank *v.* Salina, 2 Denio, 155; Ibid. 593.

§ 809. Under what circumstances a witness will be excused from answering, on the ground that the answer has a direct tendency to degrade himself, though not to expose him either to punishment or penalty, is a question about which much difference of opinion has existed.[k] Thus, on the one hand, it has been repeatedly held, that a witness cannot be forced to give an answer which will render him infamous, or involve him in shame or reproach.[l] But, on the other hand, it has been frequently said, that questions tending to elicit the truth, either as to the main facts of a case, or the character of a witness testifying in it, ought to be answered, though they may be calculated to wound the sensibility of an individual.[m] Thus, in the case of Frost *v.* Holloway, K. B., sitt. after Hil. Term, 1818, Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in jail; and, on the witness's appealing to the court, said, "If you do not answer I will send you there."[n] In the case of Candell *v.* Pratt,[o] the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J., interfered to prohibit the question; it was urged by Spankie, serj., that he had a right to put questions tending to degrade a witness, for the purpose of trying his character. Best, C. J.: "I do not forbid the question on that ground; I, for one, will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think, therefore, it ought not to be put."[p]

§ 810. The whole question, it is said by a learned writer, resolves itself

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[k] Phil. & M. on Ev. p. 907, 918; 2 Phil. Ev. 422; 2 Russ. on Crimes, 927.

[l] Resp. *v.* Gibbs, 3 Yates, 429; Bell's case, 1 Brown, 376; State *v.* Russell, 2 Yeates, 384; Galbraith *v.* Eichelberger, 3 Yeates, 515; State *v.* Garrett, 1 Busbee, 357; State *v.* Bailey, 1 Pa. R. 415; Vaughan *v.* Perrine, 2 Pa. R. 728; U. S. *v.* Dickinson, 2 M'Lean, 325; Layer's case, 6 St. Tr. 259; Friend's case, 4 St. Tr. 606; Lewis's case, 4 Esp. 225; M'Bride *v.* M'Bride, 4 Esp. N. P. 242; R. *v.* O'Coigley, 26 How. St. Tr. 1353; Howell *v.* The Common, 5 Gratt. 664.

[m] R. *v.* Edwards, 4 T. R. 440; Roberts *v.* Allett, M. & M. 192; People *v.* Mather, 4 Wend. 250.

[n] 1 Starkie on Ev. 197; but see Howell *v.* Comm. 5 Gratt. 664.

[o] 1 M. & M. 108.

[p] The current of authority in this country is, that a witness will not be excused from answering, because by so doing he may expose himself to civil loss or pecuniary liability. Bull *v.* Loveland, 10 Pick. 9; Taney *v.* Kemp, 4 Har. & Johns. 348; Stoddart *v.* Manning, 2 H. & G. 147; Baird *v.* Cochran, 4 S. & R. 397; Nass *v.* Van Swearinger, 7 S. & R. 192; Gorham *v.* Carroll, 3 Litt. 221; Conover *v.* Bell, 6 Monroe, 157; Copp *v.* Upham, 3 N. Hamp. R. 159; Com. *v.* Thurston, 7 J. J. Marshall, 63; Planters' Bank *v.* George, 6 Martin, 670; Harper *v.* Burrow, 6 Iredell, 30; 2 Russell on Crimes, 916, 929; Alexander *v.* Knox, 7 Ala. 503; Judge of Probate *v.* Green, 1 How. Miss. 146; Zollicoffer *v.* Torney, 6 Yerg. 297; Connor *v.* Brady, Anthon, 99; Lowney *v.* Perham, 2 App. (21 Maine) 235. In New York the point is still doubtful, Mauran *v.* Lamb, 7 Cowen, 174. Contra, Benjamin *v.* Hathaway, 3 Conn. R. 528; Storrs *v.* Wetmore, Kirby 203; Starr *v.* Tracy, 2 Root, 528; Cook *v.* Corn, 1 Overton, 340; Appleton *v.* Boyd, 7 Mass. R. 131; U. S. *v.* Grundy, 3 Cranch, 344, per Marshall, C. J.; Tatem's Exec. *v.* Loftan, Cooke, 115; Sloman *v.* Kelley, 4 Younge & Collyer, 169.

into one of policy and convenience; that is, whether it would be a greater evil, that an important test of truth should be sacrificed, or that by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness, who has misconducted himself, cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury such as he is. As to the other consideration, it does not seem to be very clear that, by permitting such examinations, any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil, on this side of the question, is, at all events, doubtful and contingent; on the other side, it is plain and certain.[q]

§ 811. The distinction before noticed, as applying to cases where the tendency of an answer is self-crimination, is brought to bear by Mr. Greenleaf, with great clearness, in those cases where the witness seeks to be excused on the ground of self-disgrace. A line is to be drawn between questions, on the one hand, relevant and material to the issue, and those, on the other hand, which are not strictly relevant, but are collateral, and are asked only under the latitude allowed in a cross-examination. In the former case, there seems great absurdity in excluding the testimony of a witness, merely because it will tend to degrade him, when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, or even of liberty or of life, or to the cause of public justice. Upon such a rule, one who had been convicted and punished for an offence, when called as a witness against an accomplice, would be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§ 812. The weight of authority seems to tend to the opinion, that where the transaction to which the witness is interrogated forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character.[r] Thus the prosecuting witness, on an indictment for fornication and bastardy, may be compelled to answer whether about the time the child was begotten she had connection with any other than the defendant.[s]

§ 813. On the other hand, it has recently been held in New York that where a witness is asked a question, the answer to which would disgrace him, but could have no bearing on the issue, except so far as it might impeach his

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[q] 1 Starkie on Ev. 196.

[r] 1 Phil. & Am. on Ev. 196, 917; 1 Phil. Ev. 277, 279; People *v.* Mather, 4 Wend. 250–254; per Marcy, J.; Peake's Ev. (by Norris), 202; Cundell *v.* Pratt, 1 M. & Malk. 108; Swift's Ev. 80; 1 Phil. Ev. 279, note 521, by Cowen & Hill; U. S. *v.* White, 5 Cranch C. C. R. 38. So in Scotland; Alison's Practice, 528; 1 Greenleaf on Ev. s. 454.

[s] Hill *v.* State, 6 Indiana, 112.

credibility, he is privileged from answering.[t] But even this is in many States doubted, and similar questions frequently sustained.[u]

If a witness claims the protection of the court, on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer, notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given afterwards in evidence against him.[v]

X. How character of witness may be attacked.

§ 814. The credit of a witness may be impeached by evidence affecting his character for veracity;[w] but the examination must be confined to his general reputation for *truth* and *veracity*.[x] This rule has not been strictly observed in some of the States, and inquiries have been admitted as to the witness's general bad character.[y] And on an indictment for rape, or assault with intent to commit rape, the character of the prosecutor for chastity may be inquired into.[z] But particular facts of a criminal nature cannot be proved to discredit a witness.[a] Thus, evidence of a common prostitution is not admissible to impeach a witness;[b] and so, too, evidence of particular instances of falsehood is not admissible.[c] The questions proper to be asked have in several cases been held to be: 1. Do you know the general character of the witness attempted to be impeached, and if you do, what is his general character for truth and veracity?[d] Thus, the naked question, "in what estimation the witness sought to be impeached, was held in his neighborhood," is inadmissible.[e] Nor is it admissible to prove that a witness bears "an infamous character."[f] So, a question as to the rumor and belief of people about a witness, whose impeachment is attempted, will not be allowed in that form.[ff]

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[t] Lohman *v.* People, 1 Comst. 379; S. C. 2 Barbour, 216.

[u] State *v.* Patterson, 2 Iredell, 346; State *v.* Garret, 1 Busbee, 357, and cases cited, § 808, note.

[v] R. *v.* Garbett, 2 Car. & Kir. 473.

[w] 1 Green on Ev. § 461. And this though the witness had been himself only called as to character; Starks *v.* The People, 5 Denio, 106.

[x] U. S. *v.* Vansickle, 2 M'Lean, 219; Phillips *v.* Kingfield, 1 App. 375; U. S. *v.* White, 5 Cranch C. C. R. 38.

[y] Hume *v.* Scott, 3 A. K. Marsh, 261; Blue *v.* Kirby, 1 Monr. 195; State *v.* Boswell, 2 Dev. 209; Johnson *v.* People, 3 Hill, 178.

[z] 1 Green. on Ev. § 54; R. *v.* Clarke, 2 Stark. 241; 1 Phil. & Am. on Ev. 490; Low *v.* Mitchell, 6 Shep. 372; Comm. *v.* Murphy, 14 Mass. 387; R. *v.* Martin, 6 C. & P. 562; R. *v.* Hodgson, R. & R. 211; Pleasant *v.* State, 15 Arkansas, 624.

[a] U. S. *v.* Vansickle, 2 M'Lean, 219; Barton *v.* Morphes, 2 Dev. 530; Walker *v.* State, 6 Blackf. 1.

[b] Spears *v.* Forrest, 15 Vern. 435; Bakerman *v.* Rose, 12 Wend. 146; Com. *v.* Churchill, 11 Met. 538; but see Evans *v.* Smith, 5 Monr. 363.

[c] Aixey *v.* Bayse, 4 Leigh, 330.

[d] Phillips *v.* Kingfield, 1 App. 375; U. S. *v.* Vansickle, 2 M'Lean, 219; Pleasanton *v.* State, 15 Ark. 624; State *v.* Randolph, 24 Connect. 363; Stokes *v.* State, 18 Geo. 17; Pleasant *v.* State, 15 Ark. 624.

[e] State *v.* O'Neil, 4 Iredell, 88.

[f] State *v.* Bruce, 11 Shep. 71.

[ff] Pleasant *v.* State, 15 Ark. 624.

§ 815. In England, it is customary to ask whether, from such knowledge of the impeached witness's character, the attacking witness would believe him on his oath. In the American courts the same course has been pursued,[g] though the propriety of this course has been questioned.[h]

§ 816. On the cross-examination of the attacking witness, the inquiry should be limited to the witness's opportunity for knowing the character of such witness, for how long a time and how generally, such unfavorable reports have prevailed, and from what sources they have been derived.[i]

A witness for the prosecution in a trial for riot, may be compelled to state, on cross-examination, whether he is a member of a secret society organized to suppress a sect to which the defendant belongs.[ii]

XI. How witness may be contradicted.

§ 817. The credit of a witness may be impeached, by proof that he has made statements out of court, contrary to what he has testified at the trial.[j] But it is only in such matters as are relevant to the issue that the witness can be contradicted. Therefore, a witness cannot be examined as to any distinct collateral fact irrelevant to the issue, for the purpose of impeaching his testimony afterwards, by contradicting his statements.[k] Thus, where a witness for the prosecution, on cross-examination, denied that the prosecutor paid him for coming from another State to be a witness, it was held, that the defendant could not introduce evidence to prove his declaration that he had been so paid.[l] On the other hand, it has been ruled that the motives under which a witness gives his testimony are not collateral, and therefore that his statement of them may be contradicted by rebutting testimony.[m]

§ 818. If the witness voluntarily swears falsely in relation to matters not within the issue, he may be impeached as to those matters.[n]

§ 819. As a general rule, before proof of antecedent contradictory statements can be given, the witness must be questioned as to those statements.[o]

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[g] People *v.* Mather, 4 Wend. 257; State *v.* Boswell, 2 Dev. 209; Ford *v.* Ford, 7 Humph. 92; State *v.* Howard, 9 N. H. 485; U. S. *v.* Vansickle, 2 M'Lean, 219; People *v.* Rector, 19 Wend. 569; U. S. *v.* White, 5 Cranch C. C. R. 38.

[h] Gass *v.* Stinson, 2 Sum. 610; Kimmel *v.* Kimmel, 3 S. & R. 336; Wike *v.* Lightner, 11 S. & R. 198; Phillips *v.* Kingfield, 1 Appl. 375.

[i] Phillips *v.* Kingfield, 1 Appl. 375; State *v.* Howard, 9 N. H. 485; Weeks *v.* Hall, 19 Conn. 376; and see Mors *v.* Palmer, 3 Harris, 51.

[ii] People *v.* Christie, 2 Parker C. R. (N. Y.) 519.

[j] 1 Greenl. on Ev. sect. 462; State *v.* Marter, 2 Ala. 43; Garrett *v.* State, 6 Mis. 1.

[k] U. S. *v.* Dickinson, 2 M'Lean, 325; Dozier *v.* Joyce, 8 Porter, 303; M'Intyre *v.* Young, 6 Blackf. 496; Griffith *v.* Eshelman, 4 Watts, 51; see this subject fully examined in Atty. Gen. *v.* Hitchcock, 1 Exch. 91; U. S. *v.* White, 5 Cranch C. C. R. 38.

[l] State *v.* Patterson, 2 Iredell, 346.

[m] People *v.* Austin, 1 Parker, C. C. R. 154.

[n] Dozier *v.* Joyce, 8 Port. 303.

[o] Angus *v.* Smith, 1 M. & M. 473; Crowley, *v.* Page, 7 C. & P. 789; R. *v.* Shellard, 9 C. & P. 277; R. *v.* Holden, 8 C. & P. 606; the Queen's case, 2 Brod. & Bing. 313; Franklin Bank *v.* Navigation Co., 11 Gill & J. 28; Able *v.* Shields, 7 Mis. 120; Doe *v.* Regan, 5 Blackf. 217; M'Kinney *v.* Neil, 1 M'Lean, 540; Weaver *v.* Taylor, 5 Ala. 564; M'Aleer *v.* M'Mullin, 2 Barr, 62; Weinzorpflin *v.* State, 7 Blackf. 186; Megnier *v.* Cabot, 2 Gilman, 34; Sealey *v.* State, 1 Kelly, 213; Downer *v.* Dana, 19 Verm.; 4

In Maine and Massachusetts this rule is not enforced,[p] and in Pennsylvania, it is left to the discretion of the judge trying the case to observe it or not.[q]

XII. How witness may be sustained.

§ 820. Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial, is, as an almost universal rule inadmissible,[r] and *a fortiori*, a witness cannot be allowed to corroborate his own testimony, by saying that he made the same statement previously to others.[s]

So, too, where it is proved that a witness has at other times made statements different from his testimony, the party offering him cannot be allowed to support his testimony by proving statements at other times corroborative of such testimony.[t]

§ 821. But in Indiana if a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony.[u] But if he has not been so impeached, he cannot be corroborated in that way.[v]

Testimony of a witness, upon cross-examination, that he had been tried for a crime in another State and acquitted, does not authorize the party calling him to introduce evidence of his general character for truth and integrity. Whether such evidence would be admissible, if it had not appeared that he was acquitted on that trial, *quære?*[w]

The proper rebutting evidence to sustain a witness is as to his general character for truth, and as to the readiness of the person called to believe him.

An attempt to impeach a witness, by asking another witness what was his character for truth, warrants the introduction of evidence to support his character, although the answer to the question was that his character was good.[x]

Wash. 338; M'Intire *v.* Young, 6 Blackf. 496; Palmer *v.* Haight, 2 Barb. Sup. Ct. 210; Everson *v.* Carpenter, 17 Wend. 429; Drennen *v.* Lindsey, 15 Ark. 359.

[p] Wave *v.* Wave, 8 Greenl. 42; Brown *v.* Bellows, 4 Pick. 188; Com. *v.* Hawkins, 3 Gray (Mass.), 463; Gould *v.* Norfolk Co. 9 Cush. 338; S. P. U. S. *v.* White, 5 Cranch C. C. R. 457.

[q] Kay *v.* Fredrigal, 3 Barr, 221; M'Aleer *v.* M'Mullin, 2 Barr, 62; Sharp *v.* Emmet, 5 Whart. 288.

[r] Robb *v.* Hackley, 23 Wend. 50; Dudley *v.* Bolles, 24 Wend. 465; People *v.* Finnegam, 1 Parker, C. C. 147.

[s] Deshon *v.* Merchants' Ins. Co. 11 Met. 199.

[t] Ellicott *v.* Pearl, 1 M'Lean, 206.

[u] Coffin *v.* Anderson, 4 Blackf. 395; Beauchamp *v.* State, 6 Black. 300.

[v] Coffin *v.* Anderson, 4 Blackf. 395.

[w] Harrington *v.* Lincoln, 4 Gray (Mass.), 563.

[x] Com. *v.* Ingraham, 7 Gray, Mass. 46.

BOOK III.

PREPARATION OF EVIDENCE.

CHAPTER I.

GENERAL INQUIRIES.

§ 822. The commission of an offence being known, the duty of the prosecuting officer is at once to collect and fix the testimony by which its character can be determined, and the conviction of the offender secured. In England, from the want of local prosecuting attorneys, this responsibility has centred, in cases not requiring the intervention of a coroner's jury, on magistrates, whose interest requires little more than a hurried consideration of the offence, whose office exacts nothing more than probable ground for suspicion, and whose qualifications are generally unequal to their duties. In this country, though the machinery is much more complete, the practice is not much better. The offender is arrested and bound over to court, and then for the first time, in most cases, the prosecuting officer hears of it. The committing magistrate, who is generally an unprofessional man, has contented himself with such evidence as amounted to probable cause, and has let the rest wait until reqnired by the exigencies of trial. Instead of putting—to use the forcible expression of a late German writer of eminence[a]—a glass case over the *indicia* of crime, the moment it is perpetrated, so that they can be preserved without change until the day of trial, these tests of guilt are suffered to be dispersed or obliterated. The state of the bed where the deceased lay—the position of the furniture about—the height to which was raised the window by which the offender entered—the size and direction of the foot-marks outside—points such as these, which multiply indefinitely in practice, should be ascertained and registered before accident or design makes it too late. It is here that the common law practice falls so far behind that of the civil law. Under the latter, a cast would be at once made of a foot-print stamped in the soft clay near the body of the deceased. In the former, the foot-print would be left to be practised upon by the feet of every by-stander who was curious to see how near it came to his own, till at last, varied by these means, or defaced by the weather, it became on trial an instrument of confusion rather than of the ascertainment of truth.

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[a] Mittermaier, Das Deutsche Strafverfahren.

§ 823. Of the failure of justice arising from this want of early preparations, a late conspicuous case in England affords an appropriate illustration.[b] A little girl, in the employ of a man named Bird, was found one day dead in her room. Moans had been heard for several days before, by those in the neighborhood, as of a child gradually fainting under distress and suffering. On examining her body it was found seamed with wounds which had evidently been inflicted from time to time for at least a year back; and there was no sign wanting to show that she had been the victim of steady and malignant cruelty. At once a mob was raised. The defendants had to be escorted to prison by a strong police force, to save them from being torn to pieces on the road. The attention of government was called to the offence by the press in the most vehement terms; and government really did seem to be awake to the importance of the trial, if the character of the counsel employed, and the dignity of the court to which the case was removed, are considered. But the prisoners were acquitted, in the teeth of conclusive evidences of guilt, because it appeared from the surgical testimony, that the death was beyond doubt caused by a wound in the head, instead of a blow on the back, as the indictment averred. The defendants were then indicted for an assault, the indictment specifying the "wound on the head," discovered on the former trial. To this, the plea of *autrefois acquit* was interposed, upon which, by a vote of eight to six of all the judges of England, judgment, after a most protracted and able argument, was entered for the crown. Under the barbarous distinction by which a judgment for the crown on a demurrer or plea of *autrefois acquit* in misdemeanors is final,[bb] the defendants were then sentenced for an offence for which they had never been tried, by a judge who at the time told them that this was "a great hardship." The result was, that in consequence of the want of a competent post-mortem examination, the defendants were acquitted of what they were guilty, and convicted of what they were not, and this at a great expense, and to the utter contempt of public justice.

In the present chapter it is intended to give merely a general summary of those points which occur in almost every criminal trial, and over which the eye of the practitioner should pass in the preparation of the evidence, either for the prosecution or the defence. These questions relate, not so much to questions of direct as of circumstantial evidence, not so much to positive proof, as to presumptive indications. Following the analysis already adopted in the consideration of presumptions of fact, the general points which should be glanced at before bringing a case to trial may be grouped as follows:—

I. CHARACTER, § 824.
II. INTENT, § 825.
III. ATTEMPT TO ESCAPE OR EVADE JUSTICE, § 826.
IV. FORGERY OF EVIDENCE, § 827.
V. SUPPRESSION OR DESTRUCTION OF EVIDENCE, § 828.

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[b] R. *v.* Bird, 15 Jur. 193; 2 English Rep. 448.

[bb] See ante, § 528–9.

VI. ANTECEDENT PREPARATIONS AND PREVIOUS ATTEMPTS, § 828.
VII. FRUITS OF THE OFFENCE, § 829.
VIII. EXTRINSIC AND MECHANICAL INCULPATORY INDICATIONS, § 830.

I. CHARACTER.

§ 824. As has already been fully shown,[c] the prosecution can in no way impugn the defendant's character, unless he himself draws it into controversy; and it is not necessary here to suggest to those who hold in their hands the delicate and responsible office of public prosecutor, who, from their superior experience and influence with juries, have a general advantage on the trial of most causes abundantly sufficient to counteract any tendency to a low view of the requirements of public justice; that in no case should the character of the defendant, except on his own motion, be ever hinted at, bad as it may have been. But it is always desirable, in a case of sufficient importance to warrant it, that there should be evidence collected to meet the issue which the defendant will probably tender. There are cases of homicide, also, where the character of the deceased for peace and order may be called in question, when it is important that the prosecutor should come prepared to meet a point, which, if entertained by the court,[d] may be of great moment; and in most prosecutions for injury, either to property or person, the character of the prosecutor may become a legitimate question of dispute. To the defendant, evidence of character should always become the subject of anxious consideration and careful preparation. Its importance has already been fully discussed;[e] and it has been shown, that while its non-production forms no ground for a *legal* presumption against the accused, its production, when full and satisfactory, tells in every description of case. It should, however, be always prepared in reference to the particular charge; *e. g.*, for rape, chastity; for murder, peaceableness; for larceny, honesty.[f]

It is here that is to be noticed the leading distinction between the common law and civil law methods of trial. In the first, the issue is, whether the defendant was guilty of the particular offence, and he advances to meet this issue with a presumption of general good character, which nothing but his own election can defeat. No matter what independent crimes he may have been guilty of, or what infamy he may have incurred, unless he invite the investigation himself, neither crime nor infamy can be suggested against him; and it is the pride of English and American jurisprudence that the rebuke which drove Jeffries into suicide and Wright into jail, is still waiting for any prosecuting officer who uses his official station for the purpose of getting a conviction in advance, by an appeal to bad character or past offences. But under the civil law, the issue is not whether the accused committed the particular offence, but whether his general guilt is such as to make his removal from society a general benefit. To this inquiry, the particular accusation is used merely as an avenue. Thus, by the common law, as has been observed,

[c] See ante, § 639–40.
[d] See ante, § 641.
[e] See ante, § 643.
[f] See ante, § 636, 7, 8, 9.

the court will check any attempt whatever, to show that the defendant's character and antecedents were such as to exhibit a tendency to the particular crime charged; while on these points, by the civil law, the public prosecutor is encouraged to collect as great a mass of details as possible, and to spread it before the court at the outset. Of this distinction, a curious illustration is found in a case which has excited both popular and physiological speculation in Germany.[g] A young woman, in the streets of Leipsic, one night was assaulted by a man in a cloak, who, darting from behind a dark corner, struck into her arm, above the elbow, the blade of a small lancet, and having inflicted a slight wound, retreated. He was arrested, and in this country would have been tried for an assault and battery, unless he provoked a widening of the issue.[h] But it had been rumored but a short time previously, that a very remarkable species of monomaniacs had lately made their appearance in Leipsic, called Mædchen-schneiders, who were influenced by an uncontrollable propensity to plunge, skin-deep, into the arms of any young maidens whom they could meet, a small lancet. This was brought into the issue; and three questions were presented for investigation, on which a vast amount of physiological refinement, forensic skill, and judicial exposition were spent: 1st. Did such a propensity exist; 2d. Had it been generally executed; and 3d. Was the defendant's moral tone and past history such as to make it probable that it would exert over him a control inconsistent with the convenience and the comities of society? These points, after protracted investigations, were determined against him, and he was convicted and sentenced accordingly.

The respective advantages of these two systems it is not intended now to

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[g] See "Annalen der Deutschen und Auslandischen Criminal-Rechts-Pflege, von Dr. J. C. Hitzig; der Neue Pitoval, von Dr. J. C. Hitzig und Dr. W. Haring."

[h] Such, in fact, was the very course adopted in an old English case, not contained in the reports, which was brought to the notice of the writer, while the text was passing through the press. The "Monster," as he was called—Remick Williams being his specific name—was possessed with a passion, the same as that which beset the "Mædchen-Schneider;" and when he was at last arrested, he was met with a series of indictments, which charged him with assaulting, in the year 1789, a variety of "spinsters;" it being averred, by way of description, in each case, that he did "cut, tear, and deface her silk gown," and "did cut, strike, and wound her." His manner of inflicting the wound was the same as that described in the text; but so artful and cautious were his movements, that it was not until the public were enlisted in unferreting him by permanent advertisements, he was at last detected. On the first trial he escaped, on account of misdescription in the details: but he was remanded to await his trial for the common assault, upon a number of which he was severally convicted. The narrow issue, and brief evidence each case presented, forms a vivid contrast to the elaborate and metaphysical investigation which the text notices. The prosecutrix was called, proved the assault, was followed by medical evidence of the wound, and such testimony as belonged to the *res gestæ;* and then, in the second and subsequent trials, the chairman said to the jury: "You will endeavor, if possible, to forget everything that passed, even yesterday, and to treat this as a new offence; and to treat the prisoner, in your judgment upon him, as if you had never heard of him, but that he was now brought before you, charged with an assault, *proved only by one witness*, but with certain corroborating circumstances." (See Lawyer's Magazine, London, 1792, vol. ii. p. 351.) On the first trial, Buller J., who never forgot the great guarantees of the common law, was equally emphatic: "You will totally lay aside everything you may have heard before you came into this court, and consider the case, coolly and dispassionately, *on the evidence given*." (Ibid. vol. i. p. 422.)

discuss; but this brief reference cannot be out of place; 1st, as indicating to what extent authorities to be hereafter noticed and drawn from the civil law, are applicable to our own practice; and 2d, as suggesting the feature, by a jealous preservation of which, the individuality of the COMMON LAW CRIMINAL JURISPRUDENCE can be best guarded.

II. Intent.

§ 825. What were the instruments used? For from these, as will be seen in the next chapter, in cases of homicide, the presumption of a deliberate killing may be drawn.[i]

In obtaining goods on false pretences, or larceny, are the means of a character which show an intent to defraud? Was there any intent *expressed*, and if not, are there any circumstances from which intent can be inferred? Generally speaking, as has been seen,[j] when an action is matured, the intent is presumed; but there are some cases, *e. g.*, breaches of trust, where it is necessary, and others, *e. g.*, murder in the first degree, where it is desirable, that it should appear substantively from the whole case, that such intent existed. In the following chapter of this book, will be seen how this can be done in particular cases; and in a previous book, the general bearing of the question is examined with some minuteness.[jj]

III. Attempts to escape or evade justice.

§ 826. The *first* is capable of ready proof or rebuttal; for it is only necessary to prove or disprove a prison breach, or an absolute forfeiture of bail, followed up by absconding. How far attempts to *evade* justice are admissible, and to what points the attention of counsel should be called in this respect, have been already considered.[k]

§ 827. IV. Forgery of evidence.

V. Suppression or destruction of evidence.

§ 827. These heads may be considered together; and it should be inquired, in relation to them—

(*a*) Was there any such forgery or suppression either of oral or documentary testimony?

(*b*) Was it done with a view to self-exculpation; and, if so, does it bear the marks of guilty consciousness; or may it be treated as the act of an innocent man, who, from timidity, seeks this method of avoiding a trial?[l]

(*c*) Are there any grounds to suppose it was done maliciously, by a third person, with intent to injure the accused?[m]

(*d*) Could it have been the result of accident, as is often the case with

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[i] See 4 Dallas, 145; 2 Va. Ca. 484; 11 Leigh, 749; ante, § 712.
[j] See ante, § 712–13, 715–16, 725. [jj] Ibid.
[k] See ante, § 725. [l] See ante, § 718. [m] See ante, § 718–19–20.

material papers that are overwatched; or of sport; or in order to effect some moral end?[n]

VI. ANTECEDENT PREPARATIONS AND PREVIOUS ATTEMPTS.

§ 828. These, in one light, have already been considered,[o] and in another, will be presently treated,[p] and it is sufficient here to suggest the general inquiries:—

1st. What were the relations of the defendant and the party on whose person or property the offence was committed?

2d. Are there any points in the defendant's history for a short time previous, which look like watching for an opportunity to commit the same or a similar offence?

3d. Were similar injuries inflicted within a short time before the offence in question; and, if so, was the perpetrator discovered?[q]

§ 829. VII. FRUITS OF THE OFFENCE.

VIII. EXTRINSIC AND MECHANICAL INCULPATORY INDICATIONS.

§ 830. These, in their technical relation, have already been considered,[r] and will presently be examined in detail, in cases of homicide and larceny.

CHAPTER II.

PREPARATION OF EVIDENCE IN HOMICIDES.

I. MARKS OF VIOLENCE ON THE PERSON, § 831.
- 1st. THE WEAPON USED, § 832.
- 2d. WHETHER THE WOUNDS ARE ACCIDENTAL, SELF-INFLICTED, OR GIVEN BY ANOTHER, § 383.
- 3d. WHETHER THE WOUND, IF GIVEN BY ANOTHER, IS TO BE CONSIDERED AS THE RESULT OF A MOMENTARY PASSIONATE IMPULSE, OR OF PREMEDITATION, § 835.

II. INSTRUMENT OF DEATH, § 836.

III. POISON, § 837.

IV. MATERIALS APPROPRIATE TO BE CONVERTED INTO INSTRUMENTS OF CRIME, § 845.

V. POSITION OF DECEASED, § 847.

VI. TRACES OF BLOOD, § 848.

VII. LIABILITY OF DECEASED TO ATTACK, § 849.
- 1st. POSSESSION OF MONEY OR VALUABLE ARTICLES, § 849.
- 2d. OLD GRUDGE, § 849.
- 3d. JEALOUSY, § 949.

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[n] See ante, § 721. [o] See ante, § 725. [p] Post, § 849.

[q] While the fact that such prior offences had been perpetrated by the prisoner tell strongly against him, when they are traced to another party, entirely independent of him, they tell equally in his favor.

[r] See ante, § 728.

I. Marks of violence on the person.

§ 831. When a homicide has been committed, and the body discovered, the first duty is the examination of the marks of violence upon the person of the deceased with a view to the ascertaining of any or all of the following circumstances: 1. The weapon used. 2. Whether the wounds were accidental, self-inflicted, or given by another. 3. Whether (if given by another) they are to be considered as the result of a momentary passionate impulse, or of premeditation.

1st. The weapon used.

§ 832. In ordinary cases the shape of the wound will agree with the instrument by which it has been produced. This is particularly the case with wounds inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may be made.[a] If, however, death has been produced by a bruise or contusion,[b] the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any marks of external violence. In almost every case, however, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of wood or of metal, whether the blows were repeated, and whether they were sufficient to cause death. If the wound has been produced by a gun or pistol,[c] it becomes necessary to inquire whether it was received from a person near at hand, or at a distance, whether the aim would appear to have been deliberately taken, and whether the position of the deceased, and the location and direction of the wound are such as sufficiently to indicate the premeditation of the act.[d] Of the effect with which such evidence may be used, an illustration is given by a case some years ago in Ireland. The question was, whether in a scuffle a pistol had accidentally gone off and occasioned the death, or whether the assailant had deliberately fired at him from some distance. The sons of the deceased swore that the pistol was fired from some distance, the prisoner taking deliberate aim. This was confirmed by the dying declarations of the deceased. But on a careful examination of the body, which was disinterred for that purpose, the surgeon was enabled to swear positively, that the pistol must have been fired close to the body of the deceased, as there distinctly appeared the marks of powder and burning on the wrist. So conclusive was this evidence deemed, that the prisoner was acquitted, and the parties who had appeared as witnesses against him were indicted and convicted of perjury.[e] So, also, where the deceased was shot in the street, when looking at a parade, and where the question was whether he was killed by a stray shot, or by a gun which there was some evidence to show was aimed from a third story window, the doubt was solved by the slanting direction of the wound.[f]

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[a] W. & S. Med. Jur. § 1141-2. [b] Ibid. § 809. [c] Ibid. § 811.
[d] Ibid. § 1138-39; Dean's Medical Jurisprudence, i. 242.
[e] Taylor's Medical Jurisprudence, 330.
[f] Der neue Pitoval, &c.; see, also, post, § 835.

The term "wound" has had two distinct interpretations given to it; the *first* under the ordinary common law indictments for homicide, the *second*, under the English and American statutes, making "wounding" specifically indictable.

Where the term "wound" is used in an indictment for homicide (*i. e.* in the clause, giving unto the deceased *one mortal wound, &c.*), the term is used in a popular sense, and is understood to include bruises, &c.[a]

Where, however, the indictment is under the statute making "wounding" specifically indictable, the construction varies with the terms of the statute. Under 7 Will. IV. and 1 Vict., which make it indictable to "stab, cut, or wound," &c., it was held by Lord Denman, C. J., and Park, J., in 1837, that a blow given with a hammer on the face, whereby the skin was broken internally, but not externally, was a "wounding."[b] But in 1838, Coleridge, J., Bosanquet, J., and Coltman, J., held that a blow with a stone bottle, which did not break the skin, was *not* a wounding; and the court said, "to constitute a wound, that the skin should be broken, it must be the whole skin, and it is not sufficient to show a separation of the cuticle only."[c]

But under the statutes the injury must be inflicted by "some instrument, and not by the hands or teeth;" and hence biting off the joint of a finger, and biting off the end of the nose, have been held not "wounding" within the statutes.[d] And so of injuries inflicted by throwing oil of vitriol on the face.[e] But it is otherwise with an injury inflicted by a kick from a shoe.[ff]

2d. WHETHER THE WOUNDS ARE ACCIDENTAL, SELF-INFLICTED, OR GIVEN BY ANOTHER.

§ 833. It will be necessary in the investigation of this point to inquire whether the wounds are of a character, or in a position which render them likely to have been the result of suicide, or whether their nature, location, number, and variety, conclusively point to another as having perpetrated the deed.[g] It has been observed that in ordinary cases of suicide, but one wound is inflicted which proves fatal; and that if the self-destroyer effects his purpose by a cutting instrument, or incisions, he selects the throat; that if he stabs himself, he selects the chest, particularly the heart or belly; and if he shoots himself, he generally does it through the head.[h] It therefore becomes a subject of legitimate investigation whether, or not, the wounds are in a position likely to have been selected by a person seeking instantaneous self-destruction, and whose opportunities and design would be at that which he conceived to be the most vital part. The fact that death by suicide is

[a] R. *v.* Warman, 2 C. & R. 195; State *v.* Lunard, 22 Mis. (1 Jones) 449.
[b] R. *v.* Smith, 8 C. & P. 173.
[c] R. *v.* McLaughlin, 8 C. & P. 635; S. P., R. *v.* Wood, 1 Mood. C. C. 278, 4 C. & P. 381.
[d] Jennings' case, 2 Lewin C. C. 130; R. *v.* Harris, 7 C. & P. 446; R. *v.* Stevens, Ibid.
[e] R. *v.* Murrow, 1 M. C. R. 456; Henshell's case, 2 Lewin's C. C. 135.
[ff] R. *v.* Briggs, 1 M. C. C. 318.
[g] W. & S. Med. Jur. § 816, 1143.
[h] Watson on Homicide, 276.

almost always produced by a single wound, is illustrated by numerous cases. In New York, in 1839, a woman was found dead, covered with many wounds. Her husband, who was suspected, asserted that she had destroyed herself. On examination, there were found eleven stabs, eight on and about the left side of the thorax, one of which had penetrated the pericardium and divided the trunk of the pulmonary artery at its origin, while the others were on the back near the left shoulder blade. There was every reason to suppose that the stabs in front and at the back were inflicted at the same time, and the inference was that it was impossible that the latter could have been self-inflicted.[i] So, too, the variety of the wounds will often sufficiently indicate the fact of murder. William Corder was tried at the Bury St. Edmunds Summer Assizes for the murder of Maria Marten, whose body was discovered in a barn twelve months after her disappearance. He alleged that she had committed suicide, but upon examination of the body, a handkerchief was found drawn tightly around her neck; the course of a pistol ball was traced through the left cheek, passing out at the right orbit; and three other wounds were found, one of which had entered the heart, and all of which had been made by a sharp instrument, means of death so various and unusual with females as to discredit entirely the statement of the prisoner, and lead to his conviction and execution.[j]

§ 834. It is important to inquire, in cases where the defence of suicide may be started, whether there are marks upon the person other than those made by the fatal wounds; *e. g.*, whether the hands or arms have the appearance of having been held forcibly during the commission of the deed, whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame, whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound. It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, where on the floor the presence of another person in that room was clearly demonstrated by the print of a bloody left hand on the left arm of the deceased.[k]

§ 834(*a*). Dr. Casper[l] enumerates the following circumstances as throwing light upon this question:—

(1.) The condition in life and personal surroundings of the deceased so far as they may be likely to impel to suicide.

(2.) Threats or intimations on the part of the deceased that he harbored such a purpose; his being found in a room made fast from within, &c.

(3.) Of far more importance, however, is an examination of the body, its position, the clothing, &c.

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[i] Taylor's Med. Juris. 257.

[j] Wills on Circum. Evid. p. 169, 179.

[k] Case of Mary Norkot and others, 14 Howell's St. Tr. 1324.

[l] Med. Jur. ed. 1857, p. 307.

§ 834(*b*). Where death has been produced by shooting, the following circumstances require attention:—

(1.) The position of the body. Many authors have advanced the opinion that when the body of a person who has been killed by shooting is found resting on the back, this fact is a sure indication of suicide, while other positions of the body indicate some previous struggle. From this Dr. Casper dissents.

(2.) Whether the weapon used be found lying near the dead or not is a circumstance which, according to Dr. Casper, proves nothing, since in the case of suicide the weapon may be stolen away, and in case of murder be left lying near the body in order to mislead. When the weapon is found, however, it often adds something to the probabilities of the case. As, for instance, if the weapon be old and rusty, or in very bad repair, it is not probable that such a one would be selected by a murderer for the execution of his purposes. So, too, if the weapon has exploded from being too heavily loaded, the fact would rather point to suicide, as the overcharge was probably placed in through ignorance, or else from a desire to make sure work. The ball should of course be compared with the barrel of the weapon. This is often impossible, as the ball frequently passes through the body; is sometimes mutilated, and slugs and buckshot are frequently used, which are adapted, of course, to barrels of all sizes. The matter, however, is not one of much importance, as the murderer who leaves a weapon lying by the body would be most apt to leave the identical one used.

§ 834(*c*). (3.) The hands of the dead body, in some cases, help to solve the doubt. Where the pistol is found so firmly clenched in the hand that the fingers must be sawed off in order to get it loose, this is an infallible mark of suicide. In cases also where the fingers are broken, or where the skin of the hand is recently injured, these are, generally, indications of suicide, although sometimes they may point to a previous struggle with the murderer. Where the hands are blackened by powder being burnt into them, this affords a strong probability of suicide, unless there is reason to believe that the discoloration was produced at some other time, and not by the shot which caused death. This case, however, is not to be confounded with that grayish-black color sometimes given to the hands by working in metal, which latter may be washed off, while the former remains fast. It is no negative evidence against the fact of suicide that the hands should be entirely free from this discoloration. Gloves may have been worn which have afterwards been stolen from the body, or the hands may not have been directly employed in firing the weapon, and, in fact, with percussioned fire-arms, no such discoloration is apt to be received except where the instrument is awkwardly used. So, also, injuries to the hand are not apt to occur except through unskilful management, and, hence, in the majority of cases of suicide no such marks are found.

§ 834(*d*). (4.) The direction followed by the ball sometimes furnishes important evidence in the question of suicide. In cases, for instance, where the ball is found to penetrate from behind, or to run downwards, it may often

be seen that suicide cannot have been possible. If the barrel of the pistol has been placed in the mouth and then fired, the probability is strongly in favor of suicide. In the great majority of cases, however, the question must be left doubtful so far as its answer depends upon an examination of the body. The most that the physician can say, usually is, that the probabilities are greater or less, as the case may be, in favor of suicide, or that there is nothing inconsistent with the fact of suicide.

§ 834(*e*). *Death by burning, whether self-inflicted or not.*—In cases of death by burning, as is remarked by Dr. Casper,[m] the question of voluntary suicide by a person in a sound mind finds no place, as it is hardly possible to conceive that such a mode would be selected, and as no well authenticated examples of such cases are upon record. The only question is whether the person by some accident or carelessness of his own was burned to death, or whether through violence by some third party. Much light may be thrown upon the subject by an examination of the body wherever this is possible. It will be seen in many such cases that death was produced by some previous injury, as a blow upon the head, &c., and that the body was afterwards committed to the flames for the purposes of concealment. Where the body has been so far destroyed by fire as to render it impossible to detect previous injuries even if they existed, nothing can be learned from an examination of the body, and the probabilities must be gathered from surrounding circumstances.

§ 834(*f*). Under this head the following singular case is reported by Dr. Casper. A laboring man went upon the afternoon of a certain day to the house of an old lady, Mrs. Hake, who lived alone, to borrow money of her. When refused his request, he struck her a severe blow on the forehead with his fist. Upon this "she fell and continued motionless, without groaning or wincing." He then took up a pave stone and struck her in the face, after which she "struggled a little, and then ceased to move." The murderer now turned the body face downwards, to avoid seeing the countenance, and accomplished his purpose of robbery. He remained in the house until after dark, and having lighted a tallow candle, placed it, upon leaving, underneath a cane chair. The next morning the two rooms of Mrs. Hake's dwelling were filled with a burnt smell, and the walls, furniture, &c., were covered with soot. The body, resting on the belly, was lying in the bedchamber, near to the almost destroyed bed; a burnt pillow lay upon the body, and a cane chair, which had been partially burned, and under which was a brass candlestick, stood about a foot off. In the sitting room a pave stone was lying on the floor. The points reported by the examining physician were as follows: The hair of the body was burned, in some places singed; the bone of the nose was broken, and the *septum* of the cartilages separated; the eyes were pressed flat, and upon the inside of the right eye were small blisters; the whole forehead was smeared with blood, and about the centre of it was a large suggillation which, when opened, gave out liquid blood; there was a smaller suggillation on the right cheek; the whole face was covered with dried

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[m] Gericht. Med. ed. 1857, p. 330.

blood and with burnt feathers, and was so charred as scarcely to admit of recognition; the right ear was perfectly charred, the left not so badly burnt; upon the upper extremity of the nose there was a narrow wound about one-fourth of an inch long, having irregular edges, and not far from this a second similar wound, which had only broken the skin; upon the right temple was a three-cornered shaped wound; the tongue was between the teeth; the entire circumference of the neck was charred, and in many places the skin was hanging in rags; the right hand was completely charred; the arms were only partially charred, but covered with blisters, some of which contained *serum*, others were empty. The privy parts were so thoroughly burnt that their anatomical structure could no longer be traced. The only sound members were the feet and lower part of the legs. Upon laying open the body, the cavity of the skull and the brain contained no blood. That the nose had been broken during life was now made more evident from the suggillations seen among the bones. The surface skin of the windpipe, after being washed, was of a light cherry-red color; a little bloody, watery froth was seen in the *lumen* of this organ. The lungs were overloaded with dark blood, and the softened heart, in its right half, with black blood, but the left half empty. The gullet was empty and normal; the large veins of the breast were filled with dark blood. The organs of the belly were normal, but the *vena cava* contained much dark liquid blood.

§ 834(*g*). As the result of this examination the opinion was offered that death had been caused by suffocation, and that it was possible that the burning which had taken place, was the simple cause of suffocation. The three following questions were then proposed to the examining physician:—

1. Is it certain, probable, or possible, that the suffocation which produced Mrs. Hake's death, was caused, directly or indirectly, by the blows inflicted with the fist and with the stone, or is it impossible that these blows conld have been the ultimate cause of death?

2. If this latter is the case, has suffocation been produced by the position in which the murderer placed the body after he had inflicted the blow?

3. Upon what grounds does it appear that only the smoke produced by the fire was the cause of suffocation?

In reference to the first of these questions, it was answered, that suffocation could not be produced by injuries upon the head, unless the brain had been thereby so much crushed as to affect the lungs. That, although the crushing of the nose would render breathing difficult, yet so long as the respiratory organs connected with the mouth remained uninjured, this could not cause suffocation, and hence that it was impossible that the blows could have been the ultimate cause of suffocation. In reference to the second question, it was observed that the bones of the nose having been broken, the face would press very closely against the floor, and thus greatly increase the difficulty of breathing. Taking, in connection with this, the facts that Mrs. Hake had reached an age when respiration is somewhat enfeebled, and was also in a stupor, it is not impossible that respiration may have been so hindered by this combination of circumstances, as to result at last in suffoca-

tion. Upon this supposition, however, which amounts to nothing more than a probability, it is difficult to account for the fact that the face was so much charred, while the floor against which it pressed was very little burnt. Also, that the right hand, lying upon the floor, was charred. Hence, the answer to this question, that if Mrs. Hake was placed in this position after the blows had been inflicted, and was allowed to remain so for some hours, suffocation may possibly have been thus produced.

§ 834(*h*). The soot deposited upon the walls and furniture of the room, the condition of the burnt clothing and of the body, evinced that the fire was of sufficient intensity to have produced suffocation, in case any one had been shut up in the rooms. But, while this is true, there were no reasons for supposing that "only the smoke caused suffocation." On the contrary, it is possible that the murderer may have strangled his victim by violent means, with the fingers, by pressing the pillow over the face, &c., and that the marks of such treatment have been destroyed by the subsequent burning. Hence, the answer returned to the third question, "there are no reasons for supposing that the smoke resulting from the fire could have been the only cause of suffocation."

§ 834(*i*). *Cutting throat.*—Where the throat is cut in suicide the wound runs commonly from left to right, although the opposite may sometimes occur. In many cases, it is impossible to trace the course of the wound, and, sometimes, to determine which among many wounds proved the mortal one. When none of the above-mentioned circumstances render the case in hand a plain one, the physician can only give an opinion as to the greater or less probability of suicide; and in many cases, he cannot safely go farther than to say that he finds nothing inconsistent with the supposition that the death is that of a suicide.

§ 834(*j*). *The question of suicide in cases of hanging, throttling, &c.*—Hanging, as is noticed by Dr. Casper,[n] is most frequently resorted to by suicides, suffocation rarely, and throttling, perhaps, never. It would generally be very difficult to hang another person against his will, and in such cases the body would almost certainly show the traces of a previous struggle, while murder may easily be effected by either of the other means. It must be observed in this connection, however, that certain red, or reddish-yellow and brown spots upon the face, neck, breast, &c., may often be nothing more than the results of a rough handling of the body subsequent to death, and are not to be mistaken for marks of a struggle during life. As regards the position in which the body is found, there is no position, whether suspended in the air, or with the feet touching the ground, or in a sitting or kneeling posture, or lying obliquely on the floor, &c., which precludes the supposition of suicide, since cases of undoubted suicide are quoted in which each of these positions has been observed. On the other hand, the situation of the body may sometimes clearly indicate suicide, as where it is found hanging high up in a tree.

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[n] Gericht. Med. ed. 1857, p. 518.

§ 834(*k*). Post-mortem examination can never decide the question whether strangulation was the actual cause of death, except where appearances are found which belong exclusively to such cases, as *erection* or swelling of the *penis*, emission of semen, suggillations on the neck, and tearing of the muscles of the neck.

§ 834(*l*). *The question of suicide in cases of drowning.*—Dr. Casper states the points under this head as follows:[o] The question which arises first is whether death was actually produced by drowning, or whether the body was thrown into water subsequently to death. This latter often happens in the case of young infants. It may also be possible that suicide has been committed by some other means even when the body is found in water; as the person may have inflicted some mortal wound upon himself at the water's edge, or while standing in the water. In these cases an examination of the body will show that death was produced by some other means.

Injuries found upon the dead body can seldom be relied on as showing violent treatment by another person. These injuries may have been produced by the person himself in an attempt at suicide, and drowning have been afterwards resorted to. Or they may have been produced by striking against some object in the act of drowning. Or they may have been caused by the body, after death, coming in contact with floating ice, stays of a bridge, a ship's rudder, &c. In the case of such injuries the body must be carefully examined to see whether any traces of vital reaction can be discovered. If this prove to be the case, then the further question arises whether the injury or whether drowning was the real cause of death. Where the process of decomposition is considerably advanced, it will be very difficult to distinguish between the appearances which result from decomposition, and suggillations produced by violence done to the living body, and here even experienced physicians may easily be deceived. In this, as in all other cases, some light may be thrown upon the question by the circumstances attending the given case. As, for instance, where the body is naked and the season a proper one for bathing, the probability will be accidental drowning. So, also, in the case of a person whose business is on the water, as a sailor or fisherman. On the other hand, traces of blood upon the shore, torn clothing, some article of clothing belonging to another person, will indicate probable murder.

The water in which the body is found, as whether deep or very shallow, a dirty pond or fresh pool, &c., will generally serve to throw light upon the question; although it may sometimes happen that a drunken or epileptic person will be drowned in very shallow and very disagreeable water.

§ 834(*m*). Where there is no doubt that death was produced by drowning it is often very important to discover how long the body has probably lain in water, as when it is desired to compare the time of death with the time of some supposed murder. The stages of decomposition in the case of a body lying in water have been already described. The difference produced by different temperatures of the water, and between running water and a stag-

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[o] Gericht. Med. ed. 1857, p. 580.

nant pool, must, of course, be borne in mind. The fact, also, that decomposition takes place with unusual rapidity when the body is exposed for any length of time after being taken from the water must not be overlooked. One marked peculiarity, connected with bodies which remain lying in water, is the fact that decomposition begins at the head, while with bodies kept in other mediums it begins at the surface of the belly.

§ 834(*n*). A body which in summer has lain in water about eighteen hours, or, in winter, from twenty-four to forty-eight hours, and has then been exposed to the air for the same length of time, shows—while the rest of the body has still the usual color of a corpse, and while no trace of greenish discoloration is seen on the surface of the belly—first upon the face and head, as far as to the ears and nape of the neck, a light livid bluish color, which soon changes to a brick-red. These places show no suggillation when cut into. If death has been actually produced by drowning, white foam and bubbles will issue from the mouth and nose. Bluish-green spots will soon appear on the ears, the temples, and nape of the neck, which gradually extend to the neck and breast. These spots continue to spread while the body remains in water; so that where the entire neck and head has a dirty-green color intermingled with dark-red, it may be concluded that the body has lain in the water from three to five weeks in summer, or from two to three months in winter. This discoloration of the head, neck, and breast is often seen in cases where the rest of the body is, as yet, very little discolored. The appearances which now gradually follow have been already described.

Where the entire body is greatly swollen and of a grayish or blackish-green color, with thick dirty red surface veins, where the *epidermis* is all loosened, the features no longer recognizable, the ears, eyelids, and lips greatly swollen, the color of the eyes undiscoverable, the nails loosened and hanging to the skin on the fingers, and the *scrotum* and *penis* enormously swollen, it may be concluded that the body has lain in water five or six weeks, if it be summer, or twelve weeks and longer, if fall or winter. If the body has continued in water seven, eight, or ten weeks during summer, or from four to six months during winter, the stage of decomposition will be still farther advanced; but at this period there is much greater uncertainty connected with the question of time, since changes now take place very slowly. The appearances of this stage are: the skin loosened from the skull and hanging in shreds, to which hair is loosely attached; the eyes have disappeared; commonly, parts of the body will be found mutilated by water-rats, &c.; the face and other parts will be infested with maggots; certain joints will be loosened; the whole body will be swollen to colossal proportions, be of a black or blackish-green color, and exceedingly offensive; the nails will have generally disappeared; saponification of portions of some muscles will have taken place. At this stage it will be impossible to recognize the body.

3d. WHETHER THE WOUNDS, IF GIVEN BY ANOTHER, ARE TO BE CONSIDERED AS THE RESULT OF A MOMENTARY PASSIONATE IMPULSE, OR OF PREMEDITATION.

§ 835. In this, as in the question just considered, the position of the wound is of consequence. When found inflicted in a concealed part, such as a superficial observer would not be likely to notice, the inference of intent is strong.[l] A person acting under the impule of passion would be likely to inflict a less skilful wound than one whose act was the result of premeditation. Thus, as in one or two western cases, where the deceased was found with his eyes gouged out, there is little difficulty in deducing the intent. And so in a case where an infant was found with a needle thrust upwards through its navel.

The direction of the wound may also be an important circumstance to show the intent;[m] as in a case stated by Watson, where the prisoner was tried for shooting a man who came to his house under suspicious circumstances. The defence was that the ground being rough and slippery, the prisoner stumbled, and both barrels of the gun had gone off by accident. This statement was confirmed by tracing the direction of the shot in the body of the deceased, which was found to be pointed upwards.[n]

II. INSTRUMENT OF DEATH.

§ 836. The nature of the weapon used, as has already been observed, is in a great majority of cases to be deduced from the wound itself.[o] Thus, a stab or cut would indicate the employment of a sharp instrument, while its length, shape, and direction would point to the species of the particular weapon, whether it was a common clasp-knife, a dirk, an axe, or a razor.[p] Frequently, also, the weapon may be discovered near to, or in the vicinity of the body;[q] and although this is often considered a circumstantial indication of suicide, it is by no means invariably found to be so. In July, 1683, the Earl of Essex was found dead in the Tower, with his throat cut, and a razor lying near him. His throat was smoothly and evenly cut from one side to the other, and entirely down to the vertebral column. Notwithstanding this, the razor was found to be much notched on the edge. This fact those who favored the view of suicide were asked to explain. They could do so no other way than by supposing that the deceased had notched the razor by drawing it backwards and forwards on the neck bone. This he could hardly be deemed competent to do, after all the great vessels of the neck had been divided.[r] If the weapon be found in the vicinity of the corpse, the question arises whether it could have been placed in its position by the act of the deceased. In the case of Courvoisier, who was tried for the murder of Lord William Russel,

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[l] Dean's Med. Juris. 258.
[m] W. & S. Med. Jur. § 817.
[n] Watson on Homicide, 246; ante, § 832.
[o] W. & S. Med. Jur. § 1141.
[p] W. & S. Med. Jur. § 807.
[q] Ibid. § 819, 1152.
[r] Wh. & St. Med. Jur. § 819, 1143-5; Dean's Med. Juris. 257; 2 Beck's Med. Juris. 82-84.

two facts were relied upon to show that this was not a case of suicide. One was that a napkin was placed over the face of the deceased, and the other that the instrument of death did not lie near the body.[s] To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor a good distance from the bed; but as it stuck, the point was turned toward the bed and the haft from it.[t] It may be that the weapon found near the person of the deceased is not the one with which the crime was committed. Thus, in an old case, the deceased was found with his own pistol lying near him, from which circumstance, together with that of no person having been seen to enter or leave the house, it was concluded that he had destroyed himself; but on examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol.[u] If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, to whom does it belong? In order to ascertain the ownership, it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether any one purchased or procured one of the kind a short time before the murder was committed; whether any one was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand in which it was held, or the direction in which the fatal blow was given; whether the weapon is imperfect or broken, and if so, who has been observed in possession of a fragment corresponding to the broken portion. Thus, in a trial in Philadelphia, in 1845, the prisoner's agency was determined by the fact that the profile of a notched hatchet with which the homicide was committed, was found painted in blood on his handkerchief, with which the hatchet probably had been wiped. So, when death was produced by a dirk-knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar, near the spot. Afterwards, upon a post-mortem examination of the deceased, the blade of a knife was found broken in his heart. Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused; but there was no evidence of the identity of the blade. The question remained, therefore, whether the blade belonged to the handle; and when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other, that no person could doubt that they had belonged together; because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.[v] An instance of a somewhat similar character is mentioned of a trial before Lord Eldon for murder with a pistol. The surgeon had stated in his testimony, that the pistol must have been fired near the body; be-

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[s] Dean's Med. Juris. 256; Guy's For. Med. 480; Taylor's Med. Juris. 262.
[t] 2 Beck, 86, 87; Guy's For. Med. 480; Dean's Med. Juris. 257.
[u] Wills on Circum. Evid. 80; Dean's Med. Jur. 256.
[v] Wh. & St. Med. Jur. § 1143–5; Bemis' Webster's case, p. 466.

cause the body was blackened, and the wad was found in the wound. It being asked by the judge if he had preserved that wad, he said that he had, but had not examined it. On being requested so to do, he unrolled it carefully, and on examination it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad, as shown by the texture of the paper and purport and form of stanzas of the two portions, was found in the pocket of the accused, and tended to fix him as the person who loaded the pistol.[w]

III. Poison.[x]

§ 837. The following preliminary classification of poisons is compiled mainly from Casper:—[xx]

1st. Irritant.

(1.) *Embracing* mineral acids; arsenical poisons; mercurial poisons, with the exception of calomel and mercurial vapors; poisons of zinc and antimony; oxalate of potassa, caustic potash and soda; chromate and bichromate of potash; phosphorus; colchicum; colocynth; croton oil; poisonous fungi; cantharides.

(2.) *Symptoms.*—Heat and burning in the mouth and throat; violent burning pain in the stomach, as well as the whole lower part of the body; choking, vomiting, constant thirst, discharges, coldness of the skin, cold sweat; quick pulse, sensitiveness over the stomach to the touch; rapid sinking of the strength until death ensues.

(3.) *Post-mortem Appearances.*—Inflammation or burning of such parts of the mucous membrane as the poison has touched; wrinkled and tanned look of the gullet; erosion, ulceration and perforation of the mucous membrane of the stomach, and often traces of inflammation in the lungs and heart, and especially in the larger intestines.

(4.) *Action.*—Irritation, followed by inflammation and its consequences; *e. g.* ulcerations, disorganization of the skin and mucous membrane, and often irritation of the nervous system.

2d. Narcotic.

(1.) *Embracing* opium and its compounds, belladonna, nux vomica,

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[w] Bemis' Webster's case, 466.

[x] On this point the following authorities may be consulted: Mittermaier, Deutsch. Straf. § 124; Henke, Lehrb. s. 627; Meckel, Lehrb. s. 145; Ann. d'Hygiène et de Méd. Lég. Juillet, 1830, p. 365; Devergie, Méd. Lég. i. p. 445; Wilberg, Rhapsodien aus der gerichtl. Arzneiwissenshaft. No. 8; Foderé Méd. Lég. iii. p. 449; Beck's Elements. ii. p. 573; Briand et Bresson, Méd. Lég. p. 350; Eggert der gewaltsaml Tod. p. 335; Wurzer Beitrag zuhr Lehre vom Giftmord Marburg, 1835; Orfila, vol. xvii. p. 5; Laffarge case, Raspail, Paris, 1840, &c.; Barse Manuel, Paris, 1845; Gengler die verb. der Vergiftung ii. p. 25; Barzellotti, questioni di Medicina Legale (Bianche's edition), p. 330; Puccinotti, Med. Leg. p. 195–225; Thomson, p. 447; Guy, For. Med. pt. iii.; Dean's Med. Juris. p. 286–412; Taylor, Med. Juris. p. 5–161.

[xx] Gericht. Med. ed. 1857, p. 383.

strychnia, veratria, brucia, hyoscyamus, conium, cicuta, digitalis, stramonium, nicotiana and alcohol.

(2.) *Symptoms.*—Dilatation of the pupils, loss of consciousness, stupor; slow, irregular breathing, vomiting, cramp, paralysis.

(3.) *Post-mortem Appearances.*—Sometimes may be found in the body, particularly in the stomach, remains of the poison, which, from its smell, form, &c., may be easily recognized.

(4.) *Action.*—These poisons produce death by inducing congestion of blood in the brain, lungs, head, and spinal marrow.

3d. Neuro-paralytic.

(1.) *Embracing* prussic acid, cyanide of potassium, oil of bitter almonds, and chloroform.

(2.) *Symptoms.*—These produce immediate death, or else choking, belching, vomiting, paleness of the face, cold sweat, feeble slow pulse, dilatation or contraction of the pupils, cramp, foaming at the mouth and nose, difficult breathing, death.

(3.) *Action.*—Death is produced by the paralysis of the nervous system through congestion of blood.

4th. Corrosive.

(1.) *Embracing* lead, white lead, mercury, nitrate of bismuth, arsenious vapors, and probably most of the metallic vapors.

(2.) *Symptoms.*—General leanness, cachectic countenance; after lead and quicksilver poisons, livid gums, coated tongue, loss of appetite, costiveness, trembling of the limbs, palsy, death with appearance of hectic fever.

(3.) *Action.*—The effect of this class of poisons is to undermine the health by destroying the digestive organs.

5th. Septic.

(1.) *Embracing* sausage, meat, cheese, fish, and other articles of food that happen to contain poison; also, mucus and pus.

(2.) *Symptoms.*—General prostration, nausea, the ordinary symptoms of inflammation, the general symptoms of putrid fever.

(3.) These poisons act by corrupting the blood.

In inquiries falling under this head, great caution is necessary; and the first step is to secure the most skilful professional aid. In the German practice, the prosecuting officer, at the moment of suspicion, is required to secure the co-operation of good chemists whenever a chemical analysis is necessary;[y] and for the pathological diagnosis, a professed forensic physician.[z]

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[y] W. & S. Med. Jur. § 505; Preuss. Crim. Ordu. s. 167; Baier. Crim. Ordu. s. 78; Wurt. St. P. O. s. 108; Bad. St. P. O. s. 107. For the analysis and references of this head, I am indebted to Mittermaier, Deut. St. § 124.

[z] W. & S. Med. Jur. § 505. On the proper choice of Chemical aid, see Barzellotti, c. i. p. 333; and Barse, Manuel, p. 135.

The following criteria are given by Casper: "(1.) *The symptoms observed in the pa-*

It is of the utmost importance that the chemical analysis, in case of suspected poisoning, should be intrusted to a competent chemist. In the majority of cases of poisoning, chemical tests are applicable, and yield a positive result; they may, except where the poison is of a volatile character, be employed, with the certainty of valuable results, at considerable periods after death.[zz] Where, in a trial for poisoning, circumstantial evidence is relied on, chemical analysis of the contents of the stomach and bowels should always be made.[a]

§ 838. The inquiry, which should not be abandoned merely on the strength of the declaration of the physician, attending during the last illness of the deceased, that no poison was administered,[b] is threefold: 1. To examine the corpse of the deceased, and to ascertain by inspection and by chemical analysis, whether a poisonous substance or traces of the introduction of it are to be found in the body.[c] 2. To examine the vessels and dishes found near the deceased, of which he made use,[d] the substances he partook of during his illness, and those vomited or ejected,[e] with a view to the detection of traces of the poison.[f] 3. To ascertain carefully the symptoms of disease and death,[g] in order to discover whether the phenomena attending these are such as are commonly produced during the disease, at death, or subsequently, by the application of poisons in general, or of some particular kind.[h] It must, however, be borne in mind that many of the symptoms usually produced by poisons cannot, with certainty, be considered conclusive proof of death by their use; since they are often the result of other diseases, as cholera, inflammation of the stomach, &c.;[i] and it, therefore, becomes a duty to inquire whether the case is not one of this description.[j]

As several kinds of poison produce the same symptoms,[k] it will be suffi-

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tient after the supposed poison had been taken. (2.) *The condition of the dead body as seen in dissection.* (3.) *A chemical analysis of the contents of the stomach; and* (4.) *The external circumstances attending the sickness and death.*" In reference to the first of these criteria, it must be remarked in general that very little stress can be laid upon it in elucidating a doubtful case. It is well known that this mode of producing death is most often resorted to by murderers, from the fact that the symptoms exhibited by the victim may so easily be mistaken for certain diseases. The different kinds of poison, with one or two exceptions—as prussic and sulphuric acids—are followed by almost the same symptoms; such as vomiting, discharges, stoppage of circulation, rapid sinking, &c. All these symptoms are known to belong to several diseases which arise independently of the influence of poison, so that even a physician may easily be mistaken as to a given case. It must be borne in mind, however, that here, as elsewhere, an opinion is not to be based upon any one symptom, or group of symptoms, but upon all of the appearances taken together.

[zz] See Wh. & Stil. Med. Jur. § 503.

[a] Ive *v.* State, 6 Florida, 591.

[b] Pfister, Criminal Fælle, ii. p. 92.

[c] W. & S. Med. Jur. § 501; see note to Feuerbach, Lehrb. s. 222; Helie, Theorie du code penal, v. p. 334–41; Barse, Manuel, p. 234; Friedreich, Hanb. s. 1042; Gengler, Verbi. der Vergiftun, ii. p. 16; Puccinotti, p. 200; Richter; Strafrechtspflegl, i. p. 66.

[d] Beck, p. 590.

[e] Meckel, s. 158; Eggert, i. p. 316.

[f] W. & S. Med. Jur. § 503.

[g] Pfister Criminalfalle, iv. p. 197; Friedereich, p. 1056; Meckel, Lehr. s. 148; Henke, Lehr. s. 643.

[h] Mittermaier, Deut. St. s. 124; Friedereich, p. 1069.

[i] W. & S. Med. Jur. § 495, 500; Friedereich, p. 1095; Gengle, ii. p. 30; Thomson, p. 489; Taylor, Med. Jur. p. 41; Puccinotti, p. 217.

[j] W. & S. Med. Jur. 506.

[k] Hitzig Zeitschrift, 1827, vol. i. p. 1–162.

cient for the physician to pronounce the existence of a poison belonging to a certain class, if he is unable to specify the particular kind employed.[l]

§ 839. In order to an exact discovery of the symptoms[m] as they occurred, it is essential that there should be an examination of the inmates of the house, particularly those who nursed the deceased, or were near him in his illness, while the attending physician should be called upon for an accurate report of the progress of the disease; and as the importance of many questions to be asked on this point can only be clear to a physician, it is important at the outset to obtain medical counsel, not only as to the direct point of poisoning, but as to the state of health of parties in the same family. This is particularly important in those cases where the same symptoms, shown by the deceased, are either felt or feigned by others.[n]

It rarely happens that some knowledge of the symptoms preceding death is not obtained, either directly or indirectly. 1st. The mode of invasion of the symptoms should be observed. Although arising suddenly, the symptoms do not necessarily follow *immediately* the ingestion of the poison. But when they have begun to manifest themselves, there is then a progressive development of them, and they present certain features which, combined, form a portrait by which they may be referred to some one class of the poisons, or some specific poison. 2d. The duration of the symptoms is another consideration, having important bearings. Although sudden death is not the result of the majority of poisons, or at least of such as are usually swallowed; yet death from an acute poison is an early result. However, no general rule can be laid down upon this matter.[o]

§ 840. In conducting the chemical analysis it will be necessary, 1. In exhuming the body, supposing it to have been already buried, to preserve portions of the soil in which it was laid, and of the earth immediately adjoining the body, that they be analyzed; since recent observations show that the soil is often impregnated with arsenic.[p] 2. To preserve the specimens to be analyzed, in such a manner as to protect them from all influences calculated to produce deception, so that no poison be introduced into them by accident or artifice. 3d. In transmitting them to the hands of adepts, to preserve a portion, which may be wanted for a subsequent analysis;[q] and to insure a careful transportation,[r] so that they reach the medical examiner without interference, with unbroken seal, and corresponding with the specimen to be given on the trial.[s]

With regard to the discovery of poison in the body, late researches have shown that many supposed indications of the presence of arsenic, as, for instance, tardy decomposition,[t] are not reliable, but afford some probability, if carefully examined.[u]

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[l] Hitzig, Zeitschrift, No. 18, p. 402; No. 20, p. 461; No. 21, p. 208.
[m] See W. & S. Med. Jur. § 499. [n] Mittermaier, Deut. St. s. 124.
[o] See Wh. & St. Med. Jur. § 499, 500.
[p] Devergie in the Annales d'Hygiène, No. 47, p. 165; Raspail, Mémoire, 69.
[q] Barse, Manuel, p. 161. [r] Errors in the Laffarge case, Raspail, p. 16.
[s] Errors in the Laffarge case, p. 50.
[t] Feuerbach, Interesting Cases, i. p. 8; Eggert, p. 346; Bopp. Crim. Beitraege, i. p. 8.
[u] W. & S. Med. Jur. § 573; Burdach, p. 33; Friedereich, p. 1107.

The symptoms occasioned by poisoning with arsenic do not always manifest themselves immediately; and this is particularly the case when the poison has been introduced into some article of food or drink, and taken at a meal. Still they may occur immediately.[v]

§ 841. In applying the veneficial test,[w] the present European practice is to analyze not only the substances found within and those ejected from the stomach, but also all the other parts of the body; this particularity resulting from the discovery that poisons, especially mineral ones, may also find their way into the so-called secondary courses of the body, and be there detected. Recent investigations, also, have shown it practicable,[x] by means of the hydrogen containing arsenic, and the dark spots produced by igniting the gas, to determine the presence of the poison.[y] In estimating the value of this test, it must be remembered, 1. That everything depends upon the observance of the highest degree of exactness. 2dly. That the solutions used by the chemists are often themselves impure. 3dly. That poison may have been introduced into the body by the medicines taken during the disease, which medicines should, therefore, be carefully examined;[z] or may have been introduced by other circumstances, as, for instance, the soil in which the corpse was laid,[a] since it has been shown that poison may be introduced into the body even after death.[b] 4thly. That the dark spots produced by the chemical test just mentioned, are liable to be confounded with similar ones, produced by antimony or other substances contained in the objects examined.[c]

§ 842. An exact report of the chemical analysis, and of all the proceedings of the professional examiners, is made necessary by the European practice;[d] and such a report, it cannot be too strongly urged, should in this county also be exacted. The report should be directed to the existence of the poison, its nature and quantity,[e] the objects in which it was discovered, whether in the stomach, in the evacuations, or in the food or medicines used; and the probability of its having been the cause of death. The fact of the homicide having been committed by poison, must be determined by the considerations: 1. That the failure to discover a poisonous substance in the body, does not establish the non-administration of the poison.[f] 2. That, on the other hand,

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[v] See Wh. & Stil. Med. Jur. § 573.

[w] Henke, Lehrb. s. 654-673; Meckel, Lehrb. s. 176-196; Huenfield die chemie der Rechtsflege, Berlin, 1832; Thomson, p. 502; Friedereich, Handb. p. 1124; Devergie, iii. p. 431.

[x] Marsh in Edinburgh Journal, Oct. 1836, cited in Annalen der Pharmacie, vol. 63, p. 702; Berzelius in Poggendorf's Annalen, vol. 42, p. 159; and Annalen der Staatsarzneik, by Schneider, vol. iv. No. 3, p. 133; Thomson, p. 551-3; Friedereich, Handb. p. 1146; Devergie, iii. p. 412-500; Visini, Beitrag. zur Criminalrechtwissenschaft, iv. p. 133; Taylor, p. 150; Guy, p. 158; and Taylor, 152, and 155; Devergie in the Annales d'Hygiène Légale, 1840, No. 47, p. 141.

[y] See fully W. & S. Med. Jur. § 592-602.

[z] Devergie in the Annales, No. 47, p. 176.

[a] Devergie, p. 163.

[b] Puccinotti, p. 248.

[c] Raspail, Mémoire, p. 111; Friedereich, Central Archiv. vol. i. p. 712; vol. ii. p. 235; Guy, For. Med. p. 460.

[d] Mittermaier, s. 124, &c.

[e] Meckel, Lehrb. p. 157 (note); Pfister Criminalfælle, ii. p. 112.

[f] See W. & S. Med. Jur. § 616.

the presence of poison in the food and other substances examined, affords no proof of the commission of the crime; since there is no certainty that the poison actually entered the body. 3. That even if the application of poison be established, it does not conclusively demonstrate that the patient died of the poison.[g] 4. In the case of poisons that leave no trace in the body, and are not to be detected by chemistry, it becomes necessary to ascertain the symptoms of disease and death, and the condition of the corpse, with the utmost precision. In the case of Castaing, Orfila declared that he could not determine whether the death of Auguste Ballet had been produced by natural causes or by vegetable poison. "The *corpus delicti* is wanting, because the matter vomited is not forthcoming. If that matter had been submitted to me, as well as the liquid contained in the stomach, I could have given the most satisfactory proofs. Two or three years ago it was a common error to suppose that certain vegetable poisons left no trace, exclusive of any other symptom of disease. That was even an axiom of legal medicine. At present, chemistry has made great progress, and it is almost as easy to discover vestiges of vegetable as of mineral poisons."[h]

§ 843. To constitute a case on which a conviction can safely rest, it is important to show that a poison has been discovered in the body;[i] and this was once carried so far in England and this country, that it was difficult to secure conviction for murder by poison, unless the presence of the poison was chemically ascertained. Where some imperfect evidence of symptoms of poison was the only testimony to prove the crime, and no analysis had been made of the stomach or bowels, and no motive for the perpetration of the crime appeared, it has been held that there was not sufficient evidence to authorize a conviction.[ii] It is true it was not absolutely required that the poison be found in the body;[j] though a case of conviction occurred in Scotland, where a servant girl had mixed some poisonous matter with gravy, and Dr. Christison was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce; though he said that this probability was strengthened by the fact that the violence of the symptoms was in proportion to the quantities of the suspected food taken.[k] More recently Taylor lays down the principle that while the chemical investigation should never be omitted, yet the detection of poison in the body by means of the chemical analysis is not essential;[l] but the offence will be sufficiently proved, if established by the concurrent evidence of the symptoms of the disease, the marks upon the body after death, and other similar inferential testimony.[m] Guy lays peculiar stress upon chemical investigations, and discovery of poison, if corroborated by other proofs derived from symptoms and marks upon the body.[n] In

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[g] Puccinotti, p. 250; Devergie, iii. p. 708; Mittermaier, Deut. St. s. 124.
[h] Celebrated Trials, p. 110.
[i] Devergie, Médecine Légale, i. p. 447; Helie, Theorie du Code Penal, vol. v. 341.
[ii] Ive *v.* State, 6 Florida, 591.
[j] See W. & S. Med. Jur. § 516.
[k] Wills' Circum. Ev. 180; see 33 Am. Jur. 1.
[l] See W. & S. Med. Jur. § 516.
[m] Taylor, 159.
[n] Guy's For. Med. iii. 404–407.

1856, however, in Palmer's case, it was judicially held that the detection of the poison in the body is not essential. In that case it was satisfactorily shown that in certain poisons (*e. g.* strychnia), when the minimum to destroy life is given, no trace may be discovered in the stomach or intestines.[o]

The presumption from the discovery of poison in the remains is strengthened where there is no possibility of the introduction of the poison after death;[p] where the symptoms of disease and death concur in establishing the death by poison; and where every doubt has been removed which might arise from the observation that the symptoms noticed were the results of other diseases, or that the poison detected by the analysis entered the body in another manner.[q]

§ 844. In cases of poisoning it becomes important to inquire, in seeking for the probable criminal, whether any party in the range of suspicion procured poison, particularly of the kind which probably proved fatal, shortly before the death of the deceased; whether such person was acquainted with the preparation of poisons; whether he forced himself into contact with the deceased, or, out of the sphere of his usual duties or habits, tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible.[r] There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dishes previously poisoned, particularly if it belonged to the usual meal of the family, or was a favorite dish of the deceased; whether there was any attempt to prevent others from partaking of such food; whether there was any effort to prevent a post-mortem examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels, containing them; whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased. In a case in which a number of persons are suddenly seized with similar symptoms of poisoning after a meal, or one or more of them remain exempt from them, this evidence will often not merely support the fact of poisoning, but also indicate its sources.[s] It is to be observed, in concluding this subject, that the more nearly the poison found in the body corresponds with that purchased or prepared by the prisoner, the more vivid does the suspicion become.[t] In poisoning it is necessary that the poison should have been procured, either in its rudimental or complete state. For this purpose it is admissible to show not only the possession of the fatal drug, but its purchase or the purchase of its component parts. Inquiries, also, as to the effect of that particular drug—possession of books in which the nature of poison is described—become pertinent; for,

[o] Wh. & St. Med. Jur. 2d ed. § 1110.

[p] Barse, Manuel, 265.

[q] Friedereich, 1186; Barse, Manuel, 167; Orfila, in Friedereich's Central Archiv. vol. ii. 495; Taylor, 141.

[r] See ante, § 712–731, et seq.

[s] See Wh. & Stil. Med. Jur. § 500.

[t] 2 Mittermaier, Deut. St. § 124.

unless the defendant is a scientific man, he must necessarily fortify himself with information before he attempts anything so hazardous as placing in the die both the life of another and of himself.[u]

IV. Materials appropriate to be converted into instruments of crime.

§ 845. At the earliest moment the situation and expression of the deceased should be ascertained and noted; as marks of anguish, of hurry, of disturbance, besides marks of violence, may all tend to so elucidate the question of suicide or homicide; and though our own method of trial would not make it just or decent to imitate the German practice of making a cast of the deceased's face, yet experience teaches us that the safety of human life requires that no details connected with the appearance of the body and countenance, when discovered, should be omitted. Thus, Mr. Amos, in his lectures,[v] tells us of a trial where the hypothesis of suicide was defeated by the fact, that while the united result of medical experience is that prussic acid produces *instantaneous* death, the deceased was found with a *corked* bottle in her hand, from which five drachms had been taken, and with the bedclothes composed about her person with elaborate precision.

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[u] See W. & Stil. Med. Jur. § 1154.

[v] 8 Lond. Med. Gazette, 578:—

"There are many ancient testimonies," says Mr. Amos (Great Oyer, 347), "to the existence of slow poisons, producing their fatal effects after intervals of weeks or months, as Plutarch, Theophrastus, Livy, Tacitus, and Aulus Gellius. In more modern times, the like powers have been attributed to the *Aqua Tophana* and the *Succession powder*. In 1659, the detection of a society of women at Rome, who had associated themselves for the purpose of poisoning, created great alarm. In the year 1670, the Marchioness Brinvilliers, who, among other victims, poisoned her own father and two brothers, created a like sensation in France. An Inquisition, called the Chambre Ardente, was established at Paris for the purpose of watching the use of poison. By means of this institution, two women who dealt largely in poisons, La Vagren and La Voison, were detected in 1680, and burnt alive.

"The most famous poisoner of modern times, was a woman at Naples of the name of Tophana, the inventress of the *Aqua Tophana*, which was administered in drops, proportioned to kill within any particular time that might be required. This woman, who fled from Naples in 1709, was visited as a curiosity at an asylum, in 1730. She is stated to have poisoned upwards of six hundred persons.

"These celebrated adepts at poisoning became famous after the time of Somerset's trial; but shortly before that period, Shakspeare's writings show the general notion, in England, of the efficacy of slow poisons:—

'Their great guilt,
Like poison given to work a great time after,
Now 'gins to bite the spirits.'

Tempest, Act III. s. 3.

"And the stories current in the reign of James I., of Catherine de Medicis, and of her perfumer, René, who had obtained the reputation of being able to convey poisons through a variety of vehicles, as a jelly, or the smell of a rose, had probably possessed the minds of the peers who tried Somerset, with a belief that slow poisoning was a craft which was taught and practised.

"In the present day it may be doubted if a medical man could indicate with certainty any poisonous preparation of which the effect should be fatal, but should nevertheless be suspended for two months, or even a week. And, perhaps, good scientific testimony could be produced, negativing the quality of being a slow poison to any of Franklin's drugs; unless, indeed, they be repeated in small doses for a considerable period of time."

§ 846. Many points of inquiry under this head have been suggested by a previous chapter, in which the presumptions drawn from extrinsic mechanical indications are considered.[w] Indications of such a character are always admissible, and the facts from which they are to be drawn should be carefully scrutinized by counsel, whether charged with the prosecution or defence of a supposed criminal.[x] Of these, familiar illustrations are leaves from which poison could be extracted, drugs peculiarly or exclusively suited for the purpose of adulterating food, &c., or receptacles inclosing anything of the kind, materials for preparing weapons, &c. It is to be inquired in such cases, for what use the accused was in the habit of making these materials, and whether he was familiar or acquainted with the criminal purpose to which they might be made subservient. Under this head also would properly be considered the purchase of poisons under the pretence of employing them for the destruction of vermin, and the question would naturally arise, were they so employed? A female convicted at the Warwick Summer Assizes, August, 1821, of the murder of her uncle by poison, alleged that she had bought arsenic to poison mice, and pointed to a mouse which she said had been killed by it, whereas it was found that the mouse had not died from poison.[y] Mr. Wills remarks, that "possession of the instruments or means of crime, under circumstances of suspicion—as of poison, coining instruments, combustible matters, picklock keys, dark lanterns, or other destructive or criminal weapons, instruments or materials, and many other acts of apparent preparation for the commission of an offence, are important facts in the judicial investigation of crime; though bare possession, or other mere acts of preparation, without more conclusive evidence, are not in themselves of great weight."[z]

V. Position of deceased.[a]

§ 847. The *position of the deceased*, and the appearance of the floor or bed on which a person murdered is found, should be considered in order to ascertain whether any peculiarity in the position of the body determines the homicide to be the act of another, as in a case just cited; whether the hands or feet are tied;[b] whether the floor, the bed, or the ground, present the appearance of a recent scuffle; what footsteps are noticed leading to or from the *locus in quo*,[c] together with their dimensions and other peculiarities, which should be carefully and immediately noted.[d]

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[w] See Ante, § 715–6–7, 728, 731–2–3.

[x] See W. & S. Med. Jur. § 1154.

[y] R. *v.* Mary Ann Higgins, London Med. Gaz. vol. ix. 896; Ann. Register, 1831.

[z] Wills on Circum. Evid. 46; see ante, § 731.

[a] See fully W. & S. Med. Jur. § 1155.

[b] See W. & S. Med. Jur. § 946, 1152, 1145.

[c] It is always admissible to put in evidence of footprints for the purpose of connecting the defendant with the guilty act. Campbell *v.* State, 23 Alab. 44; see post, § 858.

[d] W. & S. Med. Jur. § 810–16, 1146, 1152. The subject of identification of the defendant is examined more fully under a future head; post, § 858. Burnett's Crim. Law of Scotland, Trial of Richardson, p. 524.

VI. Traces of blood.

§ 848. *Traces of blood* near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries.[e] (1.) Were the wounds self-inflicted, or the act of another? This may in some cases be determined by observing that blood is visible in spots or pools in places where it could not have been if the death had been the result of suicide; or that there is no communication between the blood on the floor and the corpse; as if the body had been removed by another from the spot on which the deed was committed.[f] (2.) Was the deceased erect or lying down when the wounds were received? It will throw much light on this question if the spots of blood on the adjoining wall, or any other erect body near the locality be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. Prints of bloody hands may frequently be observed, and impressions of bloody feet which give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.[g] A young man in France was found dead in his bed, with three wounds in the front of his neck. The physician who was first called to see him, had unknowingly stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence of this was that suspicion was raised against a party, who narrowly escaped being committed to take trial for murder. It subsequently turned out to be a clear case of suicide.[h] The examination of spots supposed to be blood upon the person and clothes of the suspected party is always of the greatest importance; for although this is generally attempted to be explained away by attributing it to an accidental cut or bleeding at the nose, such excuses are commonly easy to disprove if it be satisfactorily ascertained that the spots are caused by blood.[i] On this subject the evidence of Dr. Wyman, in the Webster case, already referred to, is entitled to much weight.[j]

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[e] See fully W. & S. Med. Jur. § 821–831.

[f] State Trials, vol. xiv. p. 1324; Beck's Med. Juris. p. 543.

[g] Beck's Med. Juris. 786.

[h] Taylor's Med. Juris. vol. i. p. 372.

[i] W. & S. Med. Jur. § 820–3.

[j] "When blood exists, in large quantities, upon furniture, clothing, &c., a general inspection, with the aid of chemistry, will determine its presence with sufficient accuracy. It is, however, not unfrequently found in too small quantities for chemical analysis; and it has happened, that the statement of a police-officer, or other non-professional spectator, has been admitted as evidence that the stains in question were those of blood, when the bare announcement by a physician even, should be taken with the greatest caution. There are abundant instances in the treatises on medical jurisprudence, of unfounded charges and unjustifiable arrests having been made, in consequence of an error at the outset, as to the true nature of a stain assumed to be blood. It is therefore in the highest degree important, that examination should be conducted with the greatest care, and that another sign than color (which has been abundantly proved to be fallacious) should be obtained.

"Recently drawn blood, when placed under the microscope, is at once recognized by the presence of a vast number of flattened disks (commonly, though inaccurately de-

§ 848(*a*). Blood which has remained a long time, especially on metal instruments which have been exposed to the air, is not susceptible of detection.[k] Upon bright metals it can easily be distinguished, when freshly dried, from other spots, as of rust, &c., by the naked eye. If the blood spot is thin it will be of a light-red, if thick of a dark-red color. If heat is applied the blood scales will fall off, while rust remains unchanged. In examining fresh blood spots upon dark-colored wood of knife-handles, &c., an artificial light, as of a wax-candle, will often prove useful; the same is true of the microscope. If, however, the blood has been long dried, if it has been moistened and dried again, if it has been mingled with other substances, or if it has been rubbed or washed, as when on cloth, in these cases the corpuscles of blood will have been destroyed, and it will be impossible, even for an experienced microscopist with the best instrument, to distinguish blood spots from others similar.

§ 848(*b*). The following case in point is quoted by Dr Casper. Blood was found upon the shirt-sleeves of a man suspected of murder. The accused alleged that the blood was that of some animals which he had assisted in slaughtering. The shirt had been packed away in a small bundle for ten days, and thus the corpuscles of blood had been destroyed. The spots were examined with the most improved microscope, but it was impossible to determine whether the blood was that of a man or of a beast, so that the judge instructed the jury that this point must be held doubtful.

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signated as 'blood globules), of a red color, with a single central spot, interspersed among which may be seen, in far lesser numbers, compared with the disks themselves, rounded, colorless globules, containing each three or four central granules. These last are known to physiologists as 'lymph corpuscles,' or 'lymph globules' proper. If a drop of blood be dried on a piece of glass, painted wood, or other surface, and a small portion (a thin scale, scraped off with a knife, is the most desirable form) be placed under the microscope, and water added to it, it soon becomes softened, very slightly tinges the water around it with a pale reddish color, and becomes more or less transparent, according to its thickness. After a careful inspection, the observer will seldom be able to find any traces of blood-disks; but transparent, colorless spots will be seen scattered through the mass, which, with a high power (say 800 diameters), may be seen to have a globular form, and to contain granules—usually three or four. These are the lymph corpuscles. If a drop of blood be rubbed on a piece of glass, as, by drawing a bloody finger across it, so that the disks are deposited in a single layer, and then allowed to dry, they are readily recognized, even in the dried state; but when allowed to dry in masses, I have failed to determine their presence. The lymph globules, on the contrary, may be softened out, after they have been dried for months, and their characteristic marks readily obtained. I have examined blood which has been dried for six months, and have found it easy to detect them. It is not improbable that they may be detected after the lapse of years, if the blood shall have been preserved dry, so as to prevent decomposition.

"The evidence that the stains on the pantaloons and slippers of Professor Webster were of blood, was derived wholly from the microscope. And the presence of the lymph corpuscles, combined with the color, and other and less characteristic microscopic appearances of the blood, was the basis of the opinion given at the trial.

"While the presence of lymph corpuscles, combined with the ordinary and more obvious appearances of blood, is regarded as the diagnostic sign of blood, yet it should never be lost sight of, that it does not give an absolute sign that the blood is of the human body. The blood of some animals so closely resembles that of man, in its microscopic characters, that, as yet, no positive means exist by which they may be distinguished. The opinion that a stain of blood in question is human, or animal, must rest upon probabilities." (Statement by Professor Wyman, reported in Bemis' Webster case, 90, 91, note.)

[k] Casper, Gericht. Med. ed. 1857, p. 158.

§ 848(*c*). *Chemical Examination of Spots of Blood.*—The dried blood should be allowed to remain for some time in cold, distilled water, which should be occasionally poured off carefully from the fibrinous matter, until this is nearly free from color. The fibrin may then be distinctly recognized by the aid of a microscope. The bloody solution which remains from this process may now be tested with chemical agents. If chlorine water is added in such quantity as to impart its peculiar odor, the solution will change its color, and white flakes will appear, which usually rise to the surface. Three parts of nitric acid to one of the solution will give a whitish-gray precipitate, and four parts of tincture of galls to one of the solution will give a light violet precipitate. If a portion of the solution is heated to boiling, coagulations of a dirty-red color will appear, varying in quantity according to the strength of the solution; where the solution is very weak, it is often the case that only opalescence will occur. The coagulation is easily dissolved in a heated solution of potassa, in which case the color of the solution is greenish, as seen when held up to the light, but with the light falling upon it, appears red. Where there is only a small quantity of the bloody solution, all of these tests, of course, cannot be applied. In this case it is advised to boil the solution and treat with hydrate of potassa. After this test has been applied, the alkaline fluid resulting may again be tested with chlorine water, or with nitric acid. It is important to notice the test for blood upon metallic iron. Vauquelin first observed that rust, formed upon house utensils, &c., of metallic iron, contains ammonia. Hence in examining iron rust for blood it is not a suspicious circumstance that ammonia is developed. Where blood is really present, a more intense heat will produce that peculiar smell which arises from burning the white of an egg, and a brown, offensive empyreumatic oil will be seen upon the heated portion of the vessel used. A still more decisive test is the following: Melting a small quantity of the slightly heated iron-rust, with an equal volume of potassium or sodium, in a very small glass tube closed at one end. Treat the mass when cold, with water; mix with the filtered solution a small quantity of a solution of iron which contains both protoxide and sesquioxide, and saturate the whole with some acid. If blood is present, a greater or less quantity of Prussian blue will be developed, which may appear green if the added solution be in excess.

§ 848(*d*). The corpuscles of human blood are shaped like flattened disks, containing red coloring matter, and measure about 0.0033 of an inch in breadth, and 0.00062 in thickness. The annexed figure shows a drop of fresh clotted blood, as it appears under the microscope. The reticulated clotted fibrin is seen between the different corpuscles.[a] Many corpuscles appear like disks with a dark spot in the centre, which was formerly supposed to be a nucleus. The corpuscles are seen to be quite round, or, where they stand on edge, somewhat oblong. They have a strong tendency, when turned, to stand on edge, and cleave together like a roll. Some corpuscles are quite colorless and resemble pus corpuscles. If the red corpuscles of the blood

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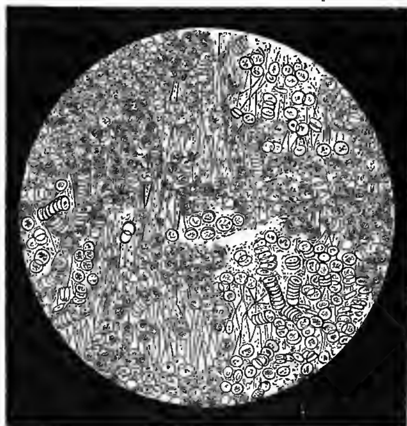
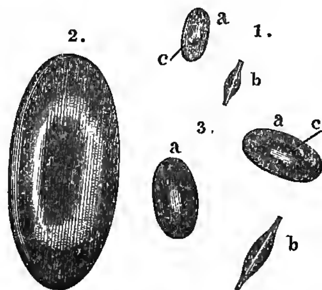
[a] See Böcker, Gericht. Med. § 165.

are exposed for any length of time to the air, or certain other agencies, as acids, water, &c., they are very much changed and distorted, even where they do not lose their color. In water they generally become colorless, but the membranes are not dissolved; and if they disappear, may be rendered visible by applying a solution of iodine. Gallic or other vegetable acids, chlorine water, sulphuric ether, and chloroform produce similar effects to those of water. These corpuscles may be well preserved in sugar-water (1 part of sugar to 4 of water), but not so well in a solution of common salt. They are dissolved by caustic alkalies. Concentrated mineral acids, as sulphuric and muriatic acids, dissolve them partially; while weaker solutions change, and, to some extent, destroy them.



§ 848(*e*). Amphibious animals have large elliptical corpuscles. The camel, the lama, birds, and the majority of fishes have small elliptical corpuscles. Cartilaginous fishes, man, and most mammalia have round corpuscles.



In the annexed figure, No. 1 shows blood-cells of the pigeon, *a*, from the surface, *b*, from the side; No. 2, blood-cells of the salamander; No. 3, of the frog, *a*, from the surface, *b*, from the side, and *ac*, as discolored by water; *c* shows the nucleus, which in the salamander is quite large.

§ 848(*f*). Fresh blood smells like the effluvium of the animals to which it belongs, and may be recognized in this way as well as by other marks. It is often the case that when blood comes from the mouth or stomach, through the anus, &c., it is mingled with mucus and other fluids which may change the form of the corpuscles or quite dissolve them. The corpuscle becomes very much distorted within from twelve to twenty-four hours after the blood leaves the living body, and the round form is only retained where the blood has dried in very thin layers.[b]

§ 848(*g*). *Examination of pieces of clothing, &c.*—Where the cloth alleged to contain blood spots happens to be a piece of white cotton or linen, it should be treated with cold, distilled water, in order to draw out the

[b] See Böcker's Gericht. Med. § 165.

coloring matter.[c] The solution can then be tested with chlorine water, nitric acid, or gallic acid, as explained above. Where the cloth is of some colored material; the dried blood must be scraped off as carefully as possible, placed in a small vessel and dissolved in cold water. The same tests apply in this case as in the above. Morin, professor of chemistry in Rouen, suggests the following, in case the cloth has been washed in hot water or with soap. The spots should first be treated with a weak solution of pure potassa. If, then, nitric or chloric acid be added a white precipitate will be given, whereby one or more of the constituents of blood will be indicated. The coloring matter, which has not been affected by the alkaline treatment, may now be extracted by means of pure chloric acid water, and this solution tested with ferrocyanide of potassa; whereby the iron of the blood will be shown. These two facts, the presence of iron and of protein, warrant, according to Morin, the conclusion that the spots are of blood. Another method is suggested by Wiehr. Let a small piece of the cloth, provided it contains no wool, be charred in a porcelain crucible, until it may be rubbed into a powder; mix this powder with some carbonate of potassa, and heat the mass red hot. Treat now with distilled water, and add to the filtered solution a small quantity of a solution of a salt of the magnetic oxide and of the sesquioxide of iron. A precipitate of uncertain color will result, and the presence of magnetic cyanide[d] of iron be indicated. If, now, some weak sulphuric acid be added, the magnetic oxide of iron and the sesquioxide will be dissolved, and the insoluble magnetic cyanide of iron, with its pure blue color, will appear.

VII. Liability of deceased to attack.

§ 849. This may arise from three different causes :—

1st. The possession of money or valuable articles.

2d. An old grudge, or other cause, such as a previous quarrel; or

3d. Jealousy.

In the first of these cases[k] the question should be asked, was the fact that the deceased was in the possession of money, particularly if the amount be considerable, known to any one; and if so, to whom; was the money found on the corpse or was it missing; is there evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum;[l] paid long standing and pressing debts of considerable amounts, or remarkably increased his expenditures? Peddlers, especially itinerant venders of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire, in cases of this description, who was last seen in company with the deceased, or who was seen with any of the articles known to have been in the deceased's possession.[m]

§ 850. Where the absence of other motive makes it probable that the

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[c] Casper, Gericht. Med. ed. 1857, p. 215.

[d] *Sic in orig.* The compound referred to is P. blue, $Fe4Cfy_3$.

[k] See W. & S. Med. Jur. § 1146.

[l] See ante, § 728-9.

[m] Wills on Circum. Evid. 237-243.

cause was an old grudge, or jealousy, the inquiry then arises, with whom the deceased has had a recent or violent quarrel, or who, from any other relation or action of the deceased towards him, would probably be tempted to seek the death of his real or supposed enemy; and who has harbored feelings of jealousy, or who has had cause to harbor such feelings.[n] In connection with this, evidence is always admissible[o] of threats and declarations of intention, as well as of quarrels and coolnesses;[p] and it is expedient, therefore, to consider who has used such declarations, and what has been their character.

§ 851. In England and this country, "jealousy" is a motive which, in cases of homicide, is but rare, when compared with those arising from the relation of debtor and creditor. When a homicide takes place, where mercenary motives may be supposed to have operated, it is necessary to inquire whether there were any debtors of the deceased, in sums which they were unable to pay; and whether their dealings with their creditor had been marked with such urgency on his part, and embarrassment on theirs, as to make his death an object to them of relief. Mr. Attorney General Clifford, in his speech in the Webster case, says in illustration: "Take the case of Colt, in New York, for the murder of Adams; there was an indebtedness, and the victim was beguiled by an appointment into the place of business of his murderer, and slain for the debt; or in the case in New Jersey, of Robinson, who killed his creditor, Mr. Suydam, and concealed his remains in his cellar, and who, by a strange concurrence of circumstances, was detected, tried, and convicted, and then confessed and was executed."[q]

§ 852. The Webster trial itself furnishes many suggestions which, in this class of cases, should be pursued. Was the defendant at the time desperately insolvent? Was his social position such as to make *appearances* of great moment; and had he been in the habit of playing at heavy odds to keep them up? Were the evidences of debt of a character which, if carried on the person, could have been easily destroyed; and was there any attempt to induce the deceased to bring them with him to the spot appointed for the interview? What, in other words, were the probabilities of the debt being cancelled by the death? for upon this the question of *intention* would depend. Should it be shown that the debt was one of record, the presumption would be much more in favor of manslaughter, arising from sudden irritability on being pressed with the debt, than it would be should it appear that the deceased had the sole evidences of debt on his person; that he had been invited to bring them, and that they were afterwards destroyed. All this is evidence, and so are those circumstances from which a countervailing presumption could be drawn, such as the fact that the deceased had independent securities for the debt, on which the defendant was liable, or that the defendant's circumstances were not such as to render the discharge of the debt of paramount importance.

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[n] See W. & S. Med. Jur. § 1150.

[o] See ante, § 631-5, 725, 727.

[p] People *v.* Hendrickson, 1 Harris C. C. 406.

[q] Bemis' Webster case, 421.

CHAPTER III.

PREPARATION OF EVIDENCE IN LARCENY, EMBEZZLEMENT, BURGLARY, ETC.

§ 853. In cases of suspected larceny where the circumstances are not such as to preclude all doubt, the first inquiry must be, whether the theft was morally possible;[a] whether the prosecutor actually possessed the articles alleged to be stolen, and whether the act could have been committed in the manner stated; and where violence is alleged, whether it was real or pretended; for it requires but little experience with a criminal calendar to see that the motives are numerous which lead to false accusations of larceny.[b] Immediately after the larceny is discovered, the practice of the civilians—a practice that should be followed in this country—is to file with the public prosecutor a minute description of the articles stolen; and as soon as any thing is found which answers to the description,[c] it must be submitted to the complainant for identification. Great caution should be exercised on this point, particularly where the articles are of a kind, the individuals of which are not easily discernible, as, for instance, grain or potatoes. An illustration of the importance of an exact investigation of the property supposed to be stolen is given by Mr. Amos,[d] in a case, where, after a girl swore positively to a certain gown, in the defendant's possession, being her own, she was sportively asked by one of the jurymen to try it on, which she did, and to her own surprise, as well as that of the whole court, found that "it did not fit," and that she was entirely mistaken.

§ 854. An inspection of the premises is important to a correct estimate of the possibility of a burglary, and the manner of its commission. In order to draw a correct inference as to the degree of activity of the criminal, or of his manner of access, there should be at once a careful inspection of all the local features which may throw any light on the means by which the entrance could have been effected. Thus, the dimensions of an aperture by which the supposed depredator entered, should be carefully noted, and it may be necessary to break off the locks which were forced and retain them for the purposes of trial. It is equally desirable to ascertain the probable time at which the crime was committed, for the purpose of determining the identity of the offence.

§ 855. Where property has been taken *lucri causa*, it is of course of primary importance to ascertain whether there are any circumstance tending to fasten guilty agency on the party with whom they are found. The posses-

[a] 2 Mittermaier, Deut. St. sec. 126.
[b] Tittman, iii. 338
[c] Pfister Criminalfælle, s. 531.
[d] Great Oyer, &c., 266.

sion of the stolen property, as has already been seen, is in itself a strong presumption of guilt,[e] though this applies only when the possession is of a kind which shows that the stolen goods have come to the possessor by his own act, or at all events with his undoubted concurrence.[f] Where, however, property is stolen, and the person accused of the offence, shortly after its commission, points out the place where it is concealed, he must be considered the thief unless he can reconcile his knowledge with his innocence.[g]

§ 856. It is important, also, to ascertain whether there has been any suspicious concealment of the stolen articles.[h] It should be inquired who is in communication with the thieves or robbers as accessary or receiver; and in case of robbery accompanied by force, who was seen with the necessary instruments, or with those corresponding to the tools probably employed; and when the property stolen is large, whether any suspected party suddenly indulged in expenditures, disproportionate to his known income and habits of life. With respect to the instruments employed, on the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements, found together in the possession of the defendant, at the time of his arrest, may be brought into court and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question.[i] In a case of burglary, where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner, and was held proper evidence. And so, evidence was received to trace the implements with which the burglary had been committed, to the defendant's home.[j] These, and similar illustrations go to indicate the importance of vigilant scrutiny, not only into the circumstances of the party accused, but into the machinery with which the offence was perpetrated, and his capacity and experience for employing them.

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[e] See ante, § 728; and see Com. *v.* Hope, 22 Pick. 1; State *v.* Weston, 9 Conn. 527; State *v.* Brewster, 7 Ver. R. 118; State *v.* Adams, 1 Haywood, 463; Hudson *v.* State, 9 Yerg. 408; State *v.* Benth, 3 Brevard, 514.

[f] State *v.* Smith, 2 Iredell, 402. Thus, where the defendant, Scipio Smith, and two of his sons who lived with him, were indicted for stealing tobacco, and the tobacco, which had been stolen in the night, was found the next day in an outhouse of Scipio's, occupied by one of his negroes, and in which Scipio kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proven to be the tobacco that had been stolen—it was held that it was an error in the judge to charge the jury "that the possession of the stolen tobacco thus found on Scipio Smith, raised, in law, a strong presumption of his guilt." And see ante, § 728, and post, § 888, &c.

[g] Hudson *v.* State, 9 Yerger, 408.

[h] State *v.* Bruce, 11 Shep. 71. Strong evidence, showing concealment, is clearly admissible. Thus, on the trial of an indictment for having obtained the property of another by threats, evidence that the same property was discovered, in a concealed state, in the house of the prisoner, is admissible, as going to show that the prisoner was conscious of having obtained it improperly. Ibid.

[i] Com. *v.* Williams, 2 Cushing, 582, 583.

[j] People *v.* Larned, 3 Selden (N. Y.) 445.

CHAPTER IV.

PREPARATION OF EVIDENCE IN ARSON.

§ 857. In investigations of arson, it becomes necessary carefully to inspect the site of the building or buildings with regard to the distance intervening between it and other buildings, to the danger to which other buildings were exposed by the fire, and to collateral circumstances tending to show whether it originated in accident, in the carelessness of the inmates, in the crime of a stranger, or in the design of the owner, or of the owner of an adjacent building to defraud the party by whom the house was insured. In connection with the first point it is necessary to ascertain whether the building or the articles it contained were insured against fire; whether the amount for which they were insured was remarkably high, and whether articles of value were removed from the house shortly before the occurrence. Here it is important to discover where the fire first broke out, whether at one or several places, and who had access to such places. It is of course desirable to ascertain the time of the first appearance of the flames (in case the defendant should endeavor to prove an alibi), and, when the attempt is abortive, the extent to which the fire proceeded; on which account it will often be well to preserve some of the movable articles which have been singed or charred, for the information of the court; and in many cases it will also be advisable to learn from adepts how the injury could have taken place. A map or plot of the building should always be prepared. Particular care is required in determining whether the fire was not brought about by the spontaneous combustion of certain contiguous substances, liable to ignite by being brought into contact.[a] It must also be ascertained whether the offence was perpetrated by people out of the house, or by the inmates, and in the latter case, whether with a felonious intent. The probable motives of the crime, the question whether any one tried to obtain possession of inflammatory substances or was seen with them at the *locus in quo*, the precise spot where the fire broke out, and who had access to it, and whether articles contained in the house are found upon the suspected person,[b] should be also investigated.

It must be satisfactorily ascertained that the fire was the result of design,

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[a] Annales d'Hygiène Lég. 1841, Avril, p. 309; Mittermaier, Deut. St. sec. 126.

[b] Thus, upon the trial of an indictment for arson, evidence was held admissible, to show that the prisoner had in his possession bank notes similar to those stolen from the house where the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them; and it was held, that an instruction to the jury that these contradictions were evidence to prove that he did not come honestly by them, was not erroneous. State *v.* Gillis, 4 Dev. 606.

and for this purpose evidence should be secured of the character already mentioned under previous heads, throwing light upon the question of intention.[c]

CHAPTER V.

IDENTIFICATION OF OFFENDER.

I. FACTS LEADING TO THE SUPPOSITION THAT A PARTICULAR PERSON WAS THE CRIMINAL, § 860.
II. FACTS CONCERNING THE EFFECTS OF THE CRIME, § 861.
III. FACTS CONCERNING THE CONDITIONS OF THE CRIME, § 862.

§ 858. WHEN the person of the accused is not designated by his own confession, or by the distinct testimony of witnesses, the prosecuting officer, besides carefully examining the facts *prima facie* manifest, must seek some clue to ascertain how far there is sufficient ground of suspicion against an individual to warrant an arrest. This clue must consist of circumstances indicating a connection between a person and the crime committed, leading to the conclusion that the party took part in the commission of the crime in question. Such indications consist not merely in accidental circumstances connected with the crime, as, the weapons used and found by the side of the corpse, but also, as has been seen, in independent antecedent facts, the relative position of the party, and when malicious injury is inflicted, the existence of previous malice.

§ 859. In the indications which tend to direct suspicion against a person, there is a distinction between those which are important for the information of the prosecuting officer, and those which authorize him in taking steps for an inquest. The former class, which would authorize him to make inquiries, to cause a person to be closely watched, or even examined without a formal charge, comprise those derived from facts, which, without having a par-

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[c] Thus, where A. was charged with wilfully setting fire to a rick, by firing a gun close to it, on the 29th of March, it was held, that evidence that the rick was also on fire on the 28th of March, and that the prisoner was then close to it, having a gun in his hand, is receivable, to show that the fire on the 29th was not accidental; (R. *v.* Dosset, 2 Car. & Kir. 305.) At the Warwick Spring Assizes, 1818, Rebecca Hodges was convicted of the crime of arson. The prisoner had been met near the ricks which were set on fire, about two hours after midnight. A part of the combustible matter employed, consisted of a piece of unburnt cotton rag, found in a tinder-box near the spot, and a piece of a woman's neckerchief, found in one of the ricks where the fire had been extinguished. It was deposed, that the piece of cotton in the tinder-box was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box. A half neckerchief was taken from the prisoner's bundle, and from the color, pattern, and fabric, it was proved that the piece found in the stack, and that found in the prisoner's box, had belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description are generally sewed with cotton), the witness clearly inferred that they were the work of the same person. Wills on Circum. Evid. p. 95, 96, and Report of the Trial.

ticular reference to the special crime committed, tend to show an inclination to the perpetration of offences, such as the one under consideration. While it is clear such tendencies or inclinations are inadmissible on trial before a court and jury,[a] it is proper that they should become the subject of investigation, not only for the purposes of the general policy of an arrest, but to enable the prosecution, should character be put in evidence by the defence, properly to rebut it. It will simplify the search after these indications, for the officer to inquire :—

I. WHAT FACTS LEAD TO THE SUPPOSITION THAT A PARTICULAR PERSON WAS THE CRIMINAL.

II. WHAT FACTS CONCERN THE EFFECTS OF THE CRIME.

III. WHAT FACTS APPEAR AS NECESSARY CONDITIONS OF THE PERPETRATION, AND APPLY TO A PARTICULAR PERSON.[b]

§ 860. Indications falling under the first subdivisions are: 1st. *The particular interest a person has in the perpetration of the act, by reason of the advantages accruing to him from the crime*, as, where the accused was the heir at law of the deceased, and in impoverished circumstances, or where he had previously secured a will in which he was legatee, or where certain articles, especially documents, are stolen, which are only valuable to a particular person. 2d. *Threats previously uttered of the crime subsequently committed, or a similar one.*[c] 3d. *Preparations made for the act, by procuring or fitting for use the necessary instruments; by narrow inquiries into circumstances; e. g.*, the road which the deceased was expected to take, the knowledge of which was indispensable, or greatly auxiliary to the execution of the purpose, by practice in the arts by which the deed must have been done, or by repeated attempts to imitate handwriting, in cases of forgery, or by repeated practice with fire-arms or other murderous weapons, in cases of homicide, or by preparatory arrangements to commit the crime or to escape detection, as by alluring a person to a distant place where a murder or robbery could be committed.[d]

§ 861. II. Among the most significant effects of the crime are: (1) marks on the person which may be accounted for by the commission of, or participation in the crime, as stains of blood on his clothes, or wounds given by the victim in self-defence, as, for instance, where the wounded man says he bit his assailant in the arm, and the arm is found to have been bitten, and where the prosecutor struck the robber on the face with a key, and the mark of the wards was afterwards identified there;[e] (2) the possession of the articles known to have been removed when the act was perpetrated, especially where their possession is attended with peculiar care or anxiety in hiding or

[a] See ante, § 640, 824, 847; and also W. & S. Med. Jur. Book vii.

[b] For the general outline of this chapter, see Mittermaier, Deut. St. sec. 128; and see also W. & S. Med. Jur. Book vii.

[c] Ante, § 727; see Moore *v.* State, 2 Ohio St. Rep. (N. S.) 500.

[d] See ante, § 725.

[e] Best on Presumption, 297; Campbell *v.* State, 23 Ala. 44.

keeping them, or with uneasiness in the behavior of the possessor, as, for instance, an endeavor to sell the article at any price; (3) intentional removal or destruction of the trace of the crime at particular places;[f] (4) anxious inquiries into the crime, and the judicial measures against the guilty party, or into the current of suspicions; (5) disclosures of circumstances which could be known only to one acquainted with the particulars of the crime, especially, boasts of the commission of the deed; (6) attempts to compound the matter with the injured party, or to remove suspicion, or to mislead those occupied with the investigation; (7) uneasy deportment, justifying the supposition of a guilty conscience; (8) flight, to which no proper or reasonable motive can be assigned;[g] (9) similarity of handwriting.[h]

§ 862. III. The indications derived from the conditions of the crime are such as (1) presence of the accused at the place at the probable time that the deed was committed; (2) discovery at the *locus in quo* of articles known to have belonged to the accused shortly before; (3) footsteps leading from the place to the dwelling of the party, and which correspond in dimensions with his shoes;[i] (4) the fact of a person being found in possession of instruments particularly serviceable in executing the design in question; (5) particular qualifications, experience, skill, pre-eminently adapted for the undertaking or perfect acquaintance with the localities.[ii]

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[f] See ante, § 722. [g] See ante, § 714. [h] Post, § 865.

[i] Campbell *v.* State, 23 Alab. 44.

[ii] *The instinct of animals* may sometimes be brought into play in aid of other testimony. Of this we have a very remarkable instance in a case tried in the Circuit Court at Raleigh, in the Twelfth Civil District of Shelby County, Tennessee, in 1852. The defendant, William Peterson, was charged with the murder of Thomas Merriweather, a young planter of Mississippi. The evidence, which was entirely circumstantial, pointed to the assassination of the deceased on a road leading from Memphis to Hernando, in the latter part of the spring of 1851. The defendant was arrested, indicted, and brought to trial. It appeared that the deceased left his home in the spring of 1851, to traverse Arkansas in search of a new home. The horse upon which the journey was to be performed, was a dark blood-bay of remarkable beauty and sagacity, and of wonderful affection for his master, whom he was in the habit of following whenever he approached him. Several months after the prisoner had been committed to jail under indictment, William Merriweather, the brother of the deceased, accompanied by a number of gentlemen, witnesses in the case, came up from their homes in Mississippi to attend the trial. William Merriweather was riding the horse of his deceased brother. Their journey lay along the Hernando road, and by the spot where the body had been found. About one or two hundred yards before the party reached the scene of the murder, the horse upon which William Merriweather was mounted began to exhibit symptoms of alarm and excitement, which, considering his ordinarily gentle and tractable character, much surprised his rider and the gentlemen who were with him. There was no apparent cause of alarm, and the several other horses of the party betrayed none. His agitation increased as the party approached the fatal spot; and when they had reached a point in the road opposite to it, the excitement of the horse arose to so furious a pitch, that he became almost unmanageable. The whole party checked their horses, and for a moment regarded his conduct with profound astonishment. His flesh quivering—his nostrils distended—his eye glancing into the wood where his master had met his fate—he stood for a moment snorting and neighing. One of the party suggested to Mr. Merriweather to give him the rein. This was done, and instantly the noble animal rushed into the wood, and down to the identical tree under which the body had been found, and commenced pawing violently at its root. After a moment he trotted off some distance, and after making a semicircle in his course, returned to the spot, and there stood neighing, trembling, and pawing, until he was forced away. Similar exhibitions were made by the horse several times afterwards in passing the spot. It was in a great measure by these means that the

It is important to consider the manner of the deed, in order to ascertain what motives could have been at work, and thus to find a clue to the probable detection of the criminal. The place where the crime was committed should be carefully inspected in order to ascertain *how* it was committed, who had access to it, and what were the means, possibilities and directions of escape from it. Everything found at the place, and which probably came there because of the crime, must be taken in evidence with the view to obtaining a clue to the mystery. "The persons, also, who were on the spot," says Mittermaier, "or neighbors who heard a noise at a particular time, must always be interrogated in search of proof. Much is often gained by cautiously putting to witnesses the general question, who is likely to have committed the crime? The examination of the articles stolen is highly important, inasmuch as by directing attention to them, very useful hints may be gathered."[j]

§ 863. It does not follow, that because the identity of the defendant is maintained by direct testimony, it is to be the less zealously scrutinized. It has already been observed, that a well-wrought chain of circumstantial, or, as the civilians term it, *indicatory* testimony, is more safe than that which is called *direct*,[k] when the latter hangs upon the oath of a single witness; and in most of the cases of contested identity, the evidence has been of the latter class. An attempt to procure a false conviction is almost always executed by a plump oath to the point; and an honest mistake is oftener made in the substantive individuality of the accused, than in the independent indications by which that individuality can be determined. Thus, Mr. Amos[l] tells us, that a woman, on a trial for burglary, in which her house and person had been plundered, swore directly to the prisoner being the offender; but when the verdict of guilty was almost rendered, upon the sheriff suggesting that a man tried a day or two before had very much the same appearance, the latter was brought into court, and the prosecutrix immediately transferred her "conviction" from the one to the other.[m] In a leading case in Boston, however,

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question of the spot where the struggle took place, on which hung the question of jurisdiction, was settled.

[j] Mittermaier, Deut. St. § 128.

[k] See ante, § 732–745.

[l] "Great Oyer," &c. 265.

[m] See Amos's Great Oyer, 266; Howell's St. Tr. vol. xxviii.; Gentlemen's Mag. Oct. 1772; Ibid. 1754, p. 404; Ibid. 1749, pp. 139, 185, 261; Chambers' Miscel. vol. iv.; Lond. Med. Gazette, vol. viii.; Salome Muller's case, Pamp. N. Orleans, 1846. In the last case, which was very extraordinary, the facts are thus stated by the Supreme Court of Louisiana:—

"The proof in the record of the complexion of the plaintiff is very strong. Not only is there no evidence of her having descended from a slave mother, or even of a mother of the African race, but no witness has ventured a positive opinion, from inspection, that she is of that race. She is evidently a brunette. Gen. Lewis, one of the most intelligent and candid witnesses on the part of the defendant, who had known her long, says she is white as most persons, but he says he has seen slaves as bright as the plaintiff. He adds, that he always thought she had something resembling the colored race in her features, but it may have been induced by the fact that he has always seen her associated with persons of color. He also testifies to her resemblance to another female then in open court, shown to be a German and kinswoman of the lost daughter of Daniel and Dorothea Muller.

"Being satisfied that the presumption is clearly in favor of the plaintiff, it is next proper to inquire how far that presumption has been weakened, or fortified, or repelled by the testimony of numerous witnesses in the record.

it was held that after evidence has been introduced by the defendant in a trial for murder, that the person alleged to have been murdered was seen alive afterwards, the government cannot call witnesses to prove that, about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood where the murder was alleged to have taken place.[n]

The subject of the identifications of individuals, for the purpose of determining the validity of claims made on their behalf is fully considered in another work.[o]

CHAPTER VI.

FORGERY AND COUNTERFEITING.

§ 864. WHEN forgery is charged, it is proper that the writings which are the subject of the prosecution should be immediately placed under the custody of the court, or of a public officer, so as to exclude the hypothesis of their having been tampered with between arrest and trial. Before any time

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"If a number of witnesses had sworn that the plaintiff is, in their opinion, the daughter of a particular colored person who was a slave, or reputed such, and an equal number of witnesses had testified to their belief that she is identical with a child who arrived here with her family from Germany more than a quarter of a century ago, so far as her age and other particulars could be ascertained after that lapse of time, and judging from color and family resemblance, we might hesitate in coming to a conclusion who the plaintiff is, whether she be in fact the child so long lost sight of, or a slave. Those who maintain the hypothesis of her slavery, throw no light upon her origin or her birth. She is first known in the condition of a slave at the age of nine years, separate from her mother, left for sale by a stranger who has not since been heard of, and first sold as a slave, for aught that appears in the record, by the defendant's warrantor, John F. Miller, acting as the agent of this stranger. Her own statements on the subject, so far as they are of any value, while they show that she did not seek this controversy, and was apparently contented with her condition, make no allusion to her parentage, unless it be to the Indian race, and when she alluded to the fact of having come over the lake, or of being sold by a negro trader, it is impossible to say whether she alludes faintly, as a dim remembrance, to her voyage over the Atlantic, or to her being brought here from Mobile. On the contrary, those who maintain the position that the plaintiff is the person she assumes to be, and is free, have something more positive and certain. It is shown beyond all controversy, that a child having that name and about the same age, arrived here from Germany in 1818, with her father, a brother and a sister; that her mother died at sea, her father and brother not long after her arrival, and that the two daughters disappeared; that after a lapse of more than twenty years, the plaintiff was discovered by a German woman by the name of Carl, who died before the trial, and was recognized by her relatives as the same lost child. Numerous witnesses swore positively to their undoubting conviction of her identity. But the proof does not stop at mere family resemblances and recognitions. It is shown by evidence which is not impeached, that the lost child had certain natural marks or moles on the inside of her thighs. The plaintiff was examined by eminent members of the medical profession, who certify to the existence of precisely such congenital marks upon her person, and that it is impossible they could be produced by any known means."

[n] Com. *v.* Webster, 5 Cush. 295.

[o] See W. & S. Med. Jur. § 473–490. Ibid. Book VII.

elapses, experts should be consulted[a] as to opinions based either on a comparison of handwritings,[b] or on chemical tests.

Where the charge is coining, it would be imprudent to go to trial without every effort to obtain possession of the instruments supposed to have been employed by the accused; and where there are doubts as to the full weight, genuineness and purity of the coin, the opinion of the proper officer of the mint should be taken. Of like importance is the inquiry into the extent and means of the circulation, the amount circulated, as well as the discovery of the contrivances employed in the coinage, by which it is to be discovered whether the coins were stamped or cast, and whether the process was such as to admit of operations on a larger scale.[c]

I. SIMILITUDE OF HANDS, § 865.
II. CHEMICAL TESTS, § 867.
III. CIRCUMJACENT TESTS, § 868.
IV. PROOF THAT THE PAPER WAS WRITTEN BY A THIRD PARTY, § 870.

I. Similitude of hands.[d]

§ 865. The first question of importance in establishing the charge of forgery against a particular person is that arising from the comparison of handwriting. Did the accused *write* the instrument alleged to have been forged? Whether handwriting can be identified or not by comparison is a much debated question. Mr. Best remarks, "that judgment in cases of identity of handwriting may be formed by one of three methods: 1st. A standard of the general character of the handwriting of any person may be formed in the mind by having on former occasions observed the letters traced by him in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. 2dly. A person who has never seen the supposed author of a document write, may obtain a like standard by means either of having carried on a written correspondence with him, or having had other opportunities of observing writing which there is reasonable ground for presuming to be his. 3dly. A judgment as to the genuineness of the handwriting of a document may be formed by a comparison instituted between it and other documents known or admitted to be of the handwriting of the party." This last method is that commonly made use of in the employment of experts. It is to be observed that tuition by the same preceptor, employment in the same place of business, as well as designed imitation, are often causes of great similarity in writing. Men in certain professions sometimes adopt peculiarities of character; and there are peculiarities indicative of age, infirmity, and sex.[e]

Handwriting is sometimes very successfully imitated. In the trial of

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[a] Devergie, Méd. Lég. ii. p. 174.
[b] Duverger Manual, ii. 471; see post, § 1462–3–4.
[c] 2 Mittermaier, Deut. St. sec. 126; ante, § 715.
[d] See on this point, post, § 1462.
[e] Trial of Rev. Robt. Bingham, 1811; R. *v.* Johnson, State Trials, vol. xxix. p. 81; ante, § 862.

Carsewell at Glasgow, in May, 1791, for the forgery of bank notes, one of the banker's clerks, whose name was on the forged note, swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription.[f] It sometimes becomes necessary to determine whether or not an attempt has been made to write a *disguised* hand. On this point the evidence of Mr. Gould in the Webster case is entitled to much consideration. He says, "In all the practice that I have ever had in writing, I have never been able to satisfy myself that I could make two letters precisely alike; so perfectly similar as to correspond throughout, if placed one upon the other. And yet, I never saw two handwritings that I could not distinguish. There is some peculiarity in every one's writing which enables a person to identify it; and it is next to impossible to get rid of that peculiarity, when the attempt is made to disguise it. Every man who undertakes to disguise his hand, must do it either by *carelessness* or *carefulness*; by *carelessly* letting his hand play entirely loose as in mere flourishing, or, by *carefully* guarding every stroke which he makes, in order to prevent its being seen to be his. In this latter mode it is next to impossible for any person to continue his observation for any great length of time, or through any considerable amount of writing, without making some of those letters which are peculiar to himself, or making them in that peculiar manner which he has been accustomed to do. Frequently these will consist only of a single particle, or character, but which will yet furnish a key for the detection of the real writer."[g]

§ 866. On the trial of an indictment for murder, the question before the jury was the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each in a different city, accompanied by parol proof that the three names were written by the prisoner, and that he was known by those names respectively in the three cities; and they were admitted without objection. It was held, that in considering the question whether the three names were written by the same person, the jury might compare the handwritings in the several registers.[h]

II. Chemical tests.

§ 867. These should be resorted to where it is desired to restore the legibility of faded writings;[i] and where it is suspected that writing has been destroyed by chlorine or other substances which it is desirable to detect.

III. Circumjacent tests.

§ 868. In this connection it is desirable to inquire if there is any discrepancy between the date of a writing and the *anno Domini* water-mark in the

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[f] Wills on Circum. Ev. p. 112; Burnett's Crim. Law of Scotland, p. 502.
[g] Bemis' Webster case, 202; as to admissibility of such testimony, see post, § 1462.
[h] Crisp *v.* State, 21 Ala. 137.
[i] Devergie, Med. Leg. ii. p. 887; Duverger Manual, ii. p. 385.

fabric of the paper;[j] though that it cannot always be relied upon is illustrated by an instance mentioned by Mr. Wills, of a commissioner of the Insolvent Debtors' Court sitting at Wakefield, in 1836, who discovered that the paper he was then using, which had been issued by the government stationer, bore the water-mark of 1837.[k] "The critical examination of the internal contents of written instruments," says Mr. Wills, "perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by some statement or allusion not in harmony with the known character, opinions and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts or modes of thought characteristic of a later or a different age from that to which the writing relates."[l] A deed was offered in evidence bearing date the 13th of November, in the second and third years of Philip and Mary, in which they were called "King and Queen of Spain and both Sicilies, and dukes of Burgundy, Milan, and Brabant," whereas, at that time they were formally styled "*princes* of Spain and Sicily," and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the two Sicilies until Trinity term following.[m]

§ 869. The following narrative is given by Mr. Warren in his sketch of Lord Sterling's case:[n] We have now to record as remarkable an incident as ever occurred in the course of a judicial inquiry. As already stated, one of the two documents *pasted* on the back of the map, was the alleged tombstone inscription. As the map was lying on the table of the densely crowded court, owing to either the heat, or some other cause, one of the corners of the paper on which the inscription was written curled up a little—just far enough to disclose some writing underneath it, on the back of the map. On the attention of the Solicitor-General being directed to the circumstance, he immediately applied to the court for its permission to detach from the map the paper on which the tombstone inscription was written. Having been duly sworn, he withdrew for that purpose, and soon afterwards returned, having executed his mission very skilfully, without injury to either paper. That on which the inscription was written, proved to be itself a portion of another copy of the Map of Canada, and the writing *which it covered* was as follows, but in French: "There has just been shown to me *a letter of Fenelon*, written in 1698, having reference to this grandson of Lord Sterling, who was in France during that year, and with regard to whom he expresses himself as

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[j] Crisp *v.* Walpole, 2 Hagg. 52.

[k] Wills on Circum. Ev. p. 114.

[l] Wills on Circum. Ev. p. 111. In Dr. Paley's Horæ Paulinæ, will be found the most perfect illustration in our language of the argument of authenticity drawn from *undesigned* coincidences.

[m] Mossam *v.* Joy, 10 St. Tr. 616; and vide Coke's First Inst. 76.

[n] Warren's Miscellanies, p. 256, 257, 258.

follows: 'I request that you will see this amiable and good Irishman, Mr. John Alexander, whose acquaintance I made some years ago. He is a man of real merit, and whom every one sees with pleasure *at court*, and in the best circles of the capital.' These were the initials, as far as they are legible, 'E. Sh.'" This was represented by the Solicitor-General as palpably an inchoate abortive forgery; and Lord Meadowbank pointed out to the jury the evident and partially successful effort which had been made to *tear off* that portion of the surface of the map on which the above had been written. "That effort failing," said he, "the only precaution that remained to prevent its appearing was to cover it over; for which purpose the parties used the inscription. But then the apprehension of its appearing, if the map were held between the light and the eye, seems to have come across the minds of the parties engaged in the operation, and hence, with a very singular degree of foresight, expertness, and precaution, they used for their cover that by which the eye of the inquirer might be misled in his investigation; for you have seen that the lines and words of the map forming the *back* of the inscription were exactly such as would naturally fall in with those on the *front* of the Map of Canada, from which the extract from the pretended letter of Fenelon had refused to be separated. Accordingly the invention, it would appear, had proved hitherto most successful; for though this map had been examined over and over again by persons of the first skill and talent, and scrutinized with the most minute attention, the writing which was thus covered up escaped detection, till, by the extreme heat of the court-house yesterday or some other cause of a similar nature, a corner of this inscription separated from the map and revealed to our observation that which was hidden below. Gentlemen, it is for you to consider the *effect* of this revelation; but I must fairly tell you, that in the whole course of my experience, I have never seen more clear and satisfactory evidence than has hereby been unexpectedly afforded, of the progress of a palpable and impudent forgery."

IV. PROOF THAT THE PAPER WAS WRITTEN BY A THIRD PARTY.

§ 870. It sometimes happens that the fact of forgery may be proved by a comparing of the alleged forged paper with the handwriting of a third person, very often of one who was active in getting up the case. Lord Meadowbank, in his charge to the jury in Humphrey's case, mentioned a very remarkable instance of this nature. A tailor in Ayr, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion, and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions, which, it was said, clearly proved his connection with the family of the deceased. When the case came to be tried, it appeared that there were a number of words in the letters, purporting to be from different individuals, spelt, or rather misspelt, in the same way, and some of them so very peculiar that, on examining them minutely, there was no doubt that they

were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table and examined in the presence of the court. He was desired to write a dictation of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and according to Mr. Wills, this result was arrived at in the teeth of half-a-dozen engravers, all saying that they thought the letters were written by different hands.[o]

§ 871. Mr. David Paul Brown, in his late work on the *Forum*, gives the following additional instance.[p]

The United States *v.* ——. Before Judge Kane: An interesting young man was indicted in the Circuit Court of the United States, for the embezzlement of a letter, and the money which it contained, which letter was directed to Mr. Scott, a well-known editor of this city.

The young man had borne an unblemished moral character, although he was supposed to be of feeble intellect. He was attended during the trial by his aged parents—and it was truly a pitiable group. There was but one important witness against him, and that was a lad of about fifteen years of age. He swore distinctly that the defendant gave him a written order upon the post-office to deliver to the bearer Mr. Scott's letters, that under that order he (the witness) obtained the letters, and was arrested with them in his possession. The order was produced, and conformed to the above statement. A member of the bar, who witnessed the trial, and felt great interest in it, suggested the following inquiry to the defendant's counsel:—

Counsel.—Cross-examination of the witness. "Can you read?"

Witness.—"Yes."

Counsel.—"Will you read that order?"

Witness.—"Certainly." (And he read it.)

Counsel.—"Can you write?"

Witness.—"Yes."

Counsel.—"Will you copy the order?"

The order was accordingly copied, and upon the two papers being handed to the court and jury, it became manifest that the witness was the offender; that he had written the original order, and upon being arrested, he had charged an innocent young man that he himself might escape condign punishment.

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[o] Wills on Circum. Ev. 117, 118.

[p] 2 Brown's Forum, pp. 443, 494.

CHAPTER VII.

INFANTICIDE AND FŒTICIDE.[a]

I. CONDITION OF THE BODY OF THE CHILD, § 873.
II. PERSON SUSPECTED, § 877.
III. CAUSE OF DEATH, § 879.
IV. QUICKENING, § 883.

§ 872. WHERE a woman is accused of infanticide, or confesses to have given birth to a child, the first duty is to make search for the dead body of the infant, and if this be discovered under circumstances calculated to excite suspicion, then to resolve all questions of place and surrounding locality, and examine the body with particular reference to

1. The condition in which it is found.
2. The degree of maturity of the child.
3. The length of time it remained alive after birth.
4. How long since its birth took place.
5. The lapse of time since death.
6. The question of its having been born alive.
7. With adequate powers of vitality; and
8. The symptoms by which the death may be accounted for.[b]

§ 873. I. The umbilical cord affords more valuable proof of extra-uterine life, as well as of the period of its duration, than any other of the external marks.[c]

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[a] See on this subject very fully, W. & S. Med. Jur. § 351–413.

[b] On this head Mittermaier refers to the following works: Guy's For. Med. 118; Dean's Med. Juris. 123–198; Taylor's Med. Juris. 435; Buettner, Volstaend Kenntniss, wie durch anzustellende Besichtigung, &c., Konigsberg, 1771; Camper, Frankfort, 1777 (translated by Herbell); Vater, Vit. 1735; Jaeger, Tub. 1780; Hutchinson, Lond. 1820; Capuron, Méd. Lég. relative à l'Art des Accouchements, Paris, 1821; Méd. Lég. ou considerations sur l'Infanticide, &c., par Lecieux, Renard, Laisne, Paris, 1819; Mons. diss. Méd. Lég. on Infanticide, Lovan, 1822; Gans, von dem Verbrechen des kindes mords, Hanover, 1824; Devergie, Méd. Lég. i. 186–255; Siebenbaar, Handb. ii. p. 8 and 626; Friedreich, Handb. i. 709; Schurmayer, Ann. der Staatsarzneikunde, vol. x. p. 417; Barzelloti, Méd. Lég. (Bianchi's ed.) Milan, 1839, vol. i. p. 318, with notes by Bianchi, beginning at p. 454; Orfila, Méd. Lég. vol. ii. p. 117, 1848. See also W. & S. Med. Jur. Tit. Infanticide.

[c] See W. & S. Med. Juris. § 359. Cases frequently exist in which the guilt of the mother—provided no third party is implicated—is apparent from the appearance of the body, as where the child has been poisoned with sulphuric acid, or drowned, &c. There are many cases, however, in which death has evidently been produced by neglect or by bad treatment, and yet where the mother may be innocent of any guilty intention. This may be the case when travail comes suddenly upon a woman, and the birth is very speedy. Under such circumstances the child may be injured on the head, or strangled by the umbilical cord, or may bleed to death from the tearing of this cord asunder. Or the mother may be driven to stool during the later stages of child-birth, and the child may be born and fall into the excrement, and thus perish. Or the mother may be unconscious at the time of giving birth to the child, and thus

On the first head, the external formation of the parts, the degree of maturity at birth,[d] the organs, the length and weight of the child, should at once be determined with the greatest accuracy, although in these cases also, particularly in reference to the point last mentioned,[e] experience has demonstrated the impossibility of establishing a universal standard.

§ 874. With reference to the question whether or not the child was born alive, which, as will be seen, is one of decisive importance in determining the grade of the offence,[f] if life is not proved by the confession of the mother, or the testimouy of witnesses, recourse is to be had to certain tests,[g] applied to the lungs,[h] the organs of digestion, the liver, and the bladder. It is, however, to be observed that great caution is necessary in receiving the testimony afforded by the confession of the mother. In one case, under the writer's observation, the mother in the agony of remorse, thought that she had observed the child move, and so declared, when it was indisputably shown that the child was dead before birth.[i] The test by the bladder rests upon the assumption that a discharge of urine cannot take place without the action of the lungs.[j] The test by suggillation proceeds on the supposition that a continued circulation of the blood is necessary to any suggillation.[k] Although these tests furnish but probabilities, no trial for infanticide should be suffered to take place until they are all scrupulously applied. The test by the lungs, in particular, is indispensable; and here again a distinction is to be drawn between, 1. The hydrostatic test (by floating.) 2. The well-known test of Ploucquet, which has regard to the relative weight of the lungs to the whole body, and the alteration produced in that relation by the act of breathing, as, one to fifty-five when the lungs have inhaled,

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neglect what may be necessary to preserve its life. Or the mother may attempt with her own hands to assist nature, and in the extremity of pain injure the child in endeavoring to draw it forth. In this case scratchings of the nails may be recognized upon the body of the child. This case, however, will not serve to explain more extensive injuries upon the body.

In each case the attending circumstances must be carefully investigated, and then it only remains for the examining physician to explain to the jury the bearing of these and the possibilities or probabilities as they exist. (Casper, Gerich. Med. 1857, p. 832.)

[d] Meckel, Lehrb. s. 244; Henke, Lehrb. s. 80; Devergie, Médecine Légale, i. p. 190; Mende, ii. p. 242; Friedreich, Handb. p. 113; Guy (Am. ed.), p. 122; Orfila, Méd. Lég. vol. ii. p. 154.

[e] Mende, Handb. ii. p. 294; Meckel, Lehrb. s. 444; Beck, Elements, i. p. 176; Orfila, Méd. Lég. p. 181; Guy (Am. ed.), p. 122; Annales d'Hygiène, Apr. 1831; Ann. d'Hyg. 1842, p. 343; Henke's Zeitschrift, 1841, ii. 235.

[f] Post, § 942.

[g] Buettner, Anweisung, s. 54–66; Henke, Lehrb. s. 509–515; Henke, Abhandlung, vol. ii. No. 3, and vol. v. p. 128; Gans vom Kindermord, p. 108–135; Orfila, i. p. 292; Devergie, Méd. Lég. vol. i. p. 202–224; Schneider, Annalen der Staatsarzneikunde, ii. b. 1, p. 35, vi. p. 195 and 601, vii. p. 444, viii. p. 679, x. p. 424; Barzelloti, Méd. Lég. ii. p. 324; Thompson, p. 130; Guy, For. Med. p. 123; Taylor, Med. Juris. p. 440; Puccinotti, p. 78; Taylor (Am. ed.), p. 358; Orfila, ii. 172.

[h] See W. & S. Med. Juris. § 361, &c.

[i] See Klein's Annalen, xviii. p. 171.

[j] Mende, Handb. pt. i. p. 201; Henke, Lehrb. s. 566–568.

[k] Mende, Handb. i. p. 215; Henke, Lehrb. s. 569, 570; Objections to the test by the bladder in Mende, Handb. iii. p. 244; Henke, Abhandl. Medicin. i. p. 24; Meckel, Lehrb. s. 269; Friedreich, Handb. p. 778; to the suggillatory test in Mende, Handb. iii. p. 137; Henke, Abh. i. p. 28; Friedreich, p. 774.

and as one to seventy where they have not.[l] 3. Daniel's test, which principally takes into account the absolute gravity of the lungs, and the other changes produced by respiration, as the inflation of the lungs, and expansion of the chest.[m] These tests are based upon the assumption that a new-born child can only breathe after it has left the womb; that the first breath drawn is the beginning of life, and is to be detected by the changes it produces upon the lungs in point of color,[n] absolute weight,[o] relation to the other organs, and specific gravity, the influx of the atmosphere causing them to float. Rigid investigations into the nature of the pneobiomantic test have elicited many strong arguments against its sufficiency;[p] and although undue importance has been attached to several of them, particularly to that derived from the so-called *vagitus uterinus*, i. e. the cry uttered by a child in the mother's womb, before the birth is completed,[q] which, from the extreme rarity of the occurrence,[r] is not entitled to serious consideration;[s] yet as the symptoms detected by the hydrostatic test are not necessarily the effect of extra-uterine life in the child, but may also be produced by artificial inflation,[t] and by decomposition,[u] it is clear that this test is of no value[v]

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[l] See fully on these points, W. & S. Med. Jur. § 370; Friedreich, p. 822. Plouquet's test is now (1860) exploded. Its summary rejection by authorities so high as Böcker, Casper, Devergie, and Elsaesser, have deprived it of any present authority. See post, § 876, Appendix.

[m] Meckel, Lehrb. s. 252; Friedreich, p. 822; Vorschlag, zur neuen hydrostat. Lungenprobe, Vienna, 1821; Wildberg. Neuer Vorschlag zur vollstand. anstellung der Lungenprobe, Berlin, 1822; Wildberg. Darst. der Lehre von der pneobiomant. Leipsic, 1830; Puccinotti, Méd. Lég. p. 85; Orfila, ii. p. 173; Taylor (Am. ed.), p. 359; Guy (Am. ed.), p. 150.

[n] W. & S. Med. Jur. § 361; Buettner, Anweisung, 35: Ibid. contra Schmidt, Versuche und Erfahrungen aneber die Lungenprobe, p. 240; Mende, Hanb. i. p. 190: Guy (Am. ed.), p. 151; Taylor, 359; Ed. Med. and Surg. Journal, xxvi. p. 367; Orfila, ii. p. 134, 175.

[o] W. & S. Med. Jur. § 376; Méd. Lég. ou considerat. sur l'Infanticide, par Lecreiux, p. 44; Annalen der Staatsarzneikunde, viii. p. 679; Dict. de Médecine, tom. xvi. p. 323; Guy (Am. ed.), p. 153; Fodere, Méd. Lég. tom. iv. p. 484 (2d ed.); Devergie, tom. i.; London Lancet, Oct. 1842; Orfila, ii. p. 175; Plouquet Test, Méd. Lég. i. 55, 56; Ann. D'Hygiène, 1835, p. 485; and Med. Gazette, 1842, p. 208.

[p] Schmitt, Neue Versuche und Erfahrungen ueber die Lungenprobe, Vienna, 1806; Henke, Revision der Lehre von der Lungenprobe, Berlin, 1811, vol. ii. No. 3, and Henke, Abh. v. p. 128; Henke, in the "Zeitschrift fur Arzneikunde," 1821, Nos. 3 and 4; Henke, Lehrb. s. 511–564; Meckel, Lehrb. s. 262–572; Olberg. diss. de docimasia pulmon, hydrostat, Halle, 1791; Mende, Handb. iii. p. 480, &c., Gans, vom Kindemord, p. 110–126; Archiv. des Crim. R. vii. p. 502–522; Ann. D'Hyg. and Méd. Lég. Apr. 1831, p. 406; Devergie, i. p. 581, 694; Friedreich, Handb. p. 788; Barzellotti, Méd. Lég. i. p. 328; Ann. des Staatsarzneik, ii. p. 35, vi. p. 195; Friedreich, Centralarchiv, vol. i. p. 337; Guy, For. Med. 128; Taylor, p. 454; Orfila, ii. p. 187, and objections, i. p. 188; Ann. D'Hyg. 1837, p. 437; also, 1841, p. 429; Brit. and For. Med. Rev., Jan. 1842; Dr. Dane's Med. Gazette, vol. xi. p. 1022.

[q] Henke, Abh. ii. p. 117; Hufeland, Journ. der Prac. Heilkunder, 1823, No. 2, p. 89; Schmitt, Versuche, p. 159; Mende, Handb. iii. p. 290; Hitzig's Zeitschrift, No. 1, p. 146, &c.; Devergie, Méd. Lég. i. p. 204; Bianchi's notes to Barzellotti, p. 473; Orfila, ii. p. 201.

[r] Schuermayer in Annalen, p. 126.

[s] Friedreich, Hand. p. 804; Thomson, gerichtl arzneik, p. 131.

[t] See W. & S. Med. Jur. § 376–9; Henke, Abhr. ii. p. 147; Schmitt, Versuche, p. 177; Mende, Handb. iii. p. 491; Eggert, p. 241; Beck, p. 253; Friedreich, p. 498, contra, Schuermayer in Annalen, p. 430; Thomson, p. 239; Guy, p. 144; Taylor, p. 461.

[u] See W. & S. Med. Jur. § 376–9; Mende, Handb. iii. p. 494; Henke, Abr. ii. p. 152; Beck, Elements, i. p. 259; Thomson, p. 237; Friedreich, p. 795; Guy, p. 135; Taylor, p. 449; Puccinotti, p. 90.

[v] Schmitt, Versuche, p. 216; Lecieux, Méd. Lég. p. 36, 58; Bernt. Vorschlag, p. 18;

(since children have lived many hours, and yet but a few vesicles were developed[w]), except where great care in conducting the examination is established, every doubt on the score of artificial inflation and decomposition excluded, and the result found to corroborate the inferences in favor of the life of the child, which are to be legitimately drawn from the other circumstances brought to light by the investigation.[x] At all events, it goes to prove only the respiration, and not the extra-uterine life of the child; and in this connection it is important to consider the cases in which the child, when born, was not really dead, but prevented from breathing by exhaustion, or the accumulation of phlegm in the windpipe, the application of the caul over its face, &c.[y]

The fact that the child did not breathe will not warrant the conclusion that it did not live, for the specific gravity of the lungs may be affected by disease.[z] Of still greater importance is the observation that respiration, more or less perfect, may take place during the delivery,[a] for the child may have died in the course of a protracted birth;[b] and hence it does not follow that the child lived out of the mother's womb. Even with all the improvements recently proposed, this test can never afford conclusive proof of the extra-uterine life of the child,[c] but will only serve where the conditions above stated are fulfilled to corroborate others.[d] A serious difficulty is the possibility that the presence of air in the lungs may have been artificially produced. When there are signs of life after birth, but the child does not breathe, both nurses and physicians are in the habit of breathing into the child's mouth, first closing its nose and gullet. This, as is pointed out to us by a writer in Henke's Zeitschrift,[e] is advised by the handbooks on which nurses ordinarily rely. Cases are given by the same writer by which the lungs were filled by this process (the stomach receiving no air), though the child was not brought to life. Now it would be very unsafe to rest a conviction of infanticide upon the presumption of a live birth afforded by the presence of air in the lungs. Nor is it so improbable, as Dr. Casper seems to think, that the mother of an illegitimate dead child, even though she may have been instrumental in its death, should resort to this method of inflation in order to bring the child to life. Remorse, the reaction so common after a crime is committed, the fear of being charged with murder, each might produce this result.

Another serious difficulty in the hydrostatic test is the fact that the slightest

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Henke, Abh. ii. p. 134–141; Remer in Henke's Zeitschrift für Staatsarzneik, vol. i. No. 1, p. 64; Hitzig's Zeitschrift, No. 20, p. 313, contra, Gans Zeit. c. 1, p. 528–540; Friedreich, Centra archer, vol. i. p. 306; Puccinotti, p. 96.

[w] Orfila, ii. p. 203; Guy's Hospital Repts. vol. v. p. 355.

[x] See W. & S. Med. Jur. § 369–383; Thomson, p. 245; Mende, die Menschliche Frucht, p. 116; Mittermaier, Archiv. des Crim. x. p. 514, 680; Friedreich, p. 836; Taylor, Med. Juris. pp. 472 and 467.

[y] W. & S. Med. Jur. § 369–383; Henke, Abh. ii. p. 103; Meckel, Lehrb. s. 265; Taylor, 458.

[z] Friedreich, 790.

[a] W. & S. Med. Jur. § 369–383; Taylor, 455.

[b] Bianchi, p. 572; Friedreich, p. 803.

[c] W. & S. Med. Jur. § 369–383; Henke, Abh. v. p. 142; Orfila, i. p. 341; Devergie, Méd. Lég. i. p. 221; Friedreich, p. 827–831.

[d] Mittermaier, Deut. St. s. 123.

[e] B. 74, S. 204.

variation in the temperature of the water produces the most marked consequences. Thus in a case of alleged child murder, tried in Pennsylvania, the State undertook to establish the fact that the child had been born alive, by evidence of an examination of the lungs by the hydrostatic test by physicians who gave it as their opinion that the child had lived, because the lungs floated in water, in whole or in parts. The physicians, however, had neglected to regulate strictly the temperature of the water in which the lungs had been tested. This was taken advantage of by the counsel for the defence, who by a very ingenious and delicate experiment, demonstrated to the jury that there was no reliance to be placed on the hydrostatic test, unless the temperature of the water had been carefully ascertained. He put a small vial of shot, just heavy enough to float in water of medium temperature, into warm water, and it sunk. On putting it into cold water the vial floated.

Independent of these difficulties, however, the hydrostatic test fails to come by its own showing to the requisitions of the law. The present inclination of the common law authorities, as has already been observed,[ee] is, that in order to constitute homicide, an independent circulation and existence should be affirmatively proved, mere *respiration* during the course of birth not being enough.

§ 875. In examining the question of *adequate vitality*,[f] it will not suffice to determine that the child was at such a state of maturity as would sustain life out of the womb,[g] but the possible existence of any mal-formation (as fissures in the spine or absence of a skull),[h] which by the laws of nature would take away the capacity of living,[i] must be looked to. Had such a test been applied, in more than one recent case, great expense and much public time would have been spared; and it is due to the supposed offender that it should be in all instances attended to before the trial is gone into.

§ 876. To establish the proofs of the recent birth of the child, as well as to determine the grade of offence at which the indictment is to strike,[j] it is a primary duty to fix with accuracy both the time at which it was born and when it probably died.

APPENDIX TO BOOK III., CHAP. VII.

The subject treated in the text is one of both so much interest and so much difficulty, that in addition to the points made in the current edition of the *Medical Jurisprudence*, prepared by Dr. Stillé and myself, I have collected (1860) the

[ee] Ante, § 748; post, § 942.

[f] Taylor, Med. Juris. p. 351; Gans. von Kindermord, pp. 64, 309; Mittermaier, Neue Arch. vii. p. 416; Devergie, Méd. Lég. i. p. 368; Feuerbach's Lehrb. s. 237, note.

[g] W. & S. Med. Jur. § 385; Anmerkungen zum baier Strafgesetzbuche, ii. p. 34; Henke, Abh. iii. p. 265; Taylor, Med. Trans. p. 352; Guy, For. Med. pp. 177 and 183; Helie, Théorie du Code penale, vol. v. p. 194.

[h] Guy, For. Med. p. 183; Meckel, Lehrb. p. 346.

[i] Mende, Hand. ii. p. 328, ii. p. 365.

[j] Mittermaier, Archiv. vii. p. 304–316; Henke, Zeitschrf. für Staatsarzneik, 1827, No. 2, p. 394; Feuerbach, s. 237, note; Briand et Bresson, Medicine, p. 167; Ollivier, Ann. d'Hyg. tom. xvi. p. 2; and Helie, v. p. 169; Bianchi, i. p. 455, notes; Taylor, Med. Juris. p. 394.

following, which are taken from treatises of recent publication, and otherwise inaccessible to the American reader, by the most eminent German writers on these topics, Dr. Böcker[a] and Dr. Casper:[b]—

Marks of the death of a child before birth.—If no injury occurred to the mother during pregnancy, according to Dr. Böcker, if the child was perceived to move in the womb, if the beating of its heart could be heard, and this shortly before birth, the probability is that the child continued to live until the birth. Sickness of the mother, or injuries received by her during pregnancy, may or may not result in the death of the child. Where the child is dead in the womb, the following symptoms will commonly be seen in the mother: chills, heavy pressure on the rectum and bladder, paleness of face, dirty-blue eyelids, hollow eyes, pain in the head, whizzing in the ears, offensive breath, loss of appetite, nausea, vomiting, fainting, sinking in of the belly, falling of the child from one side to another, discharge of fæces or of blood, protruding of the pulseless umbilical cord. These marks, however, do not indicate with certainty the death of the child in the womb, and this fact may occur without being attended with such symptoms.

If the child is born in a state of partial decomposition, as where the skin is discolored and easily peeled off, where the muscles or the whole body is withered, where the bones of the skull are easily displaced and shake, where advanced stages of disease, inflammation of the internal organs, &c., are observed in such cases, there can be no doubt that the child was dead before birth. But death may have occurred before birth without being accompanied with such results.

Whether the child was living during the birth.—If there are no marks of death previous to birth, if the birth was an easy one, if no remarkable bleeding occurred, if the umbilical cord had not been pressed before birth, and could not have been twined round the neck of the child, if the body of the child shows no suggillations and suffusions corresponding to the mechanism and the time of birth, and if it is impossible that the injuries found on the body should have been produced by the birth itself; in such cases it is probable that the child lived during birth.

Evidence of the life or of the death of the child after birth.—The relation of the child to the mother and to the external world, and the condition of its internal organs, undergo a change after birth, and these changes furnish the best evidence of the existence of life.

Changes in the organs of respiration.—The organs of breathing generally begin to act after birth, so that as a general rule evidence that a child has breathed is evidence that it was born alive. This rule, however, and, especially, its reverse, does not hold good in all cases. *Living and breathing are not identical.*

Different means are resorted to in order to determine from the organs of breathing, whether the action of breathing had taken place.

Tests of breathing are drawn from the changes which take place after birth in the chest, in the diaphragm, in the larynx, in the windpipe, and in the lungs. This includes the hydrostatic test of the lungs.

Tests of breathing by experiment. a. The hydrostatic test.—Where breathing has taken place, the lungs are commonly lighter; where it has not taken place, usually heavier than cold water. Hence the principle has been assumed, that *in the case of a newly-born child the swimming of the lungs in water is proof that the child has lived and breathed, while the sinking of the lungs shows that the child was dead before birth.*

This principle involves many difficulties which have not yet been explained, and is liable to the four following objections:—

[a] Gericht. Med. 1858. [b] Handb. Gericht. Med. 1857.

1. *This test of the lungs can only show whether the child has breathed, while the child may have lived after birth without breathing.*—In proof of this fact three cases are quoted by Dr. Böcker which came under his own observation. In two cases the children were born without difficulty, the head appearing first. Slight motions of the limbs were observed by Dr. Böcker, and by others who were present. On this account, and because he heard the heart beating after birth, and could feel the pulse of the umbilical cord for several minutes without observing breathing, Dr. Böcker supposed they would recover life. In both cases, however, the child died immediately, and the lungs, on being tested twelve or fifteen hours after the birth, were found to sink in water, and this when cut into small pieces. In another case, where the child had to be turned before it could be extracted, the existence of life after birth was evidenced by the beating of the heart and of the umbilical cord, although neither breathing nor motion was observed. The child died within two minutes after birth, and the lungs, as a whole and in pieces, sank in water. In neither of these cases was there any defect in the organs of respiration, no filling of the lungs with mucus, &c. Other cases, also, have been observed by other physicians where the child, in a condition of great weakness or apparent death, or with some defect in the breast or lower organs, has been known to live some little time after birth without breathing. If a child has died after birth without having breathed, the presumption is that death occurred naturally.

2. *The test of the lungs does not show the living and breathing of the child absolutely after birth, since it may have breathed before and during birth.*—It is possible that sufficient air may reach the child while still in the mother's womb to allow of breathing. This may happen when the hand or forceps are introduced into the womb, when a leg or arm of the child protrudes, and under some other circumstances which are not accurately known. It must be admitted, upon the testimony of reliable men, that after the opening of the womb and the escape of the water, sufficient air may reach the child to allow of its breathing and crying. That this may occur during birth when the head protrudes first is well known.

It has been generally held to be impossible that the child should cry while in the womb before the embryo membranes are broken. Professor Hüter, in Marburg, heard the child, in such a case, cry distinctly five times, and showed that this might have been effected by spontaneous development of air in the embryo membranes. The lungs of the child, which had lived three and a half hours, swam on water.

3. *The lungs may sink in water although the child has lived and breathed during and for some time after birth.*—There are cases where the child has lived and breathed for some time after birth, and, yet, whose lungs, owing to exudation in the tissues, the stoppage of the air-passages with thick mucus and blood, &c., sank, wholly or in part, in water. In the condition of the lungs called *atelectasis*, where a portion of these organs remain closed against the entrance of air, such portions are always found to sink in water. In some cases, also, where the birth is premature, there may be the movements of inspiration, and yet, owing to the defective condition of the windpipe or larynx, or muscular debility, very little air penetrate into the lungs. In such cases the lungs may sink in water, although the child had breathed.

In every case the diseased condition of the lungs which causes them to sink in water should be accurately noted and described.

A child born with the feet foremost may be so injured during birth that it will be dead when brought forth. In such a case the lungs sink in water and contain no air, and yet the conclusion that the injury was inflicted after death would be erroneous.

4. *The swimming of the lungs cannot prove certainly that the child lived after*

birth, since the lungs may float in some cases where breathing has never taken place.—1st. Air may be artificially introduced into the lungs of a child born dead, and cause them to float upon water as readily as where air has been introduced by breathing. It has been attempted to point out differences by which the two cases may be distinguished, but careful investigation has only shown that there are no reliable indications by which a doubtful case can be determined.

2d. Gases formed in the process of decomposition may increase the volume of the lungs, lessen their specific gravity, and so render them capable of floating, even in cases where breathing has not occurred. It is to be observed, however, that the lungs are slow of decomposition, and that gases will not be formed in these organs earlier than in some other organs of the body. It is also to be noted that lungs which at one time would float on water, at a later stage of decomposition will no longer do so.

Although the objections given above may, in some few isolated cases, be of weight, and deserve to be considered, yet, as a general rule, this test of the lungs is very safe and decisive. A case of vagitus uterinus is seldom met with. Where the lungs have been affected by disease after birth, and thus rendered incapable of floating, a knowledge of pathologic anatomy will enable the physician to detect the fact. He will also be able to determine whether the stage of decomposition is so advanced as to destroy the value of the test. So that, in most cases which occur in practice, the objections urged against this test may be set aside.

b. The ærostatic test of breathing.—This is given by Tortual in the following proposition: "*Lungs which have been used in breathing, and contain air, possess a power of suction (Saugkraft), while those which have not been so used lack this power.*" The same objections lie against this test as against the hydrostatic. It can only show that the lungs contain air, whether this has been acquired in the process of breathing, or has been artificially introduced, or has been produced by the formation of gases in decomposition. Besides, it is a question whether the lungs may not lose this power of suction in the process of decomposition, or, at least, whether the means of detecting the fact may not often be wanting in cases where it exists. This test can never indicate more than the fact of breathing either before, during, or after birth.

The following positions are taken by Dr. Casper:—

Hydrostatic test of the lungs.—The fact that lungs which have been filled with air are specifically lighter than water, and that fœtal lungs are heavier, is undoubted. It is objected, however, against making this a test of breathing, that the swimming of the lungs in water does not prove them to have been filled with atmospheric air, and that their sinking does not prove a fœtal condition. In regard to the capability of swimming, according to Dr. Casper,[c] this may appear under many modifications according to the more or less complete filling of the lungs with air. Sometimes both lungs, together with the heart and *thymus*, will float lightly on the surface of the water. Sometimes, while still connected with the heart and *thymus*, the lungs will show a tendency to sink, and will not float easily until the former organs are cut away. Or, again, while these organs remain joined together the whole mass will sometimes sink at once, or else gradually, to the bottom of the vessel. Sometimes only one lung, commonly the right, will float; sometimes only single lobes, while the rest sinks; sometimes only small portions cut out from these organs will float.

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[c] Handb. Gericht. Med. 1857–8, p. 736.

The following, according to Dr. Casper, are cases in which it is alleged that the lungs of still-born children may be found to contain air, and, hence, to be capable of swimming on water: (1.) When air has been artificially introduced into the fœtal lungs; (2.) Where interstitial or vesicular emphysema has occurred; and (3.) Where, in the process of decomposition, gases have been formed in the parenchyma of the lungs.

(1.) *Artificial inflation of the lungs.*—Artificial inflation of the fœtal lungs may be produced by means of a tube applied to the windpipe. In this case, according to Dr. Casper, they will expand, become spongy, and change their liver-like brownish-red color for a light cinnabar-red, but without any trace of graining. The attempt to inflate the lungs by introducing the tube into the mouth or nose is usually unsuccessful even with skilful operators, as the air is much oftener driven through the gullet into the stomach than through the windpipe into the lungs. The effort to introduce air into these organs without the use of any instrument, merely by the application of the mouth to the mouth or nose of the child, is still more difficult, and rarely succeeds.[d] Such cases, according to Dr. Casper, seldom occur in practice, and always preserve some features distinct from those of lungs where actual breathing has taken place. Notwithstanding the change of color which succeeds upon artificial inflation, the peculiar dark marbling, observable in cases of actual breathing, will not appear. There will also be a very marked difference between the quantity of blood found in the naturally and in the artificially inflated lungs. Where the air has been hastily pressed into the lungs many small cells of these organs will be found to be ruptured, and also large cavities in the parenchyma.

When the lungs have once been inflated, whether artificially or naturally, there will be the same difficulty in either case to expel the air again by pressure.

Under this head the following is given by Dr. Casper as a rule to guide in practice: "Where the light cinnabar-red color without marbling is observed, and where there is rupture of the cell-tissue, and where incision is followed by a whizzing noise without bloody foam, in such a case it may safely be concluded that the lungs have been artificially inflated."

(2.) *Emphysema.*—In regard to this it is asserted by Dr. Casper[e] "that as yet no single well-authenticated case of spontaneous emphysema in fœtal lungs has been reported, and, hence, that the swimming of the lungs cannot, in questions which arise in criminal practice, be ascribed to this cause."

(3.) *Decomposition of the lungs.*—It is urged as another reason for disregarding the test by swimming, that this capacity may be given to fœtal lungs by the air received from gases formed in the process of decomposition. The fact that this capacity may be thus acquired is undoubted, but there is ordinarily little danger of confounding such a case with one where breathing has occurred. The lungs are known to be among the last of all the soft organs which undergo decomposition. Hence, in cases where the dead body is still sound, or where decomposition is just beginning to take place, no doubt can arise. At a later stage of decomposition, when the lungs have lost the brightness of their serous coating, have become dark-gray or blackish-gray, pappy, and offensive to the smell, the swimming of itself will not be a decisive test. But even at this stage it will often happen that fœtal lungs will sink in water, and thus decide the question.

Sinking of the lungs after breathing has taken place.—Another objection stated by Dr. Casper to the hydrostatic test is the fact that lungs will sometimes sink in water even after breathing has occurred. Among the circumstances under which

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[d] On this point see remarks of Dr. Böcker at beginning of this note.

[e] Gericht. Med. 1857, p. 743.

this phenomenon may arise are atelectasis and hepatization of the tissue of the lungs. Such cases, however, are of no practical importance, since the fact of breathing may here always be known.

Incision into the lungs.—Where an incision is made into the lungs, whether fœtal or post-fœtal, blood will follow. In the case of post-fœtal lungs there will be a slight whizzing noise heard on making the incision, and bloody foam will follow either spontaneously or upon the slightest pressure. In the case of fœtal lungs, also, the blood may be accompanied with mucus or amniotic liquid, but it will require considerable pressure to force the blood out, often a squeezing together of the parts laid open. A further mark of difference is the fact that if the post-fœtal lungs be pressed under water air-bubbles will rise to the surface. It is true that these indications of air may be seen in fœtal lungs which have been artificially inflated, but even here there will not be that prompt appearance of bloody foam which remains a distinguishing feature of post-fœtal lungs. This valuable test will only fail in cases where the lungs, in common with the entire body, have become putrid or where death has been produced by bleeding.

The bladder and rectum as tests.—The position that discharges from these organs are only respiratory acts, and, hence, indicate the fact of breathing, is declared by Dr. Casper to rest upon no basis whatever. The question whether discharges have taken place or not is of no importance in answering the question whether the child has breathed.

Suggillations.—These have been proposed as tests upon the ground that exudation of blood from the bloodvessels indicates circulation, and, hence, life. The position, however, is contradicted by Dr. Casper.[r] This exudation is frequently observed, as he mentions, in cases where the child was undoubtedly born dead, and the blood in the suggillations is often coagulated. So that such appearances show nothing as to the fact of previous independent life.

According to Dr. Casper, the body may safely be pronounced that of a child who has breathed during and after birth where the annexed conditions are fulfilled:—

1. If the position of the diaphragm is between the fifth and sixth ribs.

2. If the lungs fill up more or less completely the cavity of the breast, at least so far that no separation of the incised ribs is required to expose them.

3. If the ground color of the lungs is varied by marbled blotches.

4. If the lungs are found to swim upon the surface of water.

5. If after making an incision into the lungs bloody foam exudes from light pressure.

When is the application of the tests of breathing superfluous?—In the following cases the question of previous life may be readily decided without resorting to the tests given above:—

1. Where the fœtus had been maturing for a shorter time than one hundred and eighty days, or where the body is accompanied with such deformities as to render it impossible that it should have lived.

2. Where the umbilical cord is shrivelled and the navel healed. In this case the child cannot be called newly-born.

3. Where milk is found in the stomach which has undergone partial digestion.

4. When, from the condition of the body, there is no doubt that it had been for some time dead in the womb.

Where the body has undergone partial decomposition in the womb the appearances are so different from those observed where it is exposed to atmospheric

[r] Gericht. Med. 1857, p. 765.

influences that there is no danger of mistaking the two cases. The odor arising from the bodies is different, that in the case of decomposition previous to birth being more penetrating and intolerable. In this case, also, the body does not assume a green color, but between a copper-red and pure flesh-color. The change of form is also different. In the one case, the rotund shape is preserved for some time; in the other, there is a constant tendency towards flattening, the breast and belly take an elliptical shape, the head becomes flat, the nose sinks in, the cheeks stretch out apart from each other, &c.

How long did the child live, and how long has it been dead?—As regards the first of these questions, it is observed by Dr. Casper,[g] that where the child is capable of life, robust and sound, respiration may be completely established in the shortest time, so that it will be impossible to decide whether the child has lived a half hour or two or three hours. Where proper pains are taken, however, no very important error can be made since the time during which the child can be regarded as "newly-born" is itself very brief.

In answering the second question the stages of decomposition which have been already described, together with the modifying circumstances mentioned, must be our guide.

Breathing before birth, vagitus uterinus.—This whole question of *vagitus uterinus*, as we are reminded by Dr. Casper,[h] has recently been brought into the sphere of scientific observation by the discovery of capillary extravasations (which, from their resemblance to petechiæ, have been called petechial suggillations) under the pleura, on the *aorta*, and on the heart. The fact must be admitted not only that the *fœtus* may make instinctive efforts at respiration, but that the motions of breathing will sometimes be complete and successful. The following case in point is quoted by Dr. Casper:—

"A woman, 28 years of age, and who was already the mother of children, lost, suddenly, a large quantity of the fœtal water when parturition was just beginning to take place. On examination it was found that a part of the umbilical cord had been wound into a knot and reached to the external genitals, and that this pulsated with a normal beat. The mouth of the womb was opened to the size of a shilling, and the head was found high above the superior strait. The pulsations of the heart could be distinctly heard in the left side of the mother. When the efforts to arrange the umbilical cord by means of instruments failed, it was pushed back into the vagina, and retained by a sponge. An hour afterwards the mouth of the womb stood entirely open, but instead of the head, which had declined to the left, the right elbow now presented, while the pulsation in the umbilical cord continued as before. The effort to turn the body so as to bring the feet foremost was, at first, not difficult, bnt it was not possible to bring the hand to the posterior side of the pelvis in order to push aside the loop of umbilical cord without making some slight pressure on the cord; and then the child was observed to attempt, repeatedly, deep inspirations, which were distinctly felt by the operating hand, and which the pressure called forth. In extraction the head offered considerable resistance. The child, which was nineteen inches long, and weighed seven pounds, was pulseless, and could not be brought to life by means of insufflation."

Hyperæmia in the organs of the chest and belly, as also extravasations under the pleura and on the heart, were not wanting in this case. Whether air had pressed into the lungs in the efforts at respiration made in the uterine cavity could not be discovered, owing to the artificial inflation of these organs.

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[g] Gericht. Med. 1857, p. 771.
[h] Handb. Gericht. Med. 1857, p. 706.

Analogous instances are mentioned as having been observed by Hohl. In two cases, where the trunk of the body had emerged and the head was still in the pelvis, the womb had contracted, the placenta was still separated, and the head followed slowly. In these cases the chest of the child was seen to rise and fall three or four times in succession, and the child came into the world dead. No trace of air was found in the lungs. In another case, while turning a child in order to extract it, active movements of breathing were observed, which the operator regarded as the actual drawing of breath. The child was dead and pale. In each of the three cases petechial suggillations, *i. e.* numerous pointed extravasations on the upper surface of the lungs and of the heart, were observed.

Hence it cannot be doubted that the fœtus, after separation from the surrounding membranes, may make efforts to breathe, and, indeed, the actual motions of breathing. But this does not prove actual breathing. In all the cases mentioned the lungs sank in water, unless where they had been partially inflated with air by insufflation. All the children were born dead, in some cases putrefaction had already commenced. Besides, in the cases quoted under this head, there was, invariably, more or less difficulty in the birth, and a prolonged travail. If, now, in such cases there was nothing more than an ineffective effort to breathe, how much more favorable must the circumstances be in order that actual breathing may take place? The liquor amnii must be discharged, the mouth of the womb opened, and the vagina kept open by artificial means. In the few cases of *vagitus uterinus* which have been observed all of these circumstances have, in fact, concurred. It will follow from what has just been said that marks of breathing before birth will not be found in cases of secret birth. These, in order to be secret, must be speedily accomplished and without artificial help, circumstances which are absolutely inconsistent with the possibility of breathing before birth. Hence, when marks of having breathed are found upon a child born secretly, the breathing is to be regarded as having taken place *after* (not before nor during) birth, and the child must be held to have been born alive.

II. The person suspected.

§ 877. With regard to the person suspected of infanticide, the inquiry must be, whether the woman supposed to be the mother was pregnant and delivered at a time corresponding with that of the birth of the child, and under circumstances tending to substantiate the suspicion that an offence has been committed against it. Where such suspicion is on good grounds excited, the proper course is for the officer charged with the investigation of the offence, to tender to the person accused the opportunity of an immediate medical examination to be conducted by professional examiners if possible. In a trial in 1840, in Philadelphia, for this offence, the want of such a precaution was pointedly brought to notice by evidence introduced by the defence, that the formation of the female, who was a voluntary witness for the prosecution, was such as made the destruction of the child *en ventre sa mere* necessary; and had it not been for an unexpected adjournment which enabled a medical examination to be had, the defendant would have been acquitted. In such an examination it is important to ascertain whether, and when the woman gave birth to a child, and whether in cases of abortion, there is any such mal-formation as made an abortion necessary.[k]

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[k] Mende, Lehrb. der gerich. Med. s. 324–329.

§ 878. The fallaciousness of the proofs of virginity,[l] and that of the signs of pregnancy,[m] in general, and in particular of a recent delivery,[n] on which Orfila remarks, that it is difficult to determine that a woman has given birth to a child eight or ten days after, and often still more difficult in cases of abortion,[o] should throw, however, great caution around the collection and reception of this species of evidence, since it has been insisted that the apparent signs of a recent delivery may also be the consequence of other diseases.[p] Where, therefore, the accused denies the delivery, and refers to a disease as the cause of her condition, an inquiry must be had into the truth of her allegation.

III. Cause of death.[q]

§ 879. Starting with the position that the life of the child after the birth is no ground for supposing that its subsequent death was brought about by violence on the part of the mother, it should be observed, that even where appearances go to show a violent death, the prosecution by no means possesses such conclusive testimony as to relieve it from further investigation, since the cases are numerous where the death is shown to have been caused during the travail by fortuitous circumstances, as, for instance, suffocation,[r] fracture,[s] change of the situation of the mother,[t] or by some omission,[u] for which the mother cannot be made accountable, or by compression of, or by, the umbilical cord,[v] protracted delivery,[w] debility,[x] hemorrhage from the umbilical cord,[y] damage to the skull during birth or delivery.[z] And the legal profession are charged, also, by a late American writer to bear in mind that a delivery may take place without the knowledge of the mother,[a] and that many symptoms, formerly looked upon as infallible signs, as bruises and bloody sores, have been found to be in the highest degree fallacious.[b]

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[l] Mende, Handb. iv. p. 420–450; Beck's Elem. i. p. 77; Friedreich, Handb. p. 261; Guy, For. Med. p. 68; Dean's Med. Juris. p. 27.

[m] Henke, Lehrb. i. s. 186–191; Meckel, Lehrb. s. 535; Mende, Handb. iv. p. 516; Beck, i. p. 114; Mittermaier, Neue Archiv. des Criminals, vol. x. p. 380; Devergie, Méd. Lég. i. p. 161; Friedreich, p. 313.

[n] See W. & S. Med. Jur. § 292, 301.

[o] Orfila, i. p. 273; Henke, Lehrb. s. 342; Capuron, c. i. p. 128; Mende, Handb. iv. p. 680–712; Beck, p. 147; Hitzig, Zeitschrift, No. 20, p. 234; Devergie, c. i. p. 171–177.

[p] Devergie, Méd. Lég. i. p. 174; Friedreich, p. 336; Orfila, vol. i.; but see W. & S. § 94.

[q] See generally, Siebenhaar, Handb. p. 713; Guentner, Kindesmord, p. 47; Ann. d'Hyg. Lég. 1840, No. 48, p. 341; Taylor, p. 487; Orfila, vol. ii. p. 251.

[r] W. & S. Med. Jur. § 396; Henke, Ala. i. p. 71; Mende, Handb. i. p. 230; Capuron, p. 340–356; Meckel, Lehrb. p. 386.

[s] W. & S. Med. Jur. § 389; Henke, Abh. i. p. 52; Mende, Handb. i. p. 149; Mittermaier, Neue Archiv. des Crim. R. vi. p. 631; Mende, des Fruchtkind, p. 95; Friedreich, p. 719; Puccinotti, Méd. Lég. p. 99; Taylor, p. 487; Orfila, vol. ii. p. 253.

[t] Mittermaier, Archiv. ii. p. 648–631; Devergie, Méd Lég. i. p. 246.

[u] W. & S. Med. Jur. § 402; Devergie, i. p. 231; Friedreich, p. 715; Guentner, der Kindesmord, p. 51; Orfila, vol. i. p. 255; Puccinotti, p. 97.

[v] See Wh. & Stil. Med. Jur. § 380.

[w] Ibid. § 384.

[x] Ibid. § 385.

[y] Ibid. § 386.

[z] Ibid. § 389.

[a] Beck's Elements, i. p. 166.

[b] See W. & S. Med. Jur. § 402. See Naegele, Erfahr. und Abh. aus. dem Gebiete der Krankheiten des Weiblichen Geschlechts, p. 247; Mende, Hand. iii. p. 138.

Causes of death after birth are malformation or disease,[c] exposure,[d] suffocation,[e] strangulation,[f] drowning,[g] wounds,[h] dislocation of the neck,[i] and poisoning.[j]

Injuries to the head of the child should be closely scrutinized, to see whether they are not the consequences of pregnancy,[k] or of the birth; and it is certain that tumors on the head in particular, are often susceptible of a natural explanation, without any regard to violence.[l] In calculating the probability of the fall of the child as the cause of the death,[m] it is necessary to take into account[n] every circumstance which can affect such estimate; as place, distance, position of the mother, condition of the umbilical cord, clothing worn by the woman. At all events there is nothing in the asserted improbability of injurious effects from the fall of the child.[o]

§ 880. In cases of this class it is a fact which must have been noticed by all practitioners, that in a great majority of instances of *deliberate* infanticide, and in many of accidental, the child is found in a privy;[p] and where the birth is suspected to have occurred in the same place, the spot where the mother sat, and the place through which and on which the child is supposed to have fallen, the German text writers tell us must be closely examined.[q]

Delivery may also be so *rapid*, although the mother is aware of being in labor, that she is unable to guard against an accident to the child.[r]

It should be observed that the omission to loose the umbilical cord can never in itself be pronounced with certainty to have caused the death of the child;[s] although in certain cases the hemorrhage consequent upon it may have done so; and it would be unsafe to rest, for technical reasons, on this point alone, as the weight of medical authority now is, that though much depends on the condition of the child, the manner in which the umbilical cord was severed, and the length of the piece remaining attached to the child, yet the death cannot be positively traced to this cause.

§ 881. Where the death is or may be attributed to a fall, it is proper to

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[c] Wh. & Stil. Med. Jur. § 393. [d] Ibid. § 394. [e] Ibid. § 396.
[f] Ibid. § 398. [g] Ibid. § 399. [h] Ibid. § 400.
[i] Ibid. § 401. [j] Ibid. § 404.

[k] Mende, das Fruchtkind, p. 54–63.

[l] Zeller, Heidelb. 1822; Feistb, Mayenne, 1839; Friedreich, 1845, vol. ii. p. 437.

[m] Klein, Stuttgart, 1817; Klein, Beitr. zur gerichtt. Arzneiwissench Tubingen, 1825, Henke, Abh. i. p. 63, pt. iii. No. 1; Mende, Handb. i. p. 227, iii. p. 149; Hitzig, Zeitschrift, No. 25, p. 56, 67.

[n] Mittermaier, Archiv. vii. 633–639.

[o] W. & S. Med. Jur. 392; Ann. d'Hygiène, 1840, No. 48, p. 331; Friedreich, Handb. p. 729; Devergie, i. p. 693; Siebenhaar, Handb. ii. p. 639; Friedreich Central Archiv. 1845, vol. iii. p. 441; Orfila, i. 379; Eggert, p. 281; Guentner Kindesmord, i. p. 53; Taylor, p. 481; Guy, For. Med. p. 151.

[p] W. & S. Med. Jur. § 402; Klein, Ann. der Gesetzgebung, xv. p. 225; Pfister, Criminalfælle, v. iii. No. 1.

[q] W. & S. Med. Jur. § 402–3; Pfister, Crim. v. p. 601; Ann. der Staatzarneikunde, by Schneider, 1839, iv. p. 174.

[r] Wh. & Stil. Med. Jur. § 403.

[s] Beck's Elements, i. p. 282; Mende, Hanb. iii. p. 290; Siebenhaar Handb. iii. p. 644; Friedreich Handb. 736; Ann. d'Hyg. xxv. 126, and xxvi. 244; Bianchi in Bazellotti's Méd. Lég. 481; Guentner, 49.

inspect the spot where the birth is alleged to have taken place, partly to determine the hard places on which the child is said to have fallen, and partly to ascertain the nature and amount of blood and other matter discharged by the parturient. It is indispensable to establish, with the greatest possible exactness, the time of the probable conception, as it is of importance in estimating the period of gestation; also, the health of the mother when she first felt the motions of the child, her deportment during pregnancy, whether she concealed it, and what work she performed during its continuance. Evidence should also be collected as to the exact progress of the birth, the time when the labor began (often the best means of unravelling prevarication), the demeanor of the patient, the occurrences after the birth, and the duration of the travail. Whenever the accused herself suggests an explanation of the death of the child, the possibility of such explanation should be submitted to the judgment of medical men, or determined by repeated inspections, if she voluntarily submits to them.

Poisoning as a form of infanticide is extremely rare. Recently, however, a woman destroyed her child, which was only one day old, with arsenic. She was tried and acquitted upon the plea of *puerperal insanity*, although the evidence certainly did not warrant such a verdict.[t]

§ 882. The following observations of Mittermaier (from whose admirable treatise many of the foregoing points are drawn) are worthy of much weight. "In inquests of infanticide, where the fact of a delivery is not well established, particular indications are found in the suspicious intercourse of an unmarried woman with a man, if followed by ailments or changes of appearance, or enlargement of the abdomen, denoting pregnancy; the sudden disappearance of these changes, the condition of her linen, or other tokens of a delivery, especially if the latter is established by inspection. The greater the concealment of the pregnancy the greater the suspicions, though this concealment must have been by actual contrivance, or silence towards persons who had a right to ask. These suspicions may be further increased by the obstinate refusal to produce the child; although it must not be overlooked, that the absence of a dead child may also be explained without accusing the mother of murder. If the corpse is discovered, it must be identified as the same child to which the accused gave birth, and scrutinized, remembering, however, that late researches have established the insufficiency of many proofs heretofore claimed as decisive. If found to bear traces of a violent death, the demeanor of the accused becomes important, and the more studiously she concealed her pregnancy, or has deprived herself of attendance at the time of delivery, or betrayed by her subsequent behavior, not only the intention to conceal the delivery, but fatal designs upon the child, the more foundation is there for judicial investigation; bearing in mind, however, that the accused may not before delivery have been entirely aware of her condition, and that it is a point of controversy whether a concurrence of the three in-

[t] Ed. Monthly Jour. Sept. 1852. See Wh. & Stil. Med. Jur. § 404.

dications of concealment of pregnancy, birth without attendance, and concealment of the corpse, is necessary to afford strong evidence of infanticide."[u]

IV. Quickening.

§ 883. Wherever there is a difference in the grade of punishment attached to the destruction of a "quick" child, and one not yet so, or wherever the destruction of the latter is held not to be indictable,[v] this becomes an important subject of inquiry. To a subsequent head, in which, under the stress of recent investigations, this question is elaborately examined, the reader is referred to the points to which, in a prosecution under these circumstances, it is necessary to attend.

[u] 2 Mittermaier, Deut. St. sec. 129.

[v] See post, § 1220.

BOOK IV.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

A. STATUTORY HOMICIDE.

United States, § 884.

- Murder on the high seas, § 884.
- Manslaughter on the high seas, § 885.
- Murder on high seas where death is on land, § 886.
- Murder or manslaughter on dock-yard, &c., § 887.
- Manslaughter by negligence of steamboat officer, § 888.

Massachusetts.

- Murder, § 889.
- Death by duel, § 890.
- Seconds by duel, § 891.
- Manslaughter, § 893.

New York.

- Murder, § 894.
- Death by duel, § 895.
- Justifiable and excusable homicide, § 898–9.
- Manslaughter in the first degree, § 900.
- Manslaughter in the second degree, § 901.
- Manslaughter in the third degree, § 902.
- Manslaughter in the fourth degree, § 904.
- Punishment, § 911.
- Murder in first and second degrees as provided by act of 1860, § 912 (*a*.)

Pennsylvania.

- Murder in the first and second degree, § 913–14.
- Involuntary manslaughter, § 915.
- Murder in second degree; punishment, § 917.
- Voluntary manslaughter; punishment, § 918.

Virginia.

- Murder in the first and second degree, § 919.
- Involuntary manslaughter, § 920.
- When death occurs out of State, § 921.
- Poisoning well, § 922.
- Abortion, &c., § 923.

Ohio.

- Murder in first degree, § 924.
- Murder in second degree, § 925.
- Manslaughter, § 926.
- Trial to be where blow was struck, § 927.
- Jury to ascertain degree of crime, § 928.
- Death by duel, § 929.

B. HOMICIDE AT COMMON LAW.

I. GENERAL DEFINITIONS, § 930.

1st. MURDER, § 930.
2d. MANSLAUGHTER, § 931.
  (a) Voluntary, § 932.
  (b) Involuntary, § 933.
3d. EXCUSABLE HOMICIDE, § 934.
  (a) *Per infortuniam*, § 934.
  (b) *Se defendendo*, § 935.
4th. JUSTIFIABLE HOMICIDE, § 936.
  (a) Execution by officer of law, § 936.
  (b) Killing by officer of justice, of person resisting him, § 937.
  (c) In prevention of a forcible and atrocious crime, § 938.

II. REQUISITES OF HOMICIDE GENERALLY, § 939.

1st. THERE MUST BE PROOF OF THE CORPUS DELICTI, § 939.
2d. IT MUST BE SHOWN THAT THE DECEASED WAS LIVING WHEN THE ALLEGED MORTAL BLOW WAS STRUCK, § 940.
3d. THE DEATH MUST BE TRACED TO THE BLOW, § 941.
4th. IF AN INFANT, THE CHILD MUST HAVE BEEN BORN ALIVE, 942.
5th. THE HOMICIDE MUST BE OTHER THAN IN THE COURSE OF LEGITIMATE PUBLIC WAR, § 943.

III. HOMICIDE VIEWED IN RESPECT TO THE INTENT, § 944.

1st. FROM MALICE AFORETHOUGHT EXPRESS, WHERE THE DELIBERATE PURPOSE OF THE PERPETRATOR IS TO DEPRIVE ANOTHER OF LIFE, OR TO DO HIM SOME GREAT BODILY HARM, § 944.
  (a) From a particular malice to the person killed, § 950.
  (b) Homicide from a particular malice to one, which falls by mistake or accident upon another, § 965.
  (c) Homicide from a general malice or depraved inclination to do evil, fall where it may, § 967.
2d. HOMICIDE FROM TRANSPORT OF PASSION, IN HEAT OF BLOOD, § 969.
  (a) What is a sufficient provocation, and up to what extent, to extenuate the guilt of homicide, § 970.
  (b) How far the law regards heat of blood in mitigation of homicide, independently of the question of reasonable provocation, as in case of mutual combat, § 987.
  (c) How long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled before the mortal blow given, § 990.
3d. HOMICIDE IN THE PROSECUTION OF AN UNLAWFUL ACT, WHEN THE DEATH IS COLLATERAL, § 997.
4th. HOMICIDE ARISING FROM IMPROPRIETY, NEGLIGENCE, OR ACCIDENT, IN THE PROSECUTION OF AN ACT LAWFUL IN ITSELF, OR INTENDED AS A SPORT OR RECREATION, § 1002.
  (a) General rule as to negligence, § 1002.
  (b) Death from carelessness, where the death was by no means a likely consequence of the careless act, § 1003.
  (c) Carelessness on the public road, § 1005.
  (d) Acts of omission, as well as commission, on the part of those charged with specific duties, § 1011.
  (e) Unlawful or dangerous sports, § 1012.
  (f) Undue correction by persons in authority, § 1014.
  (g) Medical mal-practice, § 1015.
  (h) Negligence on both sides, § 1016.
5th. HOMICIDE FROM NECESSITY IN DEFENCE OF A MAN'S OWN PERSON OR PROPERTY, OR OF THE PERSON OR PROPERTY OF OTHERS, § 1019.
  (a) General nature of right, § 1019.
  (b) As a general rule, the danger must be actual and urgent, § 1020.
  (c) Where the defendant may slay, without retreating to the wall, § 1021.
  (d) An attack provoked or renewed by the defendant will be no defence, § 1022.

(e) Right extends to defence of master, servant, parent, child, husband, wife, or property, against a felonious attack, § 1024.
(f) But not to a defence against a trespass, § 1025.
(g) If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defence, § 1026.
(h) Where one or more persons must be sacrificed in order to preserve the life of others, § 1028.

6th. HOMICIDE OF OR BY OFFICERS OF JUSTICE OR OTHERS KEEPING THE PEACE, § 1030.
(a) Of officers under legal process, § 1030.
(b) By officers under legal process, § 1031.
(c) Of officers or others when the arrest is illegal, § 1034.
(d) By officers of a foreign government, § 1038.
(e) By or of private citizens when attempting to prevent felony, § 1039.
(f) What is sufficient notice of an officer's authority, § 1041.

IV. HOMICIDE AS AFFECTED BY SLAVERY, § 1043.

V. INDICTMENTS, § 1052.

1st. TIME AND PLACE, § 1052.
2d. "IN THE PEACE OF GOD," § 1055.
3d. NAME, § 1056.
4th. "FORCE AND ARMS," § 1057.
5th. CLERICAL AND GRAMMATICAL ERRORS, § 1058.
6th. INSTRUMENT OF DEATH, § 1059.
7th. ASSAULT, § 1065.
8th. SCIENTER IN POISONING, § 1066.
9th. "STRIKE AND BEAT," § 1067.
10th. DESCRIPTION OF WOUND, § 1069.
11th. "FELONIOUSLY" AND "MALICE AFORETHOUGHT," § 1071.
12th. AVERMENT OF TIME AND MANNER OF DEATH, § 1073.
13th. PRINCIPALS AND ACCESSARIES, § 1074.

VI. MURDER IN THE FIRST AND SECOND DEGREE, § 1075.

VII. VERDICT, § 1119.

A.—STATUTORY HOMICIDE.

UNITED STATES.

§ 884. *Murder on High Seas.*—If any person commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder[a] or robbery, or any other offence, which if committed within the body of a county, would, by the laws of the United States,[b] be punishable with death; or if any cap-

[a] The term murder as used in this act, is to be understood as defined at common law. (U. S. *v.* Magill, 1 Wash. C. C. R. 463.)

[b] The third article of the Constitution of the United States, which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases; and a murder committed in the waters of a State where the tide ebbs and flows, is a case of admiralty, and maritime jurisdiction. (U. S. *v.* Bevans, 3 Wheat. 336; 4 Cond. R. 275.)

Congress having provided in the 8th section of the act of April 30th, 1790, for the punishment of murder, &c., committed upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State," it is not the offence committed, but the bay, &c., in which it is committed, that must be out of the jurisdiction of the State. (Ibid.)

Congress have not, in the 8th section of the act of April 30th, 1790, chap. 36, for the punishment of certain offences against the United States, exercised the power, if any such be given by the Constitution of the United States, of conferring jurisdiction on the courts of the United States, of a murder committed in the waters of a State where the tide ebbs and flows. (Ibid.)

The courts of the United States have jurisdiction of a murder committed on the high seas, from a vessel belonging to the United States, by a foreigner being on board of

tain or mariner of any vessel, shall piratically and feloniously run away with such vessel, or any goods or merchandise to the value of fifty dollars, or yield up such vessel voluntarily to a pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended or into which he may be brought. (Act 30th April, 1790, sect. 8.)

§ 885. *Manslaughter on High Seas.*—If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavor to corrupt any commander, master, officer, or mariner, to yield up, or to run away with any vessel, or with any goods, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate, knowing them to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with, or supply, or correspond with any pirate or robber upon the seas; or if any person shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any vessel, or endeavor to make a revolt in such vessel; such person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. (Ibid. sect. 12.)

§ 886. *Murder, &c., on High Seas where Death is on Land.*—If any person upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder, or rape, or shall, wilfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting, such person shall afterwards die upon land within or without the United States, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death. (Act 3d March, 1825, sect. 4.)

§ 887. *Murder or Manslaughter on Dock-yard, &c.*—If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit

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such vessel, upon another foreigner being on board of a foreign vessel. (U. S. *v.* Furlong, 5 Wheat. 184.) They have not jurisdiction, however, of a murder committed by one foreigner on another foreigner, on board of a foreign vessel on the high seas. But they have jurisdiction of a piracy thus committed. (Ibid.) They have also jurisdiction under the act of April 30th, 1790, chap. 37, of murder or robbery committed on the high seas; although not committed on a vessel belonging to the citizens of the United States, as if she had no national character, but was held by pirates or persons not lawfully sailing under the flag of any foreign nation. (U. S. *v.* Holmes et al. 5 Wheat. 412; 4 Cond. Rep. 708.)

The laws of the United States declare, that murder committed on the high seas shall be tried in the district where the offender is apprehended, or into which he is first brought; and therefore, each Circuit Court has jurisdiction in cases arising on the high seas, in which the offender is first brought within its particular district. (U. S. *v.* Magill, 1 Wash. C. C. R. 463.)

It was necessary under the act of 30th April, 1790, to bring the case in the federal courts, that not only the stroke, but the death should happen on the high seas. (Ibid.) By the act of 3d March, 1825, sect. 4, however, as given above, this defect is remedied, and jurisdiction, in such cases, given to the federal courts.

the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death.[c] If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or other place, or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. (Act 30th April, 1790, sect. 7.) (*See also remaining sections of Act of* 1790.)

For statute of 1857, *in respect to manslaughter on the high seas, where death occurs on land, see post,* § 2692.

§ 888. *Manslaughter through negligence by officer of steamboat.*—Every captain,[d] engineer, pilot, or other person employed on board of any steamboat, or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or her respective duties, the life or lives of any person or board said vessel may be destroyed, shall be deemed guilty of manslaughter, and shall, upon conviction thereof before any Circuit Court of the United States, be sentenced to confinement at hard labor for not more than ten years. (Act of July 7, 1838, sect. 12; 5 Statutes at large, 306.)[e]

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[c] The Constitution of the United States declares that Congress shall have power to exercise exclusive legislation in all cases whatever, over places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, &c. The right of exclusive legislation carries with it the right of exclusive jurisdiction; and when a murder is committed in a fort so purchased with such consent, the Circuit Court of the United States has jurisdiction over the offence, under the act of 1790; although in the cession, the State reserved a right to execute civil and criminal process issuing under the State authority in such places. (U. S. *v.* Cornell, 2 Mason's C. C. R. 91.)

[d] Under this act, every person who assumes to perform the duties of any important officer on board a steamboat, is guilty of manslaughter, if loss of life occurs through his ignorance or negligence in respect of his duties. (U. S. *v.* Taylor, 5 McLean, 242.)

[e] Malicious intent need neither be averred or proved under this act. (U. S. *v.* Warner, 4 M'Lean, 463.) On a trial for manslaughter under this act, M'Lean, J., charged the jury as follows: "Under this statute the defendant has been indicted, as engineer on board of the steamboat Virginia, and that by his misconduct, negligence, and inattention to his duties, on a trip from Wheeling in Virginia, to Steubenville in Ohio, the boilers of said boat exploded, which caused the death of several passengers on board of said boat, named, and of others not named. The word 'Engineer,' is used in the statute to designate the individual who acts in that capacity, and the law holds him responsible as such. If he assumes to perform the important duties of an engineer, without the proper qualifications, his ignorance is no excuse, but rather an aggravation of his offence. Congress could not have supposed that any one would be employed in so important a trust who did not possess the requisite qualifications. There is no situation which requires a more accurate knowledge of the power of steam, or a more matured experience, than that of engineer on board of a steamboat. I regard every steamboat as a floating volcano, freighted with human beings, which, from any want of attention by the engineer, is liable to explode, and to hurl them into eternity without a moment's warning. There are no elements in nature more destructive of life than those which are carried in the bosom of a steamboat. It overcomes the force of currents, the winds and the waves, impelled by fiery agency, which, unless kept in subjection, destroys everything within its reach.

"How fearful is the responsibility of every one, who undertakes to govern a vessel thus propelled! His skill should be undoubted, his attention and vigilance unceasing. In case of an explosion, he can only be held guiltless by having done everything to avoid it, which a skilful engineer could have done under the same circumstances. If he be guilty of misconduct, of negligence or inattention, by which means life has been sacrificed, he is punishable under the law. The law deals with him as one competent to perform the duties he has assumed, and he is required to exercise the skill of an instructed and vigilant engineer. But we do not understand that want of skill is relied on as a defence in this case.

"I shall not refer to the facts in detail as stated by the witnesses, but the principal facts are admitted by the parties, or stand uncontradicted. The explosion was more

MASSACHUSETTS.

§ 889. *Murder.*—Every person who shall commit the crime of murder, shall suffer the punishment of death for the same. (Rev. Stat. chap. 125, sect. 1.)

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destructive of human life, in proportion to the size of the boat and the number of passengers on board, than any other, I believe, upon our western waters. But few escaped unharmed. Many were killed, their mangled bodies and separated limbs being thrown upon the land and upon the water, and others were seriously injured. Some of the survivors were thrown into the air, and were found in, and rescued from the water; others were found on shore. The boat was made a perfect wreck; its boilers were broken into fragments, some of which were found a great distance from the boat, on land, others fell in the water. The hull of the boat immediately sunk. To produce such consequences, the steam must have been generated to its utmost height. It is for you, gentlemen of the jury, to inquire whether this explosion resulted from the misconduct, negligence, or inattention of the engineer. The proper determination of this question is of the utmost importance to the public as well as to the prisoner. The safety of the travelling public on our western waters, demands that the evidence and the circumstances in all cases of this sort, should be most carefully investigated. While the innocent should be protected, the culpable instrument of such immeasurable calamity should not go unpunished.

"The fact of explosion is not *prima facie* evidence against the defendant, but it is part of the *res gestæ* essential to the prosecution, and without which it cannot be maintained. But in addition to this, some inattention, negligence, or misconduct by the defendant must be proved, to authorize his conviction. On the part of the prosecution, it is contended that the boat stopped several times in eleven and a half miles from Wheeling, the point of departure to the landing, where the explosion occurred, that greater care was necessary in letting off the steam, than where the stoppages are less frequent. The force of this argument is sustained by experience. Rarely, if ever, do boilers explode when a boat is under way, unless the force of the steam be increased by extraordinary means.

"One of the witnesses, Boals, stated, that having occasion to go below, he found the defendant sitting between the boilers, engaged in reading. This was near an hour before the explosion took place. He was, however, in full view of the machinery. The witness observed to him the boat was making greater speed than usual. The boat landed about one hundred and fifty yards below the place where the boilers exploded, and remained there five minutes. At that place no steam was let off, the fires were kept up. The boat then proceeded to the fatal landing, where it remained five minutes before the engine was put in motion, when the explosion occurred. There is no evidence that the steam was permitted to escape on the first or the last landing, or at the landing where the explosion took place.

"An attempt has been made to show that the boilers of the Virginia were defective, and that its structure, it being top-heavy, rendered it unsteady, and liable to careen. And that in landing, the bow of the boat may have been run on the shore, which would naturally incline the vessel to the side opposite the shore, and that on making back water to force the vessel from the shore, she would resume her erect position, which would throw the water into the heated and measurably exhausted boilers on the other side, which probably produced the explosion. There is no evidence on which this conjecture is founded. If the bow of the boat at the last landing was run upon shore, there is no proof of the fact.

"It is also insisted that the boilers of the boat were defective. There is no competent evidence offered to prove this fact. Fragments, alleged to be of the boilers, were offered, and the statements of persons who had examined them; but they were not identified to be parts of the boilers of the Virginia. Some evidence has been given which you will duly consider, tending to show the good conduct of the defendant on former occasions while acting as engineer on a steamboat.

"Congress, by legislation on this subject, have endeavored to add somewhat to the security of passengers in travelling upon steamboats. They may not have done all that could be done by legislation. Under the commercial power they possess the exclusive authority to regulate steamboats and other vessels which are used in carrying on a commerce between two or more States. And if they shall fail to do what may be done by the exercise of legislative power, to advance this commerce, and give safety to the travelling public, they are justly amenable to public opinion. Whatever may be thought of other subjects which more immediately address themselves to the feelings and interests of Congress, there is no subject connected with our western commerce more vitally interesting to the country.

In every case of conviction of the crime of murder, the court may, in their discretion, order the body of the convict, after his execution, to be dissected, and the sheriff, in such case, shall deliver the dead body of such convict to a professor of anatomy and surgery, in some college or public seminary, if requested; otherwise, it shall be delivered to any surgeon, who may be attending to receive it, and who will engage for the dissection thereof. (Ibid. sect. 2.)

§ 889(*a.*) *Murder in the First Degree.*—Murder, committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. (Stat. of 1858, sect. 1.)

Second Degree.—Murder not appearing to be in the first degree is that in the second. (Ibid. sect. 2.)

Degree to be found by jury.—The degree of murder is to be found by the jury. (Ibid. sect. 3.)

Punishment of Murder in the First Degree.—Whoever is guilty of murder in the first degree shall suffer the punishment of death for the same, subject, however, to such conditions, regarding the time and manner of executing sentence, and the custody or imprisonment of the convict prior thereto, as shall have been otherwise provided by law. (Ibid. sect. 4.)

Of Murder in Second Degree.—Whoever is guilty of murder in the second degree shall be punished by imprisonment in the State prison for life. (Ibid. sect. 5.)

Forms of Indictment not affected by act.—Nothing herein shall be construed to require any modification of the existing forms of indictment. (Ibid. sect. 6.)

This act shall take effect from and after its passage. (March 27, 1858.) (Ibid. sect. 7.)[ee]

§ 890. *Death by Duel.*—Every person, being an inhabitant or resident of this State, who shall, by previous appointment or engagement made within the same, fight a duel without the jurisdiction of the State, and by so doing shall inflict a mortal wound upon any person, whereof the person so injured shall afterwards die, within this State, shall be deemed guilty of murder within this State, and may be indicted, tried, and convicted in the county where such death shall happen. (Ibid. sect. 3.)[f]

§ 891. *Seconds in Duel.*—Every person, being an inhabitant or resident of this

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"If the danger of steamboat travelling were more generally known and appreciated, less safety would be felt in that mode of travelling. But, gentlemen, we are not responsible for any defect of legislation on this subject. Our functions are exercised in giving effect to the law. And in the present case, if on a full and deliberate consideration of the facts and circumstances of this case, you are led to the conclusion that the calamity so much to be deplored, was occasioned by any misconduct of the defendant, by want of skill, negligence, or inattention on his part, you will render a verdict of guilty. And particularly if you shall believe that it was his duty as a careful and skilful engineer, to let off the steam, at either or both of the last two landings, and that such a failure caused the explosion, he is guilty under the statute. On the contrary, if you shall think, on weighing the evidence, that his duty was faithfully discharged, you will find him not guilty." (U. S. *v.* Taylor, 5 M'Lean, 242; 3 West, L. J. N. S. 481. And see, also, U. S. *v.* Warner, 4 M'Lean, 464, cited at large in Wh. on Homicide, 101, and U. S. *v.* Collyer, reported in same, Appendix, 483.)

In an indictment against the captain of a steamboat, for manslaughter, nnder the 12th section of the act 7 July, 1838 (203, pl. 10), it is not necessary to show *wilful* misconduct, negligence, or inattention. The omission to give order for raising the safety valve, when the boat stops, is legal evidence to support an indictment against him. (United States *v.* Farnham, 2 Blatch. 528–9.)

[ee] Supplement to Revised Statutes, 1858, ch. 154, p. 555.

[f] See post, § 959, 990–6.

State, who shall, by previous appointment and engagement made within the same, be the second of either party, in such duel as is mentioned in the preceding section, and shall be present as second, when such mortal wound is inflicted, whereof death shall ensue within this State, shall be deemed to be an accessary before the fact to the crime of murder in this State, and may be indicted, tried, and convicted in the county where the death shall happen. (Ibid. sect. 4.)

§ 892. Any person indicted under either of the two preceding sections, may plead a former conviction or acquittal of the same offence, in any other State or county, and such plea, if admitted or established, shall be a bar to all further or other proceeding against such person, for the same offence, within this State. (Ibid. sect. 5.)

§ 893. *Manslaughter.*—Every person who shall commit the crime of manslaughter shall be punished by imprisonment in the State prison, not more than twenty years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than three years. (Ibid. sect. 9.)[ff]

NEW YORK.

§ 894. *Murder.*—The killing of a human being, without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. (2 Rev. Stat. 656, sect. 4.) But see post, § 912 (b), for repeal.

Such killing, unless it be manslaughter or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:—

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.[g]

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.[h]

3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony. (Ibid. sect. 5.)

§ 895. *Death by Duel.*—Every inhabitant or resident of this State, who shall, by previous appointment or engagement, fight a duel, without the jurisdiction of this State, and in so doing shall inflict a wound upon his antagonist or any other person,

[ff] In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute of the Commonwealth declares (Rev. Stat. c. 125, § 1), "that every person who commits the crime of murder shall suffer the punishment of death for the same;" yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully considered distinctions and qualifications. For these we resort to that great repository of rules, principles and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the Provincial Government, and was formerly confirmed by the provision of the constitution (ch. 6, art. 6), declaring that all the laws which have heretofore been adopted, used, and approved in the Province or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain, and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of common law were applicable to the administration of criminal law, and have not been altered and modified by acts of our colonial or provincial government, or by the State legislature, they have the same force and effect as laws formerly enacted. (Shaw, C. J., Bemis' Webster's case, p. 456.)

[g] There must be a specific intent to take some particular life. People *v.* Sheriff, 1 Harris, C. C. 659.

[h] See as to scope of this, People *v.* Johnson, 1 Harris, C. C. 290.

whereof the person thus injured shall die within this State, and every second engaged in such duel, shall be deemed guilty of murder within this State, and may be indicted, tried, and convicted in the county where such death shall happen. (Ibid. sect. 6.)[i]

§ 896. Every person indicted under the provisions of the last section, may plead a former conviction or acquittal for the same offence, in another State or county, and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offence within this State. (Ibid. sect. 7.)

§ 897. The killing of a master by his servant, or of a husband by his wife, shall not be deemed any other or higher offence than if committed by any other person. (Ibid. sect. 8.)

§ 898. *Justifiable and Excusable Homicide.* Title 2.—The killing of one human being, by the act, procurement, or omission of another, in cases where such killing shall not be murder according to the provisions of the first title of this chapter, is either justifiable or excusable homicide, or manslaughter. (2 R. S. 660.)[j]

Such homicide is justifiable when committed by the public officers and those acting by their command in their aid and assistance, either,

1. In obedience to any judgment of a competent court; or,

2. When necessarily committed in overcoming any actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or,

3. When necessarily committed in retaking felons who have been rescued, or who have escaped; or,

4. When necessarily committed in arresting felons fleeing from justice. (Ibid. sect. 2.)

Such homicide is also justifiable, when committed by any person in either of the following cases:—

1. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling-house, in which such person shall be; or,

2. When committed in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished; or,

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[i] See post, § 959–990–996.

[j] Homicide, occasioned by committing, or attempting to commit a misdemeanor, though murder at common law, is, by the revised statutes, reduced to manslaughter, in the first degree. (People *v.* Rector, 19 Wendell, 569; See also People *v.* Johnson, 1 Harris, C. C. 290.)

The principal object of the provisions of the revised statutes was, to restore the common law of murder, as it anciently existed, by discriminating between a felonions killing with malice aforethought, and a felonious killing without such malice, and thus restrict certain cases to the grade of manslaughter, which heretofore were held to be murder. (People *v.* Enoch, 13 Wendell, 159.) It seems, however, that under these provisions, many cases will hereafter be deemed murder, which, previous to the revision, fell under the grade of manslaughter. (Ibid.) But see three cases reviewed in Darry *v.* People, 2 Parker, C. R. 606.

Where, in an indictment for murder, the crime is charged to have been committed with a premeditated design to effect the death of the person killed, it was held, that the premeditated design, or express malice, must be proved, although the act be also charged to have been done with malice aforethonght. (People *v.* White, 24 Wendell, 520, reversing S. C. 22 Wendell, 167.) Such a description cannot be rejected as surplusage. (Ibid.) To what extent premeditation must exist; see Sullivan *v.* People, 1 Harris, C. C. 347; 3 Selden R. 385.

3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace. (Ib. sect. 3.)

§ 899. *Excusable Homicide.*—Such homicide is excusable when committed—

1. By accident and misfortune, in lawfully correcting a child or servant; or in doing any other lawful act by lawful means, with usual and ordinary caution and without any unlawful intent; or,

2. By accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner. (Ib. sect. 4.)

Whenever it shall appear to the jury, on the trial of any person indicted for murder or manslaughter, that the alleged homicide was committed under circumstances, or in cases, where by law such homicide was justifiable or excusable, the jury shall render a general verdict of not guilty. (Ib. sect. 5.)

§ 900. *Manslaughter in the First Degree.*—The killing of a human being without a design to effect death, by the act, procurement, or culpable negligence of any other, while such other is engaged,

1. In the perpetration of any crime or misdemeanor not amounting to felony; or,

2. In an attempt to perpetrate any such crime or misdemeanor.

In cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree. (Ib. sect. 6.)

Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree. (Ib. sect. 7.)

The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree. (Ib. sect. 8.)[jj]

§ 901. *Manslaughter in the Second Degree.*—Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such quick child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree. (Ib. sect. 9.)[k]

The killing of a human being, without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree. (Ib. sect. 10.)

[jj] The Revised Statutes prescribe different degrees of manslaughter. Held, that under an indictment for manslaughter in the common law form, the prisoner might be convicted of manslaughter in any of the statute degrees. (People *v.* Butler, 3 Parker, C. R. (N. Y.) 377.

[k] By title 5, § 21. "Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance, or thing whatever, or shall use, or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail, not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." It seems, that under an indictment under the 8th sec. in text, for the felony of killing the unborn *quick* child, the defendant may be convicted of the misdemeanor of destroying the *unquick* child. (People *v.* Jackson, 3 Hill, 92; Lohman *v.* People, 1 Comstook, 379; ante, § 400.)

§ 902. Every person who shall unnecessarily kill another, either,

1. While resisting an attempt by such other person to commit any felony, or to do any other unlawful act; or,

2. After such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree. (Ib. sect. 11.)

§ 903. *Manslaughter in the Third Degree.*—The killing of another, in the heat of passion, without a design to effect death, by a dangerous weapon, in any case, except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree. (Ib. sect. 12.)

§ 904. The involuntary killing of a human being, by the act, procurement, or culpable negligence of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an attempt to commit such injury, shall be deemed manslaughter in the third degree. (Ib. sect. 13.)

§ 905. If the owner of a mischievous animal, knowing its propensities, wilfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large or not confined, kill any human being, who shall have taken all the precautions which the circumstances may permit, to avoid such animal, such owner shall be deemed guilty of manslaughter in the third degree. (Ib. sect. 14.)

§ 906. Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter in the third degree. (Ib. sect. 15.)

§ 907. If the captain or any other person having charge of any steamboat, used for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance, or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler, or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking, any person shall be killed, every such captain, engineer, or other person, shall be deemed guilty of manslaughter in the third degree. (Ib. sect. 16.)

§ 908. If any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any other act to another person, which shall produce the death of such other, he shall be deemed guilty of manslaughter in the third degree. (Ib. sect. 17.)

§ 909. *Manslaughter in the Fourth Degree.*—The involuntary killing of another, by any weapon, or by means neither cruel nor unusual, in the heat of passion, in any cases other than such as are herein declared to be excusable homicide, shall be deemed manslaughter in the fourth degree. (Ib. sect. 18.)

§ 910. Every other killing of a human being, by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder, or in this title manslaughter of some other degree, shall be deemed manslaughter in the fourth degree. (Ib. sect. 19.)

§ 911. *Punishment.*—Persons convicted of manslaughter in the first, second, or third degrees, shall be punished by imprisonment in a State prison, as follows:—

1. Persons convicted of manslaughter in the first degree, for a term not less than seven years.

2. If convicted of manslaughter in the second degree, for a term not less than four, and not more than seven years.

3. If convicted of manslaughter in the third degree, for a term not more than four years, and not less than two years. (Ib. sect. 20.)

§ 912. Every person convicted of manslaughter in the fourth degree, shall be punished by imprisonment in a State prison for two years, or by imprisonment in a county jail, not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Ib. sect. 21.)

§ 912(*a*). No crime hereafter committed, except treason and murder of the first degree, shall be punished with death in the State of New York. (Stat. 1860, sect. 1.)

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or the attempt to perpetrate any arson, rape, robbery, or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder in either degree shall be tried, shall, if they find such person guilty thereof, find in their verdict whether it be under the first or second degree. (Ibid. sect. 2.)

Upon any indictment against any person for murder in the first degree, it shall and may be lawful for the jury to find such accused person guilty of murder in the second degree. (Ibid. sect. 3.)

When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to confinement at hard labor in the State prison until such punishment of death shall be inflicted. The presiding judge of the court at which such conviction shall have taken place shall immediately thereupon transmit to the governor of the State, by mail, a statement of such conviction and sentence, with the notes of testimony taken by said judge on the trial. (Ibid. sect. 4.)

No person so sentenced or imprisoned shall be executed in pursuance of such sentence, within one year from the day on which such sentence of death shall be passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof, to the governor of the State, nor until a warrant shall be issued by the governor, under the great seal of the State directed to the sheriff of the county in which the State prison may be situated, commanding the said sentence of death to be carried into execution. (Ibid. sect. 5.)

Every person convicted of murder in the second degree shall be sentenced to undergo imprisonment in one of the State prisons, and be kept in confinement at hard labor for his or her natural life. (Ibid. sect. 6.)

Section 1, of Title 1, of Chapter 1, of Part 4, of the Revised Statutes shall be amended so as to read as follows:—

Every person who shall hereafter be convicted, 1st, of treason against the people of this State; 2d, of murder; or, 3d, of arson in the first degree, as those crimes are respectively declared in this title, shall be punished as herein provided. (Ibid. sect. 7.)

Section 18 of said Title 1 is hereby amended so as to read as follows:—

The inquisition of the jury shall be signed by them and the sheriff. If it be found by such inquisition that such convict is insane, the sheriff shall convey said convict to the lunatic asylum for insane convicts, there to be kept at the expense of the State until such time as the superintendent thereof shall certify to the governor that said lunatic is sane, and the governor may thereupon issue his warrant for his

execution, if he was convicted of murder in the first degree, or may direct that he be imprisoned in one of the State prisons according to law. (Ibid. sect. 8.)

The provisions of this act for the punishment of murder in the first degree shall apply to the crime of treason, and the punishment of murder in the second degree, as herein provided, shall apply to all crimes now punishable with death, except as herein provided. (Ibid. sect. 9.)

All persons now under sentence of death in this State, or convicted of murder and awaiting sentence, shall be punished as if convicted of murder of the first degree under this act. (Ibid. sect. 10.)

[*The construction of this and the other statutes, dividing murder into degrees, is given, post,* § 1082, *&c.*]

PENNSYLVANIA.

§ 913. *Murder in the First Degree and Second Degree.*—Whereas, the design of punishment is to prevent the commission of crime, and to repair the injury that had been done thereby to society, or the individual; and it hath been found by experience, that these objects are better obtained by moderate, but certain penalties, than by severe and excessive punishments; and whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety; therefore,

No crime whatsoever, hereinafter committed, except murder of the first degree, shall be punished with death in the State of Pennsylvania.

And whereas the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of atrociousness, that it is unjust to involve them in the same punishment: (Act of 22d April, 1794, sect. 1; 3 Dallas, 600; 3 Smith, 186; Pur. 6th ed. 786.)[kk]

§ 913(*a*). *Murder in the First Degree.*—All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

§ 914. That every person convicted of the crime of murder of the first degree, his aiders, abettors, and counsellors, shall be sentenced to suffer death by hanging by the neck; and it shall be the duty of the clerk of the court wherein such conviction takes place, and he is hereby required, within ten days after such sentence, to transmit a full and complete record of the trial and conviction to the governor of this commonwealth. (Rev. Stat. Bill I. sects. 74–75.)

§ 915. *Of the Second Degree.*—Every person duly convicted of the crime of murder of the second degree, shall, for the first offence, be sentenced to undergo an imprisonment, by separate or solitary confinement, not exceeding twelve years, and for the second offence for the period of his natural life. (Ibid. sect. 76.)[1]

[kk] The above is here given for reference only. It is repealed by the revised act of 1860.

[1] "No attempt has been made by the Commissioners to interfere with the law of murder as it has existed since the act of 1794. This law has been so thoroughly considered, and its construction and meaning so entirely settled by a long course of judi-

§ 916. *Petit Treason abolished.*—Every person liable at any former period to be prosecuted for petit treason, shall in future be indicted, proceeded against, and punished as is directed in other kinds of murder. (Ibid. sect. 77.)

§ 917. *Voluntary Manslaughter.*—Every person convicted of any voluntary manslaughter, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or simple imprisonment, not exceeding twelve years, and in the discretion of the court, to give security for good behavior during life, or for any less time, according to the nature and enormity of the offence. (Ibid. sect. 78.)

§ 918. *Involuntary Manslaughter.*—If any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, it shall and may be lawful for the district attorney, with the leave of the court, to waive the felony and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter; and such person, on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and to suffer an imprisonment not exceeding two years, or the district attorney may charge both wilful and involuntary manslaughter in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge. (Ibid. sect. 79.)

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cial decision, that they have deemed it inexpedient to attempt any important alteration thereof. In the seventy-sixth section of the present act, which is taken from the fifteenth section of the act of 1794, an addition has been made to the latter, requiring the clerk of the court, upon a conviction of any person of murder in the first degree, to transmit, within ten days after sentence, a complete record of the trial and conviction to the Governor of the Commonwealth."

"Murder in the second degree is now punished by the fourth section of the act 23d April, 1829, for the first offence, with imprisonment at solitary confinement at labor, not less than four, nor more than twelve years, and for the second offence, with similar imprisonment for life. This punishment was a modification of that inflicted by the fourth section of the act of 22d April, 1794, which inflicted a penal imprisonment of not less than five, nor more than eighteen years on this crime. The change proposed by the seventy-seventh section of the present act, is simply to strike out the minimum punishment in the first conviction, of four years, leaving the maximum punishment of twelve years to stand, according to the principle already discussed in this report. By the seventh section of the act of 1794, voluntary manslaughter was punished by penal imprisonment, not less than two, nor more than ten years for the first offence, and for the second offence, by penal imprisonment not less than six, nor more than fourteen years. By the fourth section of the act of 1829, this punishment was changed for the first offence, to imprisonment at solitary labor, not less than two, nor more than six years, and for the second offence, not less than six, nor more than twelve years. By the seventy-ninth section of the present act, voluntary manslaughter may be punished by imprisonment at solitary confinement, not exceeding twelve years, or by simple imprisonment. No provision is made for the increase of the punishment on a second conviction, because twelve years is the maximum pnnishment that can be imposed by the present law, even in case of a second conviction. The material change in the punishment of this crime, is the authority given to the courts to punish by simple imprisonment, in lieu of imprisonment at labor, when the circumstances are such as to render such imprisonment an adequate punishment for the crime. The law, in its anxiety for the protection of human life, has held many homicides to be manslaughters, where the killing has taken place under circumstances approximating the crime, very near excusable homicides in self-defence. While the commissioners are altogether unwilling to weaken the protection thrown by the common law around human life, by attempting nicely to grade the distinction which may exist in manslaughter, yet they think that such an extent of discretion given to the court as is proposed, would meet every objection which has been experienced in applying the punishments of the existing laws, to all the varieties of circumstances in which this crime presents itself. The change in the eightieth section consists in fixing a limit to the fine and imprisonment imposed by the act of 1794, on involuntary manslaughter, the extent of which now rests in the discretion of the court." (Reviser's note.)

For a continuation of these statutes see post, § 1082, &c.

VIRGINIA.

§ 919. *Murder in the First and Second Degree.*—1. Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder in the second degree.[m]

2. Murder of the first degree shall be punished with death.

3. Murder of the second degree, by a free person, shall be punished by confinement in the penitentiary not less than five nor more than eighteen years.

4. Voluntary manslaughter, by a free person, shall be punished by confinement in the penitentiary not less than one nor more than five years.

§ 920. *Involuntary Manslaughter.*—5. Involuntary manslaughter, by a free person, shall be a misdemeanor.

§ 921. *Death out of State.*—6. If a person be stricken or poisoned in, and die, by reason thereof, out of this State, the offender shall be as guilty, and be prosecuted and punished, as if the death had occurred in the county or corporation in which the stroke or poison was given or administered.

§ 922. *Poisoning Well.*—7. If any free person administer, or attempt to administer, any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well, or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three, nor more than five years.

§ 923. *Abortion, &c.*—8. Any free person who shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child. (Code, p 724; Title, 54, ch. 191.)

OHIO.

§ 924. *Murder in the First Degree.*—That if any person shall purposely, and of deliberate and premeditated malice,[n] or in the perpetration, or attempt to perpe-

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[m] See 1 Va. Cases, 10, 310; 2 Va. Cas. 70, 78, 111, 387, 483; 6 Rand. 721; 1 Leigh. 598; 8 Leigh, 745; 11 Leigh, 681; 2 Rob. 772; 3 Grat. 594; 5 Grat. 660; post, § 1075.

[n] To constitute the crime of murder in the first degree, when the purpose to maliciously kill, with premeditation and deliberation, is found, the length of time between the design so formed and its execution, is immaterial. Shoemaker *v.* State, 12 Ohio, 43.

"To convict of *murder in the first degree*, you must in addition to the points I have mentioned, be satisfied: 1. That the prisoner perpetrated the act *purposely*. 2. That he did it with *intent to kill*. 3. That he did it of deliberate and premeditated malice. To constitute deliberate and premeditated malice, the intention to do the injury must have been deliberated upon and the *design* to do it *formed* before the act was done; though it is not required that either should have been for any considerable time before. This supposes the party, by reflection, understood what he was about to do, and intended to do it in order to do harm. If these things are all proven, and you find the defendant guilty of murder in the first degree, you need examine no farther. If not proven to your satisfaction, you will then examine further." Wright, J., State *v.* Turner, Wright, 30.

"If the act was done *maliciously*, was it perpetrated *deliberately* with premeditation? If the prisoner *coolly* formed the design to kill, for *any time* before he executed it, the act was deliberate and premeditated. But if, *at the time*, he was led to form the design to kill, by great provocation, heated blood, and excited passion, which continued from then until the act was done, it would not be held deliberate and premeditated. Yet if the design was formed under provocation, and in hot blood, and time afterwards elapsed

trate any rape, arson, robbery, or burglary, or by administering poison,[nn] or causing the same to be done, kill another; every such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death. (Act of March 7, 1835, sect. 1, Swan's Stat. 269.)

§ 925. *Murder in the Second Degree.*—That if any person shall purposely and maliciously, but without deliberation and premeditation,[o] kill another, every such

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for passion to subside, and reason to resume her empire, the provocation and hot blood would be no excuse or palliation. We are asked to charge you that if the design to kill was abandoned before the act was done, then the killing was not with *malice prepense.*" Wright, J. State *v.* Gardiner, Ibid. 400; see, also, State *v.* Town, Ibid. 76; also State *v.* Thompson, Ibid. 622.

In a trial for murder, it is competent for the defendant to prove how he was employed at the time he met with the person he is charged to have killed, and what was his conduct a short time before the affray which resulted in the killing.

In such case it is competent for the defendant to prove, that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded, for the purpose of quarrelling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties in relation to such agreement, though the defendant had not been informed of the intent of the parties in approaching him. Stewart *v.* State, 19 Ohio, 302.

[nn] The overt act of homicide by *administering* poison, within the meaning of the law, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken, so that if the poison be prescribed and furnished in one county to a person who carried it into another county, and there, under the directions given, takes it and becomes poisoned, and dies of the poison, the administering is consummated, and the crime committed, if committed at all, in the county where the person is poisoned. Robbins *v.* The State, 8 Ohio State R. (N. S.) 131.

[o] "To convict of *murder in the second degree*, you must be satisfied of the general facts common to all the offences which I have stated, and also of the following: 1, That the prisoner perpetrated the act *purposely* and maliciously; 2, with intent to kill, and 3, without *deliberation* or *premeditation*. If you are not satisfied of the concurrence of these facts, you should acquit him of murder in the second degree, and will be under the necessity of examining further." Wright, J. State *v.* Turner, Wright, 30.

Under an indictment for murder in the second degree, under this act, it is admissible for the prosecution to prove previous threats by the defendant, in order to show that the killing was malicious. Stewart *v.* State, 1 Ohio St. R. 66.

"The difference between murder in the first and second degree, as expressed in our law, is found in this; to constitute murder in the first degree, the killing must be of deliberate and premeditated malice, while murder in the second degree is the killing *purposely* and *maliciously, but without deliberate and premeditated malice.*" Wright, J. State *v.* Gardiner, Ibid. 401.

"If the blow which occasioned the death was *purposely* and *maliciously* given by the prisoner, *without* deliberation or preconceived design, or was an act upon which his mind had not previously resolved, our law defines the offence *murder in the second degree*, and you should so find." Wright, J. State *v.* Thompson, Ibid. 924; see, also, State *v.* Williams, Ibid. 198.

Intent or purpose to kill, although not essential to constitute murder at common law, is made one of the ingredients of the crime of murder by the statute of Ohio. Therefore, it is essential to the sufficiency of an indictment for murder in the first degree in this State, that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound, in the description of the crime; and an averment that an assault and battery, resulting in the death of the person assaulted, was committed purposely, and of deliberate and premeditated malice, *ex oi termini* import a purpose or intent to kill; and the omission of such an averment cannot be supplied by any rule of evidence applicable to the proof on the trial, or be cured by the legal conclusion of the grand jury, usually inserted in the closing part of such an indictment, drawn from the antecedent averments descriptive of the crime. Fouts *v.* State, Ohio State Rep. (N. S.) 98; Swan, C. J., and Brinkerhoff, J., dissenting; Kain *v.* State, 8 Ohio State R. (N. S.) 306.

Murder at common law has been superseded by our statutory provisions in relation to homicide; and although in homicide committed in administering poison, or

person shall be deemed guilty of murder in the second degree, and, on conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, during life. (Ibid. sect. 2.)

§ 926. *Manslaughter.*—That if any person shall unlawfully kill another without malice,[p] either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act; every such person shall be deemed guilty of manslaughter, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten years, nor less than one year. (Ibid. sect. 3.)

§ 927. *Accused to be tried in county where mortal blow, &c., given, though death ensue in another place.*—That if any person shall give any mortal blow, or admi-

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in perpetrating, or attempting to perpetrate, either of the felonies mentioned in the statute, the turpitude of the felonious act is made to supply the place of the *deliberate and premeditated malice* requisite to the first class of murder defined, yet the *purpose to kill*, expressed in the statute, applies to each of the several classes of murder in the first degree. Robbins *v.* The State, 8 Ohio State R. (N. S.) 131.

An averment, merely, that the accused "purposely, and of deliberate and premeditated malice, did strike, penetrate and wound the deceased, giving to him * * * one mortal wound," and that the deceased, "of the mortal wound aforesaid, died," is not sufficient; the purpose being predicated of the assault and wounding, but not of the killing. Kain *v.* The State, 8 Ohio State R. (N. S.) 306.

In case of a homicide by administering poison, or causing the same to be done, the accused cannot be convicted of murder in the first degree, where there was *no purpose or intent* to kill the person poisoned, inasmuch as the statute of this State has made *purpose or intent to kill* an essential element of that degree of homicide for which the punishment of death is inflicted. Robbins *v.* The State, 8 Ohio State R. (N. S.) 131.

Upon trial under an indictment for murder in the first degree, it is error for the court to charge the jury that if they find the prisoner guilty of the homicide, they must state in their verdict that they find him guilty of murder in the first degree. Beaudein *v.* the State, 8 Ohio State R. (N. S.) 634.

[p] In a charge to the jury Wright, J., said, "that intention to kill was not a necessary ingredient in manslaughter, arising from a sudden quarrel," and this is assigned for error. We are all of opinion that, in this, there was no error. * * * * * * * * * * That the crime of manslaughter may be committed by an intentional killing, upon a sudden quarrel, is not doubted; but that, in all cases, this precise intent must exist, is what we are unprepared to admit. The statute provides for the punishment of one "who shall unlawfully kill another, without malice, upon a sudden quarrel," and declares he shall be guilty of manslaughter. Swan's Stat. 228. Is it not clear, that if one strike another with a dangerous and unlawful weapon, upon a sudden quarrel, or beat him in a cruel and vindictive manner, so that death ensues, although there was no specific intent to produce death, that the crime would be manslaughter? If so, an intent to kill is not a necessary ingredient of manslaughter, under this clause of the statute. Montgomery *v.* State, 11 Ohio, 426.

An indictment for manslaughter, drawn after the approved common law precedents, is good in a prosecution under the statute of Ohio, for the same offence.

A statement that the prisoner made an assault and unlawfully discharged a gun, loaded with powder and lead, at the person killed, is a sufficient averment of the unlawful act designated in the statute.

After a verdict of guilty, and judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury by the provision in the Bill of Rights, that "the accused shall not be twice put in jeopardy for the same offence." Sutcliffe *v.* State, 18 Ohio, 469.

"To convict of *manslaughter*, you must be satisfied by the evidence of the three common facts stated to you; and also, 1, that the act was done *unlawfully;* 2, *without* malice; 3, *with intent to kill*, formed in the heat of a *sudden quarrel;* or, 4, *without intent to kill*, while the prisoner was engaged in the commission of some unlawful act. If, in your opinion, the act was done maliciously, whether the malice be either express or only implied, the offence, whatever it is, is not manslaughter; so, if you find *an intention to kill*, and that there was not *great provocation*, or a *suddenly excited passion*, the crime, if any has been committed is not manslaughter." Wright, J. State *v.* Turner, Wright, 30; see also Wright, J., State *v.* Town, Ibid. 76; also Wright, J., State *v.* Gardiner, Ibid. 401.

nister any poison to another, in any county within this State, with intent to kill, and the party so stricken or poisoned thereof shall afterwards die in any other county or State, the person giving such mortal blow, or administering such poison, may be tried and convicted of murder or manslaughter, as the case may be, in the county where such mortal blow was given, or poison administered. (Act of March 7, 1835; Swan's Stat. sect. 37, 275.)

§ 928. *In trials for murder, jury to ascertain the degree of the crime, or court may do so when there is a plea of guilty.*—That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.[q] (Act of March 7, 1835; Swan's Stat. sect. 39, 275.)

§ 929. *Death by Duel.*—That if any person shall engage in or fight a duel with another, or shall be second to such person who shall fight a duel; or if any person shall, by word, message, letter, or in any other way, challenge another to fight a duel; or shall accept a challenge to fight a duel, although no duel be fought; or shall knowingly be the bearer of such challenge; or shall advise, prompt, encourage or persuade any person to fight a duel, or challenge another to fight a duel, whether such duel be fought or not; 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 ten years, nor less than one year; and shall forever after be incapable of holding any office of honor, profit, or trust, within this State. Provided, however, if death ensue from such duel, the person or persons concerned shall be deemed guilty of murder, and shall be punished for murder in the first or second degree (as the case may be), as is provided in this act; anything in this section to the contrary notwithstanding. (Act of March 7, 1835; Swan's Stat. sect. 25, 272–3.)

B.—Homicide at common law.[r]

I. General definitions.

1st. Murder.

§ 930. *Murder* is where a person of sound memory and discretion, unlawfully kills any reasonable creature in being, and in the peace of

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[q] *The Verdict.*—In all trials for murder, the degree of the crime must be found as a matter of fact, and be specified in the verdict of the jury; and without an express finding, ascertaining the degree of the crime, the court is not authorized to inflict the punishment prescribed by law for either degree of the crime. Dick *v.* State, 3 Ohio St. Rep. 80; Parks *v.* State, 3 Ohio St. R. 101.

On the trial of an indictment charging the crime of murder in the first degree, in the descriptive words of the statute, the verdict of "guilty in manner and form as he stands charged in said indictment," is insufficient. Ibid.

[r] For forms of indictment, see Wharton's Precedents, as follows: Homicide, general form of indict. 114; same in U. S. courts, 177; general requisites of indict. 114; malice aforethought, 114; instrument of death, 114; time of death, 114; death occurring in another State, 153; accessaries, how to be charged, 114; principals in, how to be charged, 114; conclusion, *Ibid. Indictments:* Shooting with a pistol, 115; against principal, in first and second degrees, for shooting slave, with same, 117; against principals, in first and second degrees, for shooting with gun, 156; striking on the hip

the commonwealth, with malice prepence or aforethought, either express or implied.[s] Where the legislature makes use of a technical law term, its meaning must be ascertained by the common law; and therefore the definition of murder under the several statutes must be taken in the common law sense.[t]

2d. MANSLAUGHTER.

§ 931. *Manslaughter* is the unlawful and felonious killing of another, without any malice, either express or implied. It is of two kinds.

§ 932. (*a.*) *Voluntary manslaughter*, which is the unlawful killing of another, without malice, on sudden quarrel or in heat of passion. Where upon a sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they upon such occasion go out and fight in a field; for this is one continued act of passion. So, also, if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendo*, neither is it murder, for there is no previous malice.[u] In these and such like cases, the law kindly appreciating the infirmities of human nature, extenuates the offence committed, and mercifully hesitates to put upon the same footing of guilt, the cool deliberate act and the result of hasty passion.

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with knife, the death occurring in another State, 153; cutting throat with knife, 116; stabbing on belly with same, 155; striking neck with axe, 152; against slave for murder with axe, 154; striking with a hatchet on high seas, 177; against principal, in first and second degrees, for hanging, 118; second count, beating and hanging, 119; stamping, kicking, and beating, 145; beating with fists and kicking, no mortal wound being found, 146; striking with a poker, 120; striking with a handspike, on the high seas, 178. Homicide, striking with a glass bottle (in a foreign jurisdiction), 179; drowning, 122; stabbing and drowning on high seas, 147; against a mother for drowning her infant child, 180; strangling, 160; choking, against principals in first and second degrees, 123–4, 8; suffocating infant, 144; poisoning with arsenic, 125, 130, 1–6; placing poison so as to be mistaken for medicine, 133; poisoning child by laudanum, 134; mixing arsenic with wine and sending it to deceased, 125, 135; giving deceased poison and thereby aiding her in suicide, 138; burning a house in which deceased was at the time, 126; giving deceased large quantities of spirituous liquors, &c., 168; starving, 161; forcing sick persons into street, &c., 143; neglecting to supply wife with shelter, 170; neglecting to supply apprentice with food, 161–2; killing same with over-work, 163; neglecting to supply infant with clothes, 165; striking with stones, 149, 167; manslaughter by same, 167; striking with a cart, 169; striking infant with dray (involuntary manslaughter), 176; riding over with a horse, 121; murder of bastard child by strangling, 144, 157; murder by throwing in privy, 158; by smothering in linen cloth, 159; same in Pennsylvania, by strangling, 123, 160; misdemeanor in concealing death of bastard child, under the Pennsylvania statute, by casting it in a well, 610; same where means of concealment are not stated, 184; endeavor to conceal the birth of dead child, under the English statute, 185; against captain and engineer of steamboat, for manslaughter in second degree, in New York, 172–3; conspiracy to murder, 183.

[s] Com. *v.* Thomson, 5 Mass. 134; 3 Wheeler's C. C. 319; State *v.* Zeller, 2 Halstead, 220; State *v.* Norris, 1 Hay. 429; State *v.* Weaver, 2 H. 54; Com. *v.* Daley, 4 Penn. Law Journ. 154; Penns *v.* Honeyman, Add. 148; 3 Inst. 47, 51; 2 Ld. Raymond, 1487; 1 Hale, 425; 1 Hawk. ch. 31, s. 3, 8; Kel. 127; Fost. 256; 4 Blac. Com. 198; Lewis, C. L. 394.

[t] U. S. *v.* Magill, 1 Wash. C. C. R. 453; Wharton on Homicide, 33, 34.

[u] 1 Hale, 449; 4 Blackstone's Com. 191; 1 Hawk. c. 30, s. 3; Parker, J., Selfridge's Trial, 158; Whar. on Hom. 35, 417; State *v.* Norris, 1 Hay. 429; State *v.* Smith, 10 Rich. Law (S. C.), 34; Stokes *v.* State, 18 Geo. 17.

In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it; if it be in prosecution of a felonious intent, or in consequences naturally tending to bloodshed, it will be murder, but if no more was intended than a mere civil trespass, it is manslaughter.[v]

Manslaughter differs from murder in this, that though the act which occasioned the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either expressed or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient.[w]

It is no defence to an indictment for manslaughter, that the homicide therein alleged, appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant, in such case, may notwithstanding be properly convicted of the offence of manslaughter.[x]

The prisoner had procured certain drugs and given them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter. It was held, that he was properly found guilty of manslaughter.[xx]

§ 933. (*b.*) *Involuntary manslaughter*, is where a man doing an unlawful act, not amounting to felony, by accident kills another.[y] It differs from homicide excusable by misadventure in this, that misadventure always happens in the prosecution of a lawful act, but this species of manslaughter in the prosecution of an unlawful one. Where a person does an act lawful in itself, but in an unlawful manner, this excepts the killing from the class of homicide, excusable *per infortuniam*, and makes it involuntary manslaughter.

3d. Excusable homicide.

Excusable homicide is of two kinds:—

§ 934. (*a.*) Where a man doing a *lawful* act, without any intention to hurt, by accident kills another; as, for instance, where a man is hunting in a

[v] 1 Hale, 449; Fost. 290; State *v.* Turner, Wright, 20; Jervis's Archbold, 9th ed. 386.

[w] Ex parte Tayloe, 5 Cowen, 51; King *v.* Com. 2 Va. Cases, 78; Com. *v.* Bob, 4 Dall. 125; State *v.* Tookey, 2 Rice, S. C. Dig. 104; Penn *v.* Levin, Addison, 279; State *v.* Travers, 2 Wheeler's C. C. 506; Com. *v.* Mitchell, 1 Va. Cases, 716; Parker, J., Selfridge's Trial, 158; 1 Hale, 449, 450, 466; 3 Inst. 55; 1 Hawk. c. 30, s. 2; vide R. *v.* Mawgridge, Kel. 124; Fost. 290; vide Lord Cornwallis's case, Dom. Proc. 1678; 2 St. Tr. 730.

[x] Com. *v.* M'Pike, 3 Cush. 181; Selfridge's case, Whart. on Hom. 417; ante, § 560, 616.

[xx] R. *v.* Gaylor, 40 Eng. Law and Ex. 556.

[y] Com. *v.* Thompson, 6 Mass. 134; Jervis's Archbold, 9th ed. 386; Studstill *v.* State, 7 Geo. 2.

park, and unintentionally kills a person concealed. This is called homicide *per infortuniam*, or by misadventure.

§ 935. (*b.*) Homicide in self-defence, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable. This species of self-defence must be distinguished from that calculated to hinder the perpetration of a capital crime, which latter is not only a matter of excuse but of justification. But the self-defence of which we are now speaking is that whereby a man may protect himself from assault in a sudden broil or quarrel. This right of natural defence does not imply a right of attack. Tribunals of justice are the remedial agents for injuries past or impending; preventive defence can only be legally used in sudden and violent cases where certain and immediate suffering would be the consequence of waiting for the assistance of the law.

It is frequently difficult to distinguish this species of homicide from manslaughter in the proper legal acceptation of that word. The true criterion seems to be that where both parties are actually in conflict, at the time the mortal stroke is given, the crime is that of manslaughter; but if the slayer decline any further struggle, and afterwards to avoid his own destruction kills his antagonist, this is homicide excusable by self-defence.[z]

The rule of the common law, that when a death occurs by the act of one who is in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, according as the intended offence is a felony or only a misdemeanor, is in force in Maine; and whether such intended offence is a felony or misdemeanor, is not to be ascertained by the common law classification, but by reference to the statute.[a]

4th. Justifiable homicide.

Justifiable homicide is of three kinds:—

§ 936. (*a.*) Where the proper officer executes a criminal in strict conformity with his sentence.

§ 937. (*b.*) Where an officer of justice, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it.

§ 938. (*c.*) Where the homicide is committed in prevention of a forcible and atrocious crime; as, for instance, when the deceased was in the act of robbing or murdering another.[b]

II. Requisites of homicide generally.

Before proceeding to consider the different grades of homicide, one or two points are to be adverted to, which apply generally:—

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[z] See Wharton on Homicide, 168, 211.

[a] State *v.* Smith, 32 Maine (2 Red.), 369.

[b] Brac. 145; 1 Hale, 448; Com. *v.* Daley, 4 Penn. Law Journal, 158; State *v.* Yarborough, 1 Hawks, 260; Wharton on Homicide, 36, 211.

1st. THERE MUST BE PROOF OF THE CORPUS DELICTI.

§ 939. There must always, as has been already noticed, be clear and unequivocal proof of the *corpus delicti.*[c]

2d. IT MUST BE SHOWN THAT THE DECEASED WAS LIVING WHEN THE ALLEGED MORTAL BLOW WAS STRUCK.

§ 940. It is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck. Thus, where it was doubtful, in a case where a mother was charged with throwing her child overboard, whether it was living or dead at the time, it was held that it rested on the government to show it was living at the time, it appearing that the mother was laboring under puerperal fever, and the idea of malice being thereby excluded.[d] The presumption that a person proved to have been alive at a particular time, is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof.[e]

3d. THE DEATH MUST BE TRACED TO THE BLOW.

§ 941. Proof that the violence inflicted by the defendant was the cause of the death of the deceased is necessary, though, as has just been seen, positive proof that life continued to the moment of the fatal blow, is not always necessary.

If the wound is the mediate cause of the death, it is no defence that the defendant might have recovered if greater care or skill had been shown in his treatment,[f] or that if he had consented to an amputation he would probably not have died.[g]

Where a surgical operation is performed in a proper manner, and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will nevertheless be responsible for the consequences.[h]

If it would appear that the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of the disease with which the deceased was afflicted at the time of the violence.[i]

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[c] See ante, § 745, 6, 7, 8, 9, and see, also, § 683.

[d] U. S. *v.* Hewson, 7 Boston Law Reporter, 361, per Story, J.; Wharton on Homicide, 93, 94, 95, 96, 97, 98, &c.; see ante, § 745, 872, &c.

[e] Com. *v.* Harman, 4 Barr. 269.

[f] Rew's case, Kel. 26; Com. *v.* Green, 1 Ashmead, 289; U. S. *v.* Warner, 4 McLean, 464; McCallister *v.* State, 17 Alab. 434; State *v.* Baker, 1 Jones, 267; State *v.* Scott, 12 La. Ann. 274.

[g] R. *v.* Holland, 2 Moody & R. 351.

[h] Com. *v.* McPike, 3 Cush. 181; Parsons *v.* State, 21 Alab. 300; see Wharton on Homicide, 241, 242, 243, 244.

[i] State *v.* Morea, 2 Ala. 275.

Where a judge charged the jury that if one person inflicts a mortal wound, and before the assailed person dies, another person kills him by an independent act, the former is guilty of murder, it was held to be error.[j]

The evidence must connect the death with the special blow charged.[k]

4th. IF AN INFANT, THE CHILD MUST HAVE BEEN BORN ALIVE.

§ 942. To kill a child in its mother's womb, is no murder; but if the child be born alive, and die after birth through the potions or bruises it received in the womb, it is murder in the person who administered or gave them.[l] Where, also, a blow is maliciously given to a child whilst in the act of being born, as, for instance, upon the head as soon as the head appears, and before the child has breathed, it will be murder if the child is afterwards born alive, and dies thereof.[m] If the child has been wholly produced from the body of its mother alive, and she wilfully and of malice aforethought strangle it while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord.[n] But it must be proved that the entire child has actually been born into the world in a living state; and the fact of its having breathed is not a conclusive proof thereof.[o]

If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder.[p]

5th. THE HOMICIDE MUST BE OTHER THAN IN THE COURSE OF LEGITIMATE PUBLIC WAR.

§ 943. The words, "in the peace of God and the said Commonwealth, then and there being," as used in the indictment, and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war;[q] but killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder.[r]

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[j] State *v.* Scates, 5 Jones, N. C. 420.

[k] Post, § 1064.

[l] 3 Inst. 50; see Wharton on Homicide, 93, 94, 95, 96, 97, 98, &c.; see ante, § 748, 874; R. *v.* Poulton, 5 Car. & Payne, 329; R. *v.* Enoch, 5 Car. & Payne, 539; R. *v.* Wright, 9 Car. & Payne, 754; see ante, § 745, 6, 7, 8, 9, 872, 3, 4, 5, 6, &c.

[m] R. *v.* Senior, 1 Mood. C. C. 346.

[n] R. *v.* Trilloe, 1 Car. & Marsh. 650; S. C. 2 Mood. C. C. 413; see R. *v.* Sallis, 7 C. & P. 850; and see Wharton on Homicide, 94, 95.

[o] R. *v.* Sallis, 1 Mood. C. C. 850; R. *v.* Poulton, 5 C. & P. 399; see ante, § 748, 874.

[p] R. *v.* West, 2 Car. & Kir. 783; Wharton on Homicide, 192–194.

[q] Wharton on Homicide, 259; 3 Inst. 50; 1 Hale, 433.

[r] 1 Hale, 433.

III. HOMICIDE VIEWED IN RESPECT TO INTENT.

1st. HOMICIDE FROM MALICE AFORETHOUGHT EXPRESS; WHERE THE DELIBERATE PURPOSE OF THE PERPETRATOR IS TO DEPRIVE ANOTHER OF LIFE OR DO HIM SOME GREAT BODILY HARM.

§ 944. Where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural or probable effect of any act deliberately done, is intended by its actor.[s] How far this presumption may be extended to all cases of violent deaths, has been already noticed.[t] In Ohio, the presumption of killing alone is that of murder in the second degree,[u] and so also it is held to be the law in Virginia.[v] And it has been laid down generally, that where there are doubts with the jury, on such a state of facts, into which of two degrees a case falls, they must find the milder.[w] In the latter state, however, it is said that where the mortal wound is given with a deadly weapon in the slayer's previous possession, there being no evidence of provocation, the case is *prima facie* murder in the first degree.[x]

In Mississippi the use of a deadly weapon is said not to raise a presumption of malice.[a]

An instrument may be deadly or not according to the mode of using it, or the subject on which it is used.[b] Hence it was held that an oaken staff, near three feet long, of the diameter of an inch and a half or two inches, with which three blows were given to the head of a man while drunk and unawares, shattering the bones of the head, and rupturing the interior vessels of the brain, was a deadly weapon, and a killing by the use of it in that way, was murder.[c]

The actual effects produced by the instrument may aid in determining its character, and in showing that the person using it ought to be aware of the danger of thus using it.[d]

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[s] See ante, § 710. See also, as to general evidence of intent, ante, § 631; Whart. on Hom. 34, 39; U. S. *v.* Cornell, 2 Mason, 91; State *v.* Smith, 2 Strobh. 77; Com. *v.* Drew, 4 Mass. 391; Res. *v.* Bob, 4 Dallas, 146; Penn. *v.* Honeyman, Addison, 148; Penn. *v.* McFall, Id. 257; Penn. *v.* Lewis, Id. 282; Com. *v.* York, 7 Boston Law Rep. 510; State *v.* Zeller, 2 Halsted, 220; State *v.* Merrill, 2 Dev. 269; People *v.* McLeod, 1 Hill's N. Y. R. 377; State *v.* Town, Wright, 75; State *v.* Irwin, 1 Hayw. 112; State *v.* Peters, 2 Rice's Dig. 106; State *v.* Turner, Wright, 20; Woodsides *v.* State, 2 Howard's Miss. R. 656; Dexter *v.* Spear, 4 Mason, 115; Bivens *v.* State, 6 Eng. (Ark.) 455; Seaborn *v.* State, 20 Ala. 15; U. S. *v.* McGlue, 1 Curtis Ct. Ct. 1; People *v.* Clark, 3 Selden, 385; People *v.* Sullivan, Ibid. 396; People *v.* Kirby, 2 Parker C. R. 28; Kilpatrick *v.* Com. 7 Casey, 198; Mitchum *v.* State, 11 Georgia, 615; Bird *v.* State, 14 Georgia, 43; Green *v.* State, 28 Mississippi, 687; U. S. *v.* Mingo, 2 Curtis C. C. 1; U. S. *v.* Armstrong, 2 Curtis C. C. 446; State *v.* Johnson, 3 Jones, Law (N. C.) 226; Com. *v.* York, 9 Metc. 93, Wilde, J., diss.; Com. *v.* Webster, 5 Cush. 535; though see Coffee *v.* State, 3 Yerger, 283; post, § 967.

[t] Ante, § 708, &c.

[u] State *v.* Turner, Wright, 20; see ante, § 710.

[v] Hill's case, 2 Gratt. 594.

[w] Ante, § 710.

[x] Ibid. See, also, McDaniel *v.* State, 8 S. & M. 401; State *v.* Hildreth, 9 Iredell, 429; Pierson *v.* State, 12 Ala. 149.

[a] Cotton *v.* State, 31 Miss. (2 George) 504.

[b] State *v.* West, 6 Jones' Law, N. C. 505.

[c] Ibid.

[d] Ibid.

§ 945. Express malice is when one, with a sedate and deliberate mind, and formed design, kills another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.[y] Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to mankind in general: as going deliberately with a horse used to strike, or discharging a gun amongst a multitude of people.[z]

§ 946. Where it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him, that they met in the street on a starlight night when they could see each other, that the deceased pressed for a fight, but the prisoner retreated for a short distance, that when the deceased overtook him the prisoner stabbed him with some sharp instrument which caused his death, and at the time of this meeting the deceased had no deadly weapon; it was held, that in such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencontre, that the killing was in self-defence, the presumption being that the killing was malicious.[a]

§ 947. Where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved.[b] So, if a man kill another suddenly, without any, or without a considerable, provocation;[c] if he kill an officer of justice in the legal execution of his duty; if an instrument likely to kill be used; if, intending to do another felony, he undesignedly kill another man; in all these cases malice is implied.[d]

§ 948. Intent for an instant before striking the blow is sufficient to constitute malice.[e]

§ 949. When the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, unless there is evidence to repel it. There must be some evidence to show that the wicked purpose has been abandoned.[f]

There may be a class of cases, to use the words of Chief Justice Shaw, "when, if reasonable doubt arises as to malice, the court would properly instruct the jury to find manslaughter, as where a mother exposed her infant child in a garden, and it was devoured by a kite, or where the death of a pauper was produced by constant shifting, on the part of the overseers of the poor, from parish to parish."[g]

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[y] Wharton on Homicide, 38, 39; 1 Hale, 451.
[z] 1 Hawk. ch. 29, sec. 12; see post, § 972-8.
[a] Wharton on Homicide, 40; State *v.* Scott, 4 Iredell, 409. [b] 2 Hale, 455.
[c] People *v.* M'Leod, 1 Hill, 177; U. S. *v.* M'Glue, 1 Curtis, C. C. I.; People *v.* Clark, 3 Selden, 385.
[d] People *v.* Clark, 3 Selden, 385; Mitchum *v.* State, 11 Georgia, 615.
[e] State *v.* Toohey, 2 Rice's Dig. 104; U. S. *v.* Cornell, 2 Mason, 91; Woodsides *v.* State, 2 Howard's Miss. R. 656; Davies *v.* State, 2 Humphrey, 437; Coffee *v.* State, 3 Yerger, 288; State *v.* Lipsey, 3 Dev. 485; People *v.* Moore, 8 Cal. 90; Wharton on Homicide, 38, 39; see ante, § 631, 710.
[f] State *v.* Johnson, 1 Iredell, 354; State *v.* Tully, 4 Iredell, 424; Wharton on Homicide, 180, 181, 183.
[g] Com. *v.* York, 9 Metc. 93; see post, § 962.

How far malice may be proved by independent facts has been already noticed.[gg]

If malice be rebutted by the defence, the prosecution may put in affirmative evidence to establish it.[h]

Malicious homicide will be regarded as arising :—[i]

(a) *From a particular malice to the person killed;*

(b) *From a particular malice to one, which falls by mistake or accident upon another;* or,

(c) *From a general malice or depraved inclination to mischief, fall where it may.*

§ 950. (a) *From a particular malice to the person killed.*—Whenever malice is shown to exist, the offence is murder, though there may have been intervening provocation. If one seek another, and enter into a fight with him, with the purpose, under pretence of fighting, to stab him, if a homicide ensue, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express.[j] So, if A., from previous angry feelings, on meeting with B., strike him with a whip, with the view of inducing B. to draw a pistol, or believing he will do so, in resentment of the insult, and determines, if he do so, to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder.[k] If one deliberately fire a rifle at another and kill him, supposing it improbable that the ball would be carried so far, the killing is not thereby reduced to involuntary manslaughter.[l] It is sufficient to constitute murder, that it appear that malice existed at the time of the killing, without regard to the time which it had before existed.[m]

§ 951. Although a person may not go in search of, or lie in wait for another, whom he kills, yet, if he has formed the purpose to kill him, and, within a short time after forming and avowing such purpose, he, duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose.[n]

§ 952. How far prior acts and attempts may be admitted to prove intent, has already been fully considered.[o]

Evidence that the prisoner had beaten his wife, and forced her to abandon her house, and seek refuge under the protection of the deceased, was held proper proof of malice prepense on the part of the prisoner.[p]

[gg] Ante, § 635.

[h] Bird *v.* State, 14 Georgia, 43.

[i] I have adopted, in this instance, the classification of Mr. East, as more in accordance with the reason of the thing, and as generally received by text writers.

[j] State *v.* Lane, 4 Iredell, 113; 1 Hale, 451; State *v.* Ferguson, 2 Hill's, S. C. R. 619; Wharton on Homicide, 38, 180, &c.; Jones *v.* State, 14 Missouri, 409; Roberts *v.* State, 14 Mis. 138.

[k] State *v.* Martin, 2 Iredell, 101.

[l] Studstill *v.* State, 7 Geo. 2.

[m] Green *v.* State, 13 Mis. 382; Mitchum *v.* State, 11 Georg. 615; People *v.* Sullivan, 3 Selden, 396; U. S. *v.* McGlue, 1 Curtis, Ct. Ct, 1; Post, § 990.

[n] State *v.* Tilley, 1 Iredell, 424.

[o] Ante, § 633, 4, 5, 637, 647, 8, 9, &c.

[p] Stone *v.* State, 4 Humph. 27; see ante, § 633, 4, 5, 639, 647, 8, 9, 50.

§ 953. When a deliberate purpose to kill or to do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done.[q] If upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or by preparing for the conflict, or the like, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion.[r] Thus, where two persons quarrel, and one throws a brick-bat at the other, who had privately armed himself with a deadly weapon, and keeps it concealed, in expectation of the affray, and, on such assault being made upon him, immediately draws forth the weapon, and with it kills the assailant, though then retreating; it was held that a verdict of murder would not be disturbed, though there was no proof of previous malice, malice being implied from the *res gestæ*, and from the preparation of the defendant.[s] And where two parties had previously had words, and a general challenge to fight passed, and, three hours afterwards, the defendant, belonging to one of them, renewed the challenge, which was accepted, and a fight ensued which resulted in the death of one of the other party, it was held murder.[t]

§ 954. Where it appeared that the deceased had threatened the prisoner, about three weeks before, that he would kill him, that they met in the street on a starlight night, when they could see each other, that the deceased pressed for a fight, but the prisoner retreated a short distance, that when the deceased overtook him the prisoner stabbed him with some sharp instrument which caused his death, and that, at the time of this meeting, the deceased had no deadly weapon, it was held, that the offence was murder.[u]

§ 955. Where the deceased, after being married for some years, left the country, and his wife, not hearing from him for two years, married the defendant, though not under circumstances which would make the second marriage legal under the Pennsylvania statute, and the deceased returned after a lapse of a year from the second marriage, and found his wife living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant deliberately shooting the deceased at his own house; it was held murder in the first degree.

Where, however, fresh provocation occurs between preconceived malice

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[q] State *v.* Johnson, 3 Iredell, 354; State *v.* Ferguson, 2 Hill (S. C.), 619; State *v.* Lane, 4 Ired. 113; State *v.* Tilley, 3 Ired. 424; Stewart *v.* State, 1 Ohio St. R. 66; post, § 971.

[r] 1 Vent. 159; 1 Hale, 452; Oneby's case, 2 Ld. Raym. 1490.

[s] Slaughter *v.* Com., Leigh, 681; see Atkins *v.* State, 16 Ark. 568; Wharton on Homicide, 39, 168, 173, 189, 199.

[t] Com. *v.* Crand, Gen. Court of Virginia, Nov. 1791, 2 Wheeler's C. C. 587.

[u] State *v.* Scott, 3 Iredell, 409.

[v] Com. *v.* Smith, 7 Smith's Laws, Appen.; 2 Wheel. C. C. 80. See post, § 1075.

and death, it ought clearly to appear that the killing was upon the antecedent malice; which may be difficult, in some cases, to show satisfactorily, if the new provocation be a grievous one.[w] In such cases, says Hawkins, it should not be presumed that they fought on the old grudge, unless it appear by the whole circumstances of the fact. But with respect to poisoning, that necessarily implies malice, however great the provocation may have been, because it is a deliberate act though no other proof of malice exists.[x]

§ 956. Malice can never, or rarely, be directly proved, and the evidence of it, therefore, being circumstantial, any facts which go to afford an inference of its existence are admissible. Illustrations of this are found under a previous head;[y] and in the subsequent consideration of murder in the first and second degrees, the subject will be further noticed. But it would seem that the malice proved must be directed to the particular act for which the prisoner is tried, as otherwise the issue might become much encumbered. Thus it was held in Tennessee, that on the trial of an indictment for murder, evidence that the prisoner, a short time before the murder, had set fire to the house of the deceased in the night time, was inadmissible for the purpose of proving that the prisoner had committed the murder.[z] Where, however, there is established a settled purpose of revenge on the part of the prisoner, such evidence would seem to be admissible if it appeared to be one of the manifestations of such spirit.[a]

§ 957. Where, on an indictment for murder, a sufficient legal provocation at the time to extenuate the homicide is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of immediate provocation, but of a pre-existing malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to.[b]

§ 958. By the common law, independent of all local legislation, it is not only murder for one man to kill another in a duel,[c] but his second, also, is guilty of murder; and it has been doubted whether this does not extend even to the second of him who was killed, because the death happened upon a compact in which all were engaged.[d]

§ 959. To make a man principal in a murder, it is not necessary that he should inflict the mortal wound. It is sufficient if he be present, aiding and abetting the act. Nor is it necessary that there should be a particular malice against the deceased. It is sufficient if there be deliberate malignity and depravity in the conduct of the party.[e]

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[w] Wharton on Homicide, 198; 1 Hawk. ch. 31, sec. 30; 1 Hale, 452, 455; 3 Inst. 48; 4 Blac. Com. 193, 200; Foster, 68.

[x] 2 Wheel. C. C. 18; Com. v. Norton, 3 Boston Law Rep. 241; Com. v. Kinney, Ibid. 405; Green v. State, 13 Mis. 382.

[y] See ante, § 633, 4, 5, 639, 647, 8, 9, &c.; Wharton on Homicide, 34, 38, &c.

[z] Stone v. State, 4 Humph. 27; see ante, § 647, 8, 9, &c.

[a] See ante, § 633, 639, 645, 647, 8, 9, &c.

[b] State v. Barfield, 7 Iredell, 299.

[c] Wharton on Hom. 168, 169, &c.; Smith v. State, 1 Yerger, 228; as to Statutes, see ante, § 890, 895; § 929 as to principals and accessaries in ante, § 12.

[d] 1 Hale, 441, 453; Taverner's case, 3 Bulster, 171, 172; 1 Roll. Rep. 361; R. v. Murphey, 6 C. & P. 103; R. v. Campbell, 3 Boston Law Rep. 131; see ante, § 121.

[e] Whar. on Hom. 156, 157; U. S. v. Ross, 1 Gallis, C. C. R. 524.

§ 960. Malice may be exerted against a party in his absence; as where A. lays poison for B. in his victuals, which B. afterwards takes and dies. So, where A. procures an idiot or a lunatic, to kill B., which he does. In both instances A. is guilty of the murder as principal.[f]

§ 961. It is not necessary that the homicide should have been the effect of the direct violence of the defendant. If a person, being attacked, should, from an apprehension of immediate violence, an apprehension which must be well grounded and justified by the circumstances, throw himself for escape into the river, and be drowned, the person attacking him is guilty of murder.[g]

§ 962. If a person do any act towards another, who is helpless, which must, necessarily, lead to the death of that other, the crime amounts to murder; but, if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind.[h] Where a woman left her child, a young infant, at a gentleman's door, or other place, where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a remote place, where it was not likely to be found, that is, on a barren heath, and the death of the child ensued, it would be murder.[i] So, if a seaman be in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, and his death is occasioned by such misconduct in the master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.[j]

Evidence of an assault with the hands and feet only, hastening the death of a woman enfeebled by disease, whom the offender knew or had reasonable cause to believe to be in such a feeble condition that the attack would end her life, or inflict great bodily harm, or hasten her death, is proof of implied malice, which will warrant a conviction of murder. But it is otherwise, if the criminal had not such knowledge or reasonable cause of belief.[jj]

§ 963. It has been settled in England that if a man encourages another to murder himself, and he is present abetting him while he does so, such man is guilty of murder as principal. If two encourage each other to murder themselves together, and one does so, and the other fails in the attempt upon himself, he is a principal in the murder of the other.[k] A husband and wife, being in extreme poverty, and great distress of mind, the husband said, "I am weary

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[f] Whar. on Hom. 34, 35, 156; see ante, § 112, 152.
[g] Whar. on Hom. 117; R. *v.* Pitts, 1 Car. & Mars. 284.
[h] Reg. *v.* Walters, 1 Car. & Mars. 164; Whar. on Hom. 95, 96, 117; ante, § 949.
[i] Ibid.
[j] U. S. *v.* Freeman, 4 Mason's C. C. R. 505; Whar. on Hom. 117, 118.
[jj] Com. *v.* Fox, 7 Gray, Mass. 585.
[k] R. *v.* Dyson, Russ. & Ry. C. C. R. 528; R. *v.* Allison, 8 Car. & Pa. 418; see ante, § 122, 114; Whar. on Hom. 98.

of life, and will destroy myself," upon which the wife replied, "If you do, I will too." The man bought some poison, mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty.[1]

§ 964. In a case in Massachusetts, it was said by the court, "The government is not bound to prove that Jewett" (the deceased) "would not have hung himself had Bowen's" (the defendant's) "counsel never reached his ears. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and depraved wretch. But it is a man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respectful friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage that self-murder displays, might induce, encourage and fix the attention, and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still, the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale. If you are satisfied that Jewett, previously to any acquaintance or conversation with the prisoner, had determined within himself, that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, mere idle talk, let your verdict say so. But if you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly. It may be thought singular and unjust, that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such a one out of the reach of the law, is no trivial offence. Farther, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are

[1] See R. *v.* Allison, 8 C. & P. 418; Whar. on Hom. 111.

not to consider this atrocity of the offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him."[m]

As has been already remarked, where the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a *principal*, because he was not present; nor as an accessary before the fact at common law, because the principal cannot be convicted; nor as guilty of a substantive felony under 7 Geo. III. c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried. And in England it is ruled that if a woman takes poison with intent to produce a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not, and that the person who furnished her with the poison for that purpose will, if absent when she took it, be an accessary before the fact only.[n]

§ 965. (*b*) *Homicide from a particular malice to one which falls by mistake or accident upon another.*—Where a blow aimed at one person lighteth upon another and killeth him, this is murder.[o] Thus A. having malice against B., strikes at and misses him, but kills C.; this is murder in A.; and if it had been without malice and under such circumstances that if B. had died, it would have been but manslaughter, the killing of C. also would have been but manslaughter.[p] Again, A. having malice against B., assaults him, and kills C. the servant of B., who had come in aid of his master: this is murder in A.; for C. was justified in attacking A. in defence of his master, who was thus assaulted. In another case, if A. give a poisoned apple to B., intending to poison her, and B. ignorant of it give it to a child, who took it and died; this is murder in A., but no offence in B.; and this, though A., who was present at the time, endeavored to dissuade B. from giving it to the child.[q] So where Plummer and seven others opposed the king's officers in the act of seizing wool. One of those persons shot off a fusee and killed one of his own party. The court held, in giving judgment upon a special verdict, that as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusee against any of the king's officers that came to resist him, in the prosecution of that design, and by accident had killed one of his own accomplices, it would have been murder in him. As if a man out of malice to A. shoot at him, but miss him and kill B. it is no less a murder than if he had killed the person intended.[r] Where a prisoner fired a loaded

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[m] Com. *v*. Bowen, 2 Wheel. C. C. 231; 3 Mass. 359; Whar. on Hom. 98–100.

[n] R. *v*. Leddington, 9 C. & P. 79; R. *v*. Russell, M. C. C. 356.

[o] Whar. on Hom. 42–44; Foster, 261; R. *v*. Smith, 33 Eng. Law & Eq. 567.

[p] 1 Hale, 379, 439, 466; Dyer, 128; Kel. 111, 112, 117; Pult. de Pace, 124 b; Fost. 261; 1 Hawk. c. 31, s. 42; State *v*. Cooper, 1 Green, N. J. Rep.; State *v*. Bentory, 2 Dev. & Bat. 196.

[q] 1 Hale, 230; 2 Plowden's Com. 474.

[r] 12 Mod. 627; Kelyng. 111; Lord Raym. 1581; 9 St. Tr. 112; Higgin's case, Dyer, 128; Plowd. 60, 474; Cromp. 101; 9 Co. 81; Agnes Gore's case, 1; William's case,

pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball hit another person and killed him, it was held that the crime was murder.[s] In another case the prisoner mixed poison in an electuary, of which her husband and her father and another took part and fell sick. Martin, the apothecary, who had made the electuary, on being questioned about it to clear himself took part of it and died. On this evidence a question arose, whether Agnes Gore, the defendant, had committed murder; and the doubt was, because Martin, of his own will, without invitation or procurement of any, had not only eaten of the electuary, but had, by stirring it, so incorporated the poison with the electuary, that it was the occasion of his death. The judges resolved, that the prisoner was guilty of the murder of Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; *quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*, and the stirring of the electuary by Martin, without putting in the poison by Agnes, could not have been the cause of his death.[t] Under the same head may be classed the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. The case, at common law, was murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practised.[u]

§ 966. If a man have a sudden quarrel, and fight with A., by which his passions are strongly excited, and while his passions are thus excited, he without any real or supposed provocation kill B., who is an utter stranger to the whole affair, and has not interfered in the quarrel, nor been in any way connected therewith, even in the party's own supposition, it will be murder.[v] But, where the prisoner, having had a quarrel with his wife, and aimed a blow at her with an axe, which fell on the head of his infant son, then in her arms, by which he was instantly killed, it being shown that the prisoner was ignorant of his child's position, and was at the time in the heat of blood, seeking to avenge himself on his wife for a supposed injury, it was held that as the case was to be considered as if the wife had been the victim, the same grade of homicide would attach to the killing of the child as it would have done to that of the wife, if she had been killed.[w] But in this as in cases of malice prepense and express, if the blow intended for one would

cited in the Queen *v.* Mawgridge; Kelyng. 131, 132; 9 St. Tr. 61; Wharton on Hom. 42–44.

[s] State *v.* Smith, 2 Strobh. 77; Whar. on Hom. 43.

[t] 9 Co. 11; 1 Hale, P. C. 50; Jenk. Cent. 220; Cromp. Fust. 23, pl. 24; 3 Inst. 51; Plowd. Com. 574; 1 Hawk. P. C. & C. 31, s. 3.

[u] 1 Hale, 90; Com. *v.* Chauncey, 2 Ashm. 227; though see Smith *v.* State, 3 Redding, 48, and Whar. on Hom. 43, 44, where this question is fully discussed.

[v] U. S. *v.* Travers, U. S. Cir. Court, 2 Wheel. C. C. 508, per Story, J.

[w] Com. *v.* Dougherty, 7 S. Smith's Laws, 696; Whar. on Hom. 43.

in law only have amounted to manslaughter, it will still be the same, though by mistake or accident it kill another. Thus, in an old case, a quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier who had before driven part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him he struck at them with the flat side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned, he asked whether they had murdered his comrade; and being several times again assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed, the prisoner went up to him and struck him on the head with the sword, of which he presently died. This was holden manslaughter; it was not murder, because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner.[x]

§ 967. (c) *Homicide from a general malice or depraved inclination to do evil, fall where it may.*—When an action unlawful in itself is done with deliberation, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such an original intention doth not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful.[y] Thus, if a person, breaking in an unruly horse, wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder. For how can it be supposed that a person wilfully doing an act so manifestly attended with danger, especially if he showed any consciousness of such danger himself, should intend any other than mischief to those who might be encountered by him?[z] So if a man mischievously throw from a roof into a crowded street where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death on such as it might fall, and death ensue, the offence is murder at common law.[a]

§ 968. Where the court refused to charge the jury on request of the prisoner's counsel, in the words of the statute of Mississippi, to wit: "That

[x] Whar. on Hom. 43, 44; Foster, 262; 1 Hawk. c. 31, s. 44; Crown Cas. Res. Leach 151, S. C.

[y] Foster, 261; see ante, § 944.

[z] 1 Hale, 176; 4 Blac. Com. 200; 1 East, P. C. 231.

[a] Com. *v.* Dougherty, 7 Smith's Laws, 696.

unless they find from the evidence that the prisoner, with a premeditated design, or in some act dangerous to others, evincing a depraved mind regardless of human life, killed the deceased, they cannot find a verdict of murder," it was held, that the charge should have been given, and that the error was not cured by charging the jury at the instance of the State, that if they believed the act of killing was committed without a sufficient legal provocation, and without reasonable ground to believe himself in imminent danger of death, or great bodily harm, they must find the prisoner guilty of murder.[b]

§ 969. 2d. HOMICIDE FROM TRANSPORT OF PASSION, OR HEAT OF BLOOD.

(a) *What is sufficient provocation, and up to what extent, to extenuate the guilt of homicide.*

(b) *How far the law regards heat of blood in mitigation of homicide independently of the question of reasonable provocation, as in cases of mutual combat.*

(c) *How long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled before the mortal blow given.*

§ 970. (a) *What is a sufficient provocation, and up to what extent, to extenuate the guilt of homicide.*—No provocation whatever can render homicide justifiable, or even excusable: the least it can reduce it to is manslaughter. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only.[c] Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.[d]

§ 971. To determine, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument, as has been before observed, wherewith the homicide was effected, must be taken into consideration, for if it were effected with a deadly weapon, the provocation must be great indeed to lower the grade of the crime from murder; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact the instrument employed must bear a reasonable proportion to the provocation to reduce the offence to manslaughter.[e]

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[b] Boles *v.* State, 9 S. & M. 284.

[c] Whar. on Hom. 168; Kel. 135; 1 Hale, 466; Fost. 290; U. S. *v.* Travers, 2 Wheel. C. C. 504; Com. *v.* York, 9 Metcalf, 93; State *v.* Tackett, 1 Hawks. 210; Allen *v.* State, 5 Yerg. 453; Jacob *v.* State, 3 Humph. 493; King *v.* Com. 2 Va. Ca. 98; Preston *v.* State, 25 Miss. 383.

[d] Whar. on Hom. 170; 1 Hale, P. C. 456; Foster, 290; U. S. *v.* Wiltberger, 2 Wash. C. C. R. 515; U. S. *v.* Travers, per Story, J., 2 Wheeler's C. C. 507; Com. *v.* York, 9 Metcalf, 93; R. *v.* Campbell, 4 Boston Law Rep. 131; State *v.* Tackett, 1 Hawks. 210; State *v.* Merrill, 2 Dever. 269; Ray *v.* State, 15 Georgia, 223; Rapp *v.* State, 14 B. Monroe, 614; People *v.* Freeland, 6 Cal. 96; People *v.* Butler, 8 Cal. 435.

[e] Whar. on Hom. 189.

In a leading case where some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast and then ran after her and stabbed her in the back, this was at first deemed murder, but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was holden to be manslaughter only.[f] This case has, however, been very much shaken by the remarks of an eminent American jurist. "To reduce the offence to manslaughter," says Gibson, C. J., "it is necessary that a quarrel should have taken place, and blows have been interchanged between parties, in some measure, upon equal terms of strength and condition for fighting; and this without regard to the question, who struck first. Yet this must be taken with some grains of allowance. If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife upon her husband, would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case, in which, for a woman's blow on the face with an iron patten, given to a soldier in return for words of gross provocation, he gave her a blow with the pommel of his sword on her breast, and then ran after her and stabbed her in the back, and the crime was held to be only manslaughter."[g] Where a blow is cruel or unmanly, the provocation will not excuse it; and the same law exists where there was a previous quarrel, and the killing was on the old grudge.[h] If the provocation, however, be sought by the prisoner himself, as has already been noticed, it does not extenuate the offence, no matter how grievous such provocation may be.[i]

§ 972. An unintentional and trivial assault is no palliation. Thus in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. "In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark, would not authorize such a murderous attack upon him." Such an act of itself would be a sure indication of a "depraved and wicked heart, void of all social duty, and fatally bent on mischief."[j]

§ 973. When two parties are fighting, or about to fight, and a third, unconnected with either, without any apparent provocation, but it may be for the mere love of mischief, stabs one of the parties whilst fighting, the law in such cases will imply malice.[k]

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[f] R. *v.* Stedman, Foster, 292; Kel. 13; 1 Hale, 457; 4 Blac. Com. 200; 1 Hawk. ch. 31, sec. 34.

[g] Com. *v.* Mosler, 4 Barr. 268; 1 Hale, 457; 1 Hawk. c. 31, s. 34.

[h] Com. *v.* Mosler, 4 Barr. 268; Whar. on Hom. 197.

[i] See ante, § 953; Whar. on Hom. 197; State *v.* Ferguson, 2 Hill's S. C. R. 619; State *v.* Lane, 4 Ired. 113; State *v.* Marten, 2 Ired. 101; State *v.* Tilley, 3 Ired. 424; Stewart *v.* State, 1 Ohio St. R. 66; 1 Hale, 451.

[j] State *v.* Tukey, 2 Rice's Digest, 404; ante, § 945, &c.; post, § 1020.

[k] Whar. on Hom. 201; Conner *v.* State, 4 Yerger, 137; Johnson's case, 5 Grat. 660.

§ 974. When persons fight on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enters a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter but murder.[1]

The defendant, upon his trial for murder, may introduce evidence to show that there was a deep cut on his head the day after the death of the deceased, it being a matter of controversy whether the deceased struck the defendant with his fist or had something in his hand.[ll]

§ 975. A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence, and if he do, and with it kill the trespasser, it will be murder, and this, though killing were actually necessary to prevent the trespass.[m] In an old case, A., finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him; this was holden to be manslaughter. To extenuate the offence, in such case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and deter the offender from repeating the like, and it must so appear. For if A. had knocked out the brains of the deceased with a bill or hedge-stake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder.[n]

§ 976. So, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, the horse took fright and ran away, and dragged the boy on the ground till his shoulder was broken, whereof he died, the killing was ruled murder, it being held to be not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savored of cruelty. But if the chastisement had been more moderate, it had been but manslaughter. For between persons nearly connected together by civil or natural ties, the law admits the force of a provocation done to one to be felt by the other; and, therefore, if in such case the owner or master himself had caught the trespasser and beat him in such a manner as showed a desire only to chastise and prevent a repetition of the offence, but had unfortunately and against his intent killed him, it would only have been manslaughter.[o]

§ 977. A man has a right to order another to leave his house, but has no right to put him out by force, until gentle means fail; and if he attempt to use violence in the outset and is slain, it will not be murder in the slayer, if there is no previous malice.[p]

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[1] State *v.* Scott, 4 Iredell, L. R. 409; State *v.* Hildreth, 1 Iredell, Law R. 429; Green *v.* State, 28 Mississippi, 688; Whar. on Hom. 189.

[ll] Atkins *v.* State, 16 Ark. 568.

[m] Whar. on Hom. 185; Com. *v.* Drew, 4 Mass. 391; State *v.* Morgan, 3 Iredell, 186; M'Daniel *v.* State, 8 S. & M. 401; Oliver *v.* State, 17 Ala. 588.

[n] Foster, 291; 1 Hale, 473; 1 Hawk. c. 31, s. 34; Kel. 132.

[o] Whar. on Hom. 117-119, 169, 175; Halloway's case, Cro. Car. 131; Palm. 545; W. Jones, 198; 1 Hawk. c. 31, s. 39; 1 Hale, 454, 473; Kelyng, 127.

[p] M'Coy *v.* State, 3 Eng. (Ark.) 451; Whar. on Hom. 185.

Where one, in another case, having had his pocket picked, seized the offender, and being encouraged by a concourse of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned, this was ruled to be manslaughter only.[q]

§ 978. Any assault in general, made with violence or circumstances of indignity upon a man's person, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood, upon that provocation, will reduce the crime to manslaughter;[qq] and the same rule would apply, says Lord Hale, if when A. and B. were riding on the road, B. had whipped A.'s horse out of the track, and then A. had alighted and killed B.[r] The same extenuation exists, if a man be injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping while he sent for a bailiff to arrest him.[rr]

§ 979. If a person upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road, and in his lawful pursuit, accepts the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way; and it will be manslaughter.[s]

A. presented a gun at B. and subsequently took it down. B. then said that if he raised it again he would throw a brickbat at him. He did again raise it, the brickbat was thrown, and B. was shot. It was held, that in consideration of the threat or banter of B., such killing may have been no more than voluntary manslaughter, and that it was error in the court below to charge that "if the first presenting of the gun was with malicious intent, notwithstanding what followed the killing was murder."[a]

Where the deceased took hold of the bridle rein of a horse, on which the prisoner was mounted (who was about to go home from the place where they were), and held it forcibly for from ten to forty-five minutes, in spite of the efforts of the prisoner to loosen the rein, and the prisoner, at the end of that time, struck the deceased, with a gallon-jug of molasses, which he casually had in his hands, several violent blows, the first of which knocked the deceased down; on death ensuing from these blows, it was held to be manslaughter, and not murder.[b]

§ 980. If the deceased is approaching the prisoner's path, with the intention of assailing the prisoner, and becomes irresolute and stops or abandons his intention, leaving the prisoner with full liberty to pass, and the prisoner, with a design of slaying the deceased, brings on the attack, the killing will

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[q] 1 East, P. C. 236; 1 Hale, 456.

[qq] Ante, § 932; Atkins *v.* State, 16 Ark. 568.

[r] Whar. on Hom. 47–49, 51; Kel. 135; 4 Blac. Com. 191; Lamure's case, 17 Car. 1; 1 Hale, 456; Preston *v.* State, 25 Miss. 383.

[rr] Whar. on Hom. 51.

[s] Copeland *v.* State, 7 Humph. 479; Whar. on Hom. 186.

[a] McGuffie *v.* State, 17 Geo. 497.

[b] State *v.* Ramsey, 5 Jones, N. C. 195.

be murder in the first or second degree, according to circumstances; if the killing were from the old grudge, and a previously premeditated intention, it would be murder in the first degree; but if it were from malice suddenly produced by the sight of his enemy, and without premeditation, it would be murder in the second degree.[t]

§ 981. If any one, under color or claim of authority, unlawfully arrest or actually attempt or offer to arrest another, and this latter, in his resistance, kills the aggressor, it will be no more than manslaughter.[u] The same principle applies where one, not a stranger, aids the injured party by endeavoring to rescue him, or to prevent an unlawful arrest, when actually attempted.[v] Where an affray had taken place, and a quarterly sergeant appeared and ordered the wranglers to desist, and on their not doing so, reported to the orderly sergeant, who called at the room, and ordered the persons engaged to the guard-house, but the prisoner remained behind on some pretence connected with his clothes, and when the sergeant was temporarily absent, declared he would be the death of any one who attempted to take him to the guard-house, retired to a corner of the room where a number of unloaded muskets had been left, loaded one, and when the sergeant entered, with another, accosted him, "Stand off; if you approach, I will take your life." He immediately afterwards fired, and mortally wounded the sergeant and his companion. The case depended on the question whether or not at the time the defendant was legally liable to arrest, and the court, Story, J., and Davis, J., charged the jury, that if such was not the case, the offence was manslaughter, if otherwise, murder.[w]

Where an officer of a British ship of war, in the year 1769, attempted, without a special warrant, to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority.[x]

A police officer found N. with potatoes under his shirt, which had been very recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so, and a rescue being attempted, O. was going away, and was struck by A., who went away, and O. was afterwards killed by other persons who attempted the rescue: it was held that the police officer had no right to apprehend N., and that the killing of O., therefor, did not amount to murder.[y]

§ 982. Where one interferes to stop a brawl, and exercises no other force than is necessary for the object, having previously announced his purpose, the killing of him by one of the assailants will be murder.[z] Thus, when A., in order to prevent B. from fighting with his brother, laid hold of him and

[t] Copeland v. State, 7 Humph. 479.

[u] Com. v. Drew, 4 Mass. 391; Buckner's case, Styl. 467; R. v. Curvan, 1 Moody, C. C. 132; and see Wharton on Hom. 64–66, and same volume, 54–92, where the whole subject is fully and at large examined; see also post, § 1030.

[v] Ibid.; and see U. S. v. Travers, per Story, J., 2 Wheel. C. C. 509.

[w] 2 Wheeler C. C. 495.

[x] Case of the crew of the Pitt packet, 4 Boston Law Reporter, 369.

[y] R. v. Phelps, 1 Car. & Mars. 180.

[z] Whar. on Hom. 71–73.

held him down, striking no blow, upon which B. stabbed A., it was decided, that if in such case A. did nothing more than was necessary to prevent B. from beating his brother, the killing of him was murder; if otherwise, it would have been manslaughter only.[a] The prisoner and one W. engaged in a fight, and were separated by the deceased. Some time after, the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance, who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavored to avoid him) with a knife, and inflicted a mortal blow; it was held that this was a case of murder.[b]

§ 983. The line which distinguishes between those provocations which will and will not extenuate the offence, cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial, and from which a great degree of violence does not usually follow, may serve to mark the distinction.[c] There is one which, though it does not amount to a personal assault upon the party himself, is yet of so grievous a nature as the law reasonably concludes cannot be borne in the first transport of passion; where the injury is irreparable and can never be compensated. This arises where a man finds another in the act of adultery with his wife; in which case if he kills him in the first transport of passion, he is only guilty of manslaughter, and that of the lowest degree; and in one case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation.[d] But if he had killed the adulterer with deliberation and malice, it would be murder.[e] In a case in New York, it was even held manslaughter, under similar circum-

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[a] R. *v.* Browne, 5 Car. & P. 120. [b] State *v.* Ferguson, 3 Hill's S. C. Rep. 619.

[c] Ibid.

[d] Whar. on Hom. 177, 178; State *v.* Samuels, 3 Jones Law (N. C.), 74.

[e] Manning's case, T. Ray, 212; 1 Ventr. 159; State *v.* Samuel, 3 Jones Law (N. C.), 74; State *v.* Neville, 6 Jones Law (N. C.), 424. "Prima facie," says Rolfe, B., "when any man takes away the life of another, the law presumes that he did it with malice aforethought, unless there be evidence to show the contrary. Such are the cases where there has been a quarrel, a fight, or dispute, and in the violence of such quarrel, fight, or dispute, death has ensued. Undoubtedly we find other cases stated, and among them the case of adultery. It is said, that if a man were to find his wife in the act of committing adultery, and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder; and if I were to direct you, or you were to find otherwise, I am bound to tell you, either I or you would be grievously swerving from our duty. I state that without the least shadow of doubt. We must not shut our eyes to the truth. [His lordship here stated the facts as proved, observing, that he thought it very immaterial as to the length of time that elapsed between the time when the prisoner saw the deceased and Dougherty together, and the time when he fired the shot, and equally little material whether the prisoner took the cartridge out of the pouch at the same time when he loaded the musket, or left the room between the one and the other, and concluded:] In point of law, there is nothing here to reduce the crime of murder to the crime of manslaughter. The only suggestion is, that the prisoner did it, because he had conceived a jealousy of the woman; even if that was so, it would not reduce the crime to manslaughter." (R. *v.* Kelly, 2 Car. & Kir. 815, Rolfe, B.)

stances, though a short time had elapsed between the discovery and the homicide.[f]

If a father see another person in the act of committing an unnatural offence with his son, and instantly kill him, it is but manslaughter; but if there be reflection and delay, it is murder.[g]

A husband suspecting his wife of an adulterous intercourse with A., employed B. to watch them. While so employed B. killed A. It was held, that testimony that A. had committed adultery with the wife was not relevant in the trial of B. for the murder of A., whatever might have been the law if the husband had killed him.[gg]

§ 984. Under such provocations as these, it will appear by the cases last cited, that whether the blood has had time to cool or not, is a question for the court, and not for the jury.[h] But it is for the jury to find what length of time elapsed between the provocation received and the act done. In a case already considered,[i] it was held that if, in a case of stabbing, the jury are of opinion that the wound was given by the prisoner while smarting under a *provocation so recent and so strong*, that the prisoner might be considered as not being at the moment the *master of his own understanding*, the offence will be manslaughter; but if there had been, as is remarked by a learned annotator,[j] after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner displayed thought, contrivance, and design, in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion.

A father was informed that a man had wantonly whipped his son, a small boy. On the evening of the next day he met the man, and then he beat and stamped him, with his fist and feet, whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night. It was held that this was murder, there being evidence of deliberation.[k]

§ 985. The rule, that words of reproach, or indecent provoking actions, or gestures of contempt, will not free the party killing from the guilt of murder, without an assault upon the person, will not hold in cases where, from such words or gestures, or indeed upon any other sudden provocation, the parties come to blows, *no undue advantage being sought or taken on either side.*[l] Thus, where A. using provoking language and behavior towards B., B. strikes him, upon which a combat ensues, in which A. is killed, it was holden to be manslaughter, for it was a sudden affray, and they fought upon equal terms; and in *such combats upon sudden quarrels, it matters not who gave the first blow.*[m] But if B. had drawn his sword and made a pass at A., his sword

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[f] People *v.* Ryan, 2 Wheel. C. C. 54.
[g] R. *v.* Fisher, 8 C. & P. 182; see M'Whist's case, 3 Grat. 594; Whar. on Hom. 177, 178.
[gg] People *v.* Horton, 4 Mich. 67.
[h] Whar. on Hom. 179–181.
[i] R. *v.* Hayward, 6 C. & P. 157.
[j] 2 Car. and Kir. 814; and see post, § 950.
[k] M'Whist's case, 3 Grat. 594; Whar. on Hom. 189, 195, 197.
[l] Whar. on Hom. 186, 195; Foster, 295.
[m] 1 Hale's P. C. 456.

then undrawn, and thereupon A. had been killed, this would have been murder; for B., by making his pass, *his adversary's sword undrawn*, showed that he sought his blood, and A. endeavoring to defend himself, *which he had a right to do*, is no excuse to B. But if B. had first drawn, and forborne until his adversary had drawn too, it had been no more than manslaughter.[n]

§ 986. In no case, however, will the plea of provocation avail the party, if such provocation were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice.[o] As where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes, and A. kills him: this is murder.[p] If one seek another and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express.[q]

A party committing a trespass, and going armed with deadly weapons to take the life of the owner of the premises, should he attempt to eject him, would be guilty of murder in killing the owner, even to repel an assault by him, unless the assault was such as to appear to show an intention to take the intruder's life.[qq]

In all cases of provocation, in order to extenuate the offence, it must appear that the party killing acted upon such provocation, and not upon an old grudge; for then it would amount to murder.[r] Thus, it is not error in a judge to tell the jury, on the trial of an indictment for murder, that "if they believe from the evidence that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation;" it being clear from the context of the charge that the malice spoken of was the purpose to kill, or do great bodily harm to the deceased.[s]

§ 987. (b) *How far the law regards heat of blood in mitigation of homicide, independently of the question of reasonable provocation, as in case of mutual combat.*—Where death ensues, in heat of blood, on immediate provocation, there having been no previous malice, the offence is manslaughter.[t] Where there is a quarrel and fight between two, and one of them kills the other, in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside and reason to interpose, the killing would be murder;[u] but if such a time had not intervened, if the parties, in their passion, fought immediately, or even if, immediately upon the

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[n] Kelyng, 61, 119, 138; Mawgridge's case, 1 Hawk. P. C. 6th edit. 123; 2 Ld. Raym. 149; Oneby's case, 3 Ld. Raym. 1489; 2 Strange, 771; State *v.* Johnson, 1 Ired. 354.

[o] Whar. on Hom. 197; Wray *ex parte*, 30 Miss. (1 George) 673.

[p] 1 Hale, 457; 1 Hawk. c. 31, s. 24; 2 Ld. Raym. 1496; 2 Stra. 773; 1 Hale, 452.

[q] State *v.* Lane, 4 Iredell, 113; see Whar. on Hom. 197, 198.

[qq] Lyon *v.* State, 22 Geo. 399.

[r] Whar. on Hom. 198.

[s] State *v.* Tilley, 3 Iredell, 424.

[t] Whar. on Hom. 81, 186, 201.

[u] Foster, 296; 2 Hale, 453.

quarrel, they went out and fought in a field (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only,[v] whether the party killing struck the first blow or not.[w] Thus, where, in New York, the prisoners, three women, each of them armed with a club, had fallen into a quarrel with the deceased, who was also armed with a club, and had been chased by him for some distance till he stopped, upon which one of them turned round and gave him a mortal blow, it was held manslaughter.[x] The indulgence which the law extends to cases of this description is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice.[y]

§ 988. There are cases, however, of sudden quarrel, where circumstances exist which indicate malice upon the part of the party killing; and the killing then would be murder and not merely manslaughter. If, as has been formerly shown, the party killing began the attack under circumstances of undue advantage[z]—as, if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword, and they fight, and B. is killed: A. would be guilty of murder, for his making the pass before B. had drawn his sword, shows that he sought his blood.[a] The same reasoning operated in a case already referred to, where A. and B. quarrelled, and A. threw a bottle at B., and then drew his sword, and B. then threw the bottle back at A., and wounded him, upon which A. immediately stabbed him; this was held to be murder.[b] But where the parties at the commencement, attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatch up a deadly weapon and kill the other with it, this is manslaughter only.[c]

§ 989. In a leading case in England, three Scotch soldiers were drinking together in a public house; some strangers in another box abused the Scotch nation, and used several provoking expressions towards the soldiers, on which one of them, the prisoner, struck one of the strangers with a small rattan cane, not bigger than a man's little finger. The stranger went out for assistance, and in the mean time an altercation ensued between the prisoner and the deceased, who then came into the room, and who, on the prisoner's offering to go without paying his reckoning, laid hold of him by the collar and threw him against a settle. The altercation increased, and when the soldier had paid the reckoning, the deceased again collared him, and shoved him from the room into the passage. Upon this the soldier exclaimed that

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[v] 3 Inst. 51; 1 Hale, 453; 1 Hawk. c. 31, s. 29; Foster, 295.

[w] Foster, 295; 1 Hale, 456; State *v.* Rutherford, 1 Hawks, 349.

[x] People *v.* Garretson et al. 2 Wheeler, C. C. 347; U. S. *v.* Thayer, U. S. Cir. Court, 2 Wheeler, C. C. 503.

[y] Ibid.

[z] Whar. on Hom. 189; see Glery *v.* State, 8 Eng. (13 Ark.) 236.

[a] Foster, 295; State *v.* Rutherwood, 1 Hawks, 349; R. *v.* Rankin, 1 R. & R. 43; R. *v.* Ayes, R. & R. 166.

[b] R. *v.* Mawgridge, Kelw. 128.

[c] 1 East, P. C. 243; R. *v.* Taylor, 5 Burr. 2793; R. *v.* Anderson, 1 Russ. 447; R. *v.* Kessel, 1 C. & P. 437; Com. *v.* Daley, 4 Penn. Law Journal, 158.

he did not mind killing an Englishman more than eating a mess of crowdy. The deceased, assisted by another person, then violently pushed the soldier out of the house, whereupon the latter immediately turned round, drew his sword, and stabbed the deceased to the heart; it was adjudged manslaughter.[d]

Where A. and B. by preconcert make an attack on D., in which C., not being privy to their designs, interferes in hot blood, this is not murder in C. if death ensues from wounds inflicted by A. or B.[e]

§ 990. (c) *How long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled before the mortal blow given.*

However great the provocation may have been, if there be sufficient time for the passion to subside, and for reason to interpose, the homicide will be murder.[f] Thus in the case above given of an adulterer, if the husband kill him deliberately and upon revenge, there having been sufficient cooling time, the provocation will not avail in alleviation of the guilt.[g] Where a man assailed has retreated from the assailant, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new contest with the aggressor. If he do so, and slay him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leave the scene of outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat, and slay his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of, and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind, smarting under the original wrong.[h] The law assigns no limits within which cooling time may be said to take place. Every case must depend on its own circumstances,[i] but the time in which an ordinary man, in like circumstances, would have cooled, may be said to be the reasonable time.[j] If, upon a sudden quarrel, the parties agree to fight upon the spot, or if, not having their weapons there, they presently, without any other matter intervening, fetch them, and go into the field and fight, and one fall, it will be but manslaughter; yet if they appoint to fight the next day, or even upon the same day at such an interval of time as that passion might have subsided, or if, before any blows passed, or words of anger, they agree to fight at a more convenient place, or the fight otherwise appear to be upon deliberation, and death ensue, it will be murder.[k]

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[d] R. *v.* Taylor, 5 Burr. 2793; Whar. on Hom. 186.

[e] Thompson *v.* State, 25 Alab. 41; Frank *v.* State, 27 Alab. 38.

[f] Whar. on Hom. 179–181; People *v.* Sullivan, 3 Selden, 396; as to duels, see ante, § 959; as to challenges to fight, ante, § 984, post, § 2680.

[g] Foster, 296.

[h] Com. *v.* Hare, 4 Penn. Law Jour. 257.

[i] Com. *v.* Dougherty, 7 Smith's Laws, 695; Kilpatrick *v.* Com. 7 Casey, 198.

[j] State *v.* McCants, 1 Spear, 384.

[k] Whar. on Hom. 179, 180; Foster, 297; 1 Hale, 453; Kel. 27; 1 Hawk. c. 31, s. 22, 29; MS. Tracy, 56; 4 Black. Com. 191; 3 Inst. 51; 1 Bulst. 86; Ld. Morley's

§ 991. In a leading case, Major Oneby was indicted for the murder of Mr. Gower, and a special verdict was found, stating that the prisoner, being in company with the deceased and three other persons at a tavern in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half crowns, whereupon the deceased, in a jocular manner, laid down three half pence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half crowns, and lost them to him, immediately after which the prisoner, in an angry manner, turned about to the deceased, and said, "it was an impertinent thing to set half pence, and that he was an impertinent puppy for so doing," to which the deceased answered, "whoever called him so was a rascal." Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased, in return, immediately tossed a candlestick or bottle at the prisoner, which missed him, upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company; the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over," and at the same time offered his hand to the prisoner, who made answer, "No, damn you, I will have your blood;" after which, the reckoning being paid, all the company except the prisoner left the room; but he, calling back the deceased, closed the door, and the rest of the company, shortly after, hearing a clash of swords, found the deceased had received from the prisoner a mortal wound. It was further found, that from the throwing of the bottles there had been no reconciliation. Upon these facts all the judges were of opinion that the defendant had been guilty of murder, and that from the period which had elapsed there had been reasonable time for cooling.[1]

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case, 7 St. Tr. 421; Kel. 56; Cromp. 23; 1 Sid. 287. For a very interesting collection of cases on this point, see Mr. Townsend's Modern State Trials, i. 151 et seq. The English judges, though generally laying down the law with becoming precision, sometimes go beyond any of our American authorities, in mawkish sensibility with the accused. Thus, on the trial of Purefoy, for killing Colonel Roper in a duel, at Maidstone, in 1794, Baron Hotham thus charged the jury: "The oath by which I am bound obliges me to say, that homicide, after due interval of consideration, amounts to murder. The laws of England, in their utmost lenity and allowance for human frailty, extend their compassion only to sudden and momentary frays; and then, if the blood has not had time to cool, or the reason to return, the result is termed manslaughter. Such is the law of the land, which undoubtedly the unfortunate gentleman at the bar has violated, though he has acted in conformity to the laws of honor. His whole demeanor in the duel, according to the witness whom you are most to believe, Colonel Stanwid, was that of perfect honor and perfect humanity. Such is the law, and such are the facts. If you cannot reconcile the latter to your conscience, you must return a verdict of guilty. But if the contrary, though the acquittal may trench on the rigid rules of law, yet the verdict will be lovely in the sight both of God and man." (1 Townsend's Modern St. Trials, 154. See, also, ante, § 950.)

[1] Major Oneby's case, O. B. 12 Geo. I.; 2 Stra. 766; and 2 Ld. Raym. 1485; Whar. on Hom. 182.

§ 992. Where the defendant, having been violently beaten and abused, made his escape, ran to his house, eighty yards off, got a knife, ran back, and on meeting with the deceased, stabbed him, it was held but manslaughter; but it was said that if, on the second meeting, the defendant had disguised the fact of having a weapon, for the purpose of inducing the deceased to come within his reach, it would have been murder, such concealment affording ground for the presumption of deliberation.[m]

§ 993. If between the provocation received, and the mortal stroke given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder.[n]

§ 994. In order to mitigate a homicide, committed in a second combat, by what occurred at a previous one, which had fairly begun on the sudden, both contests must be considered as making one combat, or the first as a separate combat must be considered as a sufficiently sudden provocation for either a second combat, or for a subsequent attack producing a contest not entitled to be called a mutual combat.[o] Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on a sudden occasion, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present, but drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprised of the pursuit by a call from the person holding the prisoner, left the road on which he was walking, and provided himself with a rail from a neighboring fence; that on his return towards the road he met the prisoner, gave back, and struck him several blows upon the head as he rushed on, with the rail, which, breaking some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighboring house, within hearing of the noise of the second quarrel, to reach the place of strife. The court, under this state of facts, were of opinion that both contests could not have constituted one combat, nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means of defence at hand, but was neither equally armed nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the court refused to disturb it.[p]

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[m] State *v.* Norris, 1 Hayw. 429.

[n] Com. *v.* Green, 1 Ashmead, 289; Whar. on Hom. 179.

[o] State *v.* M'Cants, 1 Spear, 384.

[p] State *v.* M'Cants, 1 Spear, 385.

§ 995. In a case where the defendant was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about three hundred yards, passed through his bed-room to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased, giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying, he had served him right; after this, the prisoner ran home, repassed through the rooms to the pantry, and went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry; Tindal, C. J., told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, and showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only: or whether, after the provocation, there had been time for the blood to cool, and reason to resume its sway before the wound was inflicted, in which case the offence would be murder. The jury found the prisoner guilty of murder.[q] Where the prisoner and the deceased, who were previously on intimate terms, were at a public house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye, the prisoner called for the police, and went away upon the policeman coming up; in about five minutes, however, he returned and stabbed the deceased with a knife, which he usually carried about him: Lord Tenterden, C. J., said, that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder: but he left it to the jury to say, whether in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind: if not, they should find him guilty of manslaughter only.[r]

§ 996. If, in fine, there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly accounts to murder.[s]

3d. Homicide in the prosecution of an unlawful act, when the death is collateral.

§ 997. It has already been noticed that, if a man, designing to kill another, kill, by mistake, a third person, the killing of such third person is murder. It is not only in cases where the original intent was to kill that such a rule

[q] R. *v.* Haward, C. & P. 157,

[r] R. *v.* Lynch, 5 C. & P. 324. See Whar. on Hom. 179–181. Ante, § 950.

[s] R. *v.* Campbell, Boston Law Reporter, 161; State *v.* Yarborough, 1 Hawks, 78; R. *v.* Thomas, 7 C. & P. 817.

holds good. If the act on which death ensue be *malum in se*, it will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but the death ensued, against or beside the intent of the party, it will be murder: but, on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. As, where A. shoots at the poultry of B., and, by accident, kills B. himself: if his intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent: but if it were done wantonly and without that intent, it will be barely manslaughter.

Where A. strikes a horse on which B. is riding; whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A., but misadventure in B.[t]

§ 998. If a number of persons conspire together to do an unlawful act, and death happened in the prosecution of the design, it is murder in all.[tt] If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happened collaterally, or beside the principal design.[u] Thus, if several persons conspire to seize, with force and violence, a vessel, and run away with her, and, if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in executing the design.[v] The law makes no distinction between any of the parties engaged. All engaged in such an outrage, to use the language of a learned judge of this country in a late charge, "are aware that their acts are unlawful, and that murder may result from such resistance. Where, however, the resistance is carried on with the use of deadly weapons; where cannon, charged with every species of offensive missile, and small arms, loaded with ball, are used, there is no room for doubt as to all engaged in such resistance being guilty of murder, whether the proof establishes the particular individual on trial to have actually fired the cannon and musketry or not. Being engaged in a riot, whose avowed object was the killing of the ministers of justice while engaged in the execution of their duty, every man concerned is just as guilty of a murder committed by any one of such a combination as if he actually struck the fatal blow himself. How can such a man escape this conclusion? Did he not array himself with a lawless band, armed with the most dangerous and deadly weapons, and having for their direct object the attack and destruction of the officers of the law? If the deaths of the officers follow, that is the intention with which the assault is made. And surely there is neither hardship nor severity in holding all the members of an illegal combination responsible for the acts of each, done in

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[t] Whar. on Hom. 45-47; Foster, 258, 259; Plummer's case, 1 Hale, 475; 2 Inst. 56; Kel. 117; Sum. 56; 6 St. Tr. 222; 1 Hawk. c. 29, s. 11, c. 31, s. 41. Ante, § 950.

[tt] State *v.* Simmons, 6 Jones' Law, N. C. 21.

[u] U. S. *v.* Ross, 1 Gallis, C. C. R. 524; Beets *v.* State, Meigs, 106; U. S. *v.* Travers, 2 Wheeler's C. C. 508; Brennan *v.* People, 15 Illinois, 511.

[v] U. S. *v.* Ross, 1 Gallis, C. C. R. 524.

furtherance of their common design."[w] But if one of the party, of his own head, turn aside to commit a felony, foreign to the original design, his companions do not participate in his guilt.[x]

§ 999. In the course of a series of cases of late occurrence, growing out of the Kensington riots in Philadelphia County, where great loss of life had been the result of popular tumult, the common law authorities, as applicable to such instances of homicide, were collected and expressed with great ability. "Where divers persons," it was said, "resolve generally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in doing so happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who unlawfully engage in such bold disturbances of the public peace in opposition to, and in defiance of the justice of the nation. Malice in such a killing is implied by law in all who were engaged in the unlawful enterprise; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary to prevent riotous combinations from committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators."[y] "If from the proofs before you," it was said in another case, "it had been made to appear that Hare, the defendant, and others with whom he was in association after the original assault on the morning of the 7th of May, and the dispersion of that meeting consequent upon it, left the scene of action, gathered arms and friends, and returned, and there commenced burning the houses and property of the assailants, and firing upon and killing, or endeavoring to kill them, not for the purpose of arresting and bringing the original offenders to justice; then their conduct was illegal and unjustifiable, and they each and all are criminally liable for all the consequences flowing from such acts of unauthorized vengeance. The law does not and will not permit any individual or body of men to become their own avenger; and if they attempt it, and injuries to person or property follow, they are criminally responsible for their conduct. If courts of justice should once recognize this wild right of private vengeance, it is evident that the bands of social order and security would be torn asunder and the cannon and the musket become the substitute for the bench and the

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[w] 4 Penn. Law Jour. 49; Whar. on Hom. App. 460, &c.; Brennan *v.* People, 15 Illinois, 511.

[x] State *v.* King et al., 2 Rice's S. C. Digest, 106.

[y] Per King Prest. Judge, Com. *v.* Daley, 4 Penns. Law Jour. 154; 1 East's P. C. 257; Sir Wm. Courtenay's case, 1 Boston Law Rep. 206; 1 Hale, 53, 442, 245; 1 Hawk. c. 29, s. 10, c. 31, s. 46; 4 Blac. Com. 200; 2 Roll. Rep. 120.

jury-box, in measuring out the nature and amount of punishment to offenders against public law. The concession of such a right of self-vindication would be the immediate and complete demolition of all public safety, the surrender of all the powers of government, and the termination of the supremacy of the law. If any citizen or body of citizens are injured or aggrieved, the vindication of their infracted rights belongs exclusively to the civil government; and if they attempt to forestall the public arm and undertake to chastise those from whom they have suffered wrong, they are acting as much in opposition to public justice as the original aggressors. If during such a scene of unlawful violence, an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in their unlawful doings, such a homicide would be murder at common law, in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and from a simultaneous fire, innocent citizens, their wives or children in their houses, should be killed by some of the missiles discharged. Shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefits of impracticable niceties in order to their indemnity from the consequences of their own conduct?"[z]

§ 1000. Several persons were engaged in a smuggling transaction; and upon an attempt to oppose their design by the king's officers, one of the smugglers fired a gun, and killed one of his accomplices. It was determined by the court, that if the gun were discharged at the king's officers in prosecution of the original design, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation against the accomplice from anger or some precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular case by the general purpose in view at the time the death happened, the killing must be in pursuance of such unlawful purpose, and not collateral to it.[a]

§ 1001. If, upon a sudden affray, as has been seen, a stranger interfere to

[z] 1 Com. *v.* Hare, 4 Penn. Law Jour. 257.
[a] Plummer's Case, Kel. 109; 12 Mod. 627; 1 Hale, 443; Whar. on Hom. 45–47.

part the combatants, and give reasonable notice that such is his intention, and that he means only to keep the peace, and not to interfere in the quarrel; and in so doing be killed by either of the combatants, it is murder; but if he so interfere without giving reasonable notice of his intention, and he is killed, it is no more than manslaughter.[b] Without some such proclamation of intention, he may be considered by those engaged in the combat, as participating in it himself, and his killing, under such circumstances, in heat of blood, will be homicide of the same grade as the killing of one of the original combatants. Thus, in a case cited by Mr. East, where the prisoners were hired by a tenant to carry away his goods to prevent a distress, and went armed with bludgeons and other offensive weapons; and the landlord assisted by others, attempted to prevent it; and in the violence of the affray, after the constable had in vain attempted to disperse them, a boy standing at his father's door, who took no part therein, was killed by one of the company unknown; Holt, C. J., and Pollexfen, C. J., held it murder in all the party, by reason that the prisoners came armed with offensive weapons, and in a riotous way, and that they persisted in the affray after the constable had interfered to put a stop to it. But a majority of the judges held, that as the boy was unconcerned in the affray, the killing of him could not be imputed to the rest, who were merely engaged in the general affray; that he could not be deemed an opposer to the party, so as to make him an object of this contention; and that they could no more be said to have abetted the killing of him than if one of the company had killed a person looking out of a window. The reasoning of the majority in the above case seems to have proceeded upon the defect of any evidence to show, that the stroke by which the boy was killed was either levelled at any of the opposing party but had hit him by mistake, or was levelled at him upon the supposition that he was one of the opponents; for otherwise it seems that in either of these cases the same guilt would have attached upon all who were concerned in the same design with the striker as upon the striker himself. For if the act or design be unlawful and premeditated, and death happen from anything done in the prosecution of it, it is clearly murder in all who take part in the same transaction. In the above case the two chief justices were of opinion, in which the others did not differ from them, that though the moving of the goods might be lawful, yet the continuing of the party together after the constable had ordered them to disperse was unlawful; and besides, that the great numbers who were thus assembled, and the unusual weapons they were armed with, did also make the assembly unlawful. Perhaps the more correct method would have been for the jury to have found the fact one way or other, whether the stroke which killed the boy were or were not aimed at any of the assailants, or levelled at him, mistaking him to be such.[c]

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[b] Whar. on Hom. 71, 78–80; U. S. *v.* Travers, 2 Wheel. C. C. 504, 508.
[c] 1 East's P. C. 259.

4th. HOMICIDE ARISING FROM IMPROPRIETY, NEGLIGENCE, OR ACCIDENT, IN THE PROSECUTION OF AN ACT LAWFUL IN ITSELF, OR INTENDED AS A SPORT OR RECREATION.

§ 1002. (*a.*) *General rule as to negligence.* — When death ensues from negligence, it is manslaughter in the negligent party. The greater the risk, the greater the caution required; the policy of the law exacting that in this way parties intrusted with such dangerous responsibility should be put under bonds to keep the peace. With regard to the ordinary employments of life, *e. g.*, riding or driving in a thoroughfare dedicated to the use of horses—ordinary care, as has just been seen, is alone required.[d] Where, however, the danger increases, increased care is exacted. Thus, a person who drives *out* of the ordinary track is required to use a better look out, and peculiar diligence;[e] and so of him who is passing through an unusual concourse of people,[f] or is encroaching on a road or other place where there is no side-walk, and where, consequently, foot-passengers must necessarily be passing to and fro.[g] A distinction has been taken between cases where the responsibility is *compulsorily*, and those where it is *voluntarily* assumed. Thus, where an incompetent person, in the absence of all possible professional aid, is forced to treat a surgical or medical case, he is, it seems, subjected to a much less degree of responsibility than he would be if regular medical or surgical aid could have been had.[h]

§ 1003. (*b.*) *Death from carelessness, where the death was by no means a likely consequence of the careless act* —There are many cases in which death is the result of an occurrence in itself unexpected, but which arose from negligence or inattention.[i] How far, in such cases, the agent of such misfortune is to be held responsible, depends upon the inquiry whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes; and the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act immediately conducive to the death. Where deer had entered a corn-field, and were beating down the corn, the owner went with his servant to watch at night with a gun, and charged him to fire when he heard anything rush into the standing corn: and upon the owner rushing into the corn in another part of the field, the servant fired and killed him. In the first passage, wherein Lord Hale mentions this case, he seems to think that it amounted to manslaughter, for want of due diligence and care in the servant in shooting upon such a token as might befall a man as well as a deer: however, he says, it was a question of a great difficulty. But in a subsequent part of his work, as is noticed by Mr. East, the learned author relating the

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d See Whar. on Hom. 112.

e Kennedy *v.* Way, Brightly's R. 186.

f R. *v.* Murray, 5 Cox, 509.

g Whar. on Hom. 115; Knight's case, 1 Lewin, 168.

h R. *v.* Webb, 1 M. & Robb. 405; 2 Lewin, 196.

i See Whar. on Hom. 101–153, where this subject is fully examined; and see, also, a series of interesting articles in 7 Boston Law Rep. 256, 377, &c.

same case, which had been determined by himself at Peterborough, says, that he had ruled it to be only misadventure; for the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. But it seemed to him, that if the master had not given such direction which was the occasion of the mistake, it would have been manslaughter; because of the want of due caution in the servant to shoot before he discovered his mark.[k]

§ 1004. Whatever may be the difference as to the *degree* of homicide, a party whose negligence causes the death of another is in like manner responsible whether the business in which he was engaged was legal or illegal. If the business was of such a character as to be felonious, the offence, it is clear, is murder; and of this the leading illustration is that of the tame fowl, the attempt to shoot which for the purpose of stealing, when it results in homicide, is murder.[l] But even where the business is perfectly legal, negligence in the discharge of it when producing homicide is manslaughter. Thus the business of a physician and apothecary is undoubtedly legal, and yet death resulting from negligence in the discharge of it is undoubtedly manslaughter.[m] Such also is the law with regard to manufacturers and workmen;[n] to persons having charge of children or dependents,[o] and to officers of steam and other vessels.[p]

Where a man lays poison to kill rats, and another man takes it, and it kills him; if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter,[q] if otherwise, misadventure only.[r]

§ 1005. (*c.*) *Carelessness on the public road.*—The question here depends in a great measure upon whether the road is a thoroughfare or not. If it be not, the defendant is required to exercise only ordinary caution. If it be, he is responsible for any accident which extreme care might have averted.

Of this a pointed illustration is given in a case tried in the Old Bailey, in 1664. The defendant was employed on a building, thirty feet from the highway, and threw down a piece of timber, have first cried out to stand clear. The timber fell upon a person who happened to go out of the way to pass underneath, and killed him. It was held misadventure only, though it was said that if the house had been on a constant thoroughfare, it would have been manslaughter.[s]

On the same view a merchant, who was raising a cask of wine to a third story, over a crowded street, and who let the cask slip, whereby two women were killed, was guilty of manslaughter, as, under the circumstances, the method taken of raising the cask was not sufficiently guarded.[t]

Where a person driving a carriage, races with another carriage, and urges his horses to so rapid a pace that he cannot control them, it is manslaughter, if in consequence the carriage upset and a passenger be killed.[u]

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[k] Whar. on Hom. 208, 209.
[l] Whar. on Hom. 46.
[m] See post, 1013.
[n] Whar. on Hom. 144.
[o] Ibid. 117.
[p] Ibid. 101.
[q] Whar. on Hom. 209; 1 Hale, 431.
[r] 1 Hale, 431.
[s] R. *v.* Hull, Kel. 40.
[t] R. *v.* Rigmardon, 1 Lewin, 180.
[u] R. *v.* Timmins, 7 C. & P. 499; see Whar. on Hom. 112.

The defendant, who was nearsighted, drove along a road at lamplight, at the rate of eight or nine miles an hour, sitting at the time at the bottom of his cart, and ran over a foot passenger and killed him; and it was holden to be manslaughter.[v]

§ 1006. Driving at the rate of fifteen miles an hour, or a mile in four minutes on a public highway is unlawful; and if death ensue from a collision thus produced without fault of the injured party, the offence, it seems, would be murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.[w]

Driving with loose reins on a frequented road, whereby death ensues, has been held manslaughter.[x]

§ 1007. If each of two persons be driving a cart at a dangerous and furious rate, and they be inciting each other to drive at a dangerous and furious rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter; and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.[y]

§ 1008. Negligence on the high seas is responsible under the same general limitations as negligence on shore.[z] It was once thought that the officers of a ship were not liable for accidents occurring from omissions (*e. g.*, from not keeping a sufficient look out),[a] but the better and later opinion is to the contrary.[b]

Negligence on the deceased's part is, indeed, no excuse for the defendant, if the latter's position was such that with proper care the accident would have been avoided. Thus, where a deaf man, who, in spite of repeated warnings, insisted on walking in the middle of the road, was killed by the defendants' negligent driving, it was urged that the deceased's negligence excused the defendants; but Rolfe, B., said, "Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed."[c] So also where a ferry boat was overloaded, and in consequence of a fright, the passengers all hastily and rashly jumped up and upset the boat, upon which one of them was drowned, it was held that such carelessness on the passengers' part was no defence to an indictment against the ferryman.[d] With this is consistent the acknowledged principle, that though surgical maltreatment or personal misconduct contributes to the death, this does not excuse the party who inflicts the fatal wound.[e]

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[v] R. *v.* Grout, 6 C. & P. 629.

[w] Kennedy *v.* Way, Brightly, R. 186; see Whar. on Hom. 112–114.

[x] R. *v.* Dalloway, 2 Cox, C. C. 273; see R. *v.* Murray, 5 Cox, C. C. 509.

[y] R. *v.* Swindall, 2 Car. & Kir. 229.

[z] R. *v.* Spence, 1 Cox, C. C. 352.

[a] R. *v.* Green, 7 C. & P. 156; R. *v.* Allen, 7 C. & P. 186.

[b] R. *v.* Lowe, 4 Cox, C. C. 449; 3 C. & K. 123; R. *v.* Spence, 1 Cox, C. C. 352; R. *v.* Haines, 2 C. & K. 368.

[c] R. *v.* Longbottom, 3 Cox, C. C. 439; see, also, R. *v.* Walker, 1 Car. & P. 320; R. *v.* Williamson, 1 Cox, 97; post, § 1016.

[d] R. *v.* Williamson, 1 Cox, 97.

[e] Whar. on Hom. 241.

§ 1009. If a man driving a cart or other carriage, drive it over another man and kill him: if he saw or had timely nótice of the probable mischief, and yet drove on, it would be murder;[f] if he purposely drove it furiously in amongst a crowd, it would probably be murder; but if in a street where persons were not much in the habit of passing, it would be manslaughter;[g] if in a place where people did not usually pass, misadventure merely, provided he took that care which persons in similar situations are accustomed to do.[h] If a man breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him; this is murder, if the rider brought the horse into the crowd with an intent to do mischief, or even to divert himself by frightening the crowd;[i] manslaughter, if done heedlessly and incautiously only.[j]

§ 1010. Where it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, ran over him and killed him; the prisoner had called out twice to the deceased, who from the state in which he was and the pace of the horses, could not get out of the road: the offence was held to be manslaughter.[k]

Where the deceased met two persons riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him, and both fell, the deceased being killed by the concussion: Patteson, J., directed an acquittal of the first who passed: and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding he ran against the deceased, but to acquit him if they thought that the deceased's horse was unruly and ran against the horse of the prisoner.[l]

Where, in an old case, a gentleman came to town in a chaise, and before he got out of it fired his pistols in the street, which by accident killed a woman, the offence was ruled manslaughter; the act being likely to produce danger, and manifestly improper;[m] and in New York it has been lately held that it is manslaughter in the common law if one discharge a gun in the dark and kill one whom he did not see.[mm]

§ 1011. (*d.*) *Acts of omission as well as commission on the part of those charged with specific duties.*—It is not necessary that the fatal result should have sprung from an act of *commission*, for if the defendant *omits* an act incumbent on him, from which death results to another, he is guilty of manslaughter. This, as has already been abundantly shown in another work, is peculiarly the case with parents and others having the charge of children or other dependents, whose naked *neglect*, when there is a capacity as well as a

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[f] 1 Hale, 475; Foster, 263; Whar. on Hom. 117.
[g] Per Holt, C. J., 1 East, P. C. 263.
[h] Anon. 1 East, P. C. 261.
[i] 1 Hawk. c. 31, s. 68.
[j] 1 East, P. C. 231; see Hale, 475; 1 Hawk. c. 29, s. 12.
[k] R. *v.* Walker, 1 C. & P. 320.
[l] R. *v.* Mastin, 6 C. & P. 396.
[m] Burton's case, 1 Stra. 481; see Whar. on Hom. 210.
[mm] People *v.* Fuller, 2 Parker, C. R. (N. Y.) 16.

duty to provide, is criminally responsible,[n] though in this case it is important to keep in mind the qualification that the defendant must at the time have the means and ability to prevent the mischief.[o] If there be malice, the act is murder—if the injury was unintended, manslaughter.[p] And so where an engineer leaves the engine in charge of an incompetent person;[q] where a pilot failed to make himself understood by a foreign helmsman;[r] where the proper signal was neglected by a railway tender,[s] and where a ground bailiff neglected to ventilate a mine;[t] in all these cases, where death ensues, the defendant is guilty of manslaughter.

On the part of those charged with the care and management of machinery, a degree of prudence is required which increases in proportion as the circle of probable mischief resulting from an accident expands. Thus, where an iron founder, employed to cast cannon, instead of recasting a piece that had burst, filled up the hole with lead, and returned it, after which it burst a second time, producing loss of life, this was held manslaughter;[u] and so in the case already noticed, where the proper ventilation of a mine was neglected, and death ensued.[v]

§ 1012. (*e.*) *Unlawful or dangerous sports.*—If, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter;[w] if the sport were lawful and not dangerous, it would be homicide by misadventure merely.[x] Under the former class, however, cannot be ranked prize-fighting, public boxing matches, and cases of such character, which are exhibited for the sake of lucre, and are calculated to draw together a number of idle disorderly people. For in such cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained.

Such meetings, also, have a strong tendency in their nature to a breach

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[n] See Whar. on Hom. 93–97, 117–130; State *v.* Hoit, 3 Foster, 355; R. *v.* Edwards, 8 C. & P. 611; R. *v.* Lowe, 4 Cox, C. C. 449; 3 C. & K. 123; 1 Bennett & H. Lead. Cas. 49; R. *v.* Middleship, 5 Cox, C. C. 339; R. *v.* Plummer, 1 C. & K. 600, and see Nixon *v.* People, 2 Scammon, 269, where the charge was suffering the deceased to freeze to death.

[o] R. *v.* Hogan, 5 Eng. Law & Eq. 553; Saunders' case, 7 C. & P. 277; R. *v.* Philpott, 20 Eng. Law & Eq. 591; R. *v.* Renshaw, 2 Cox, 285; R. *v.* Vann, 8 Eng. Law & Eq., 285. Where there is such incapacity, it is the parent's duty to apply to the proper authorities; and if he neglect to do so, he is responsible; R. *v.* Mabbett, 5 Cox, 339. An allegation in an indictment that a husband "did assault" his wife, and "violently, feloniously, and of his malice aforethought, did remove and force her out of his dwelling-house, and her there leave, whereby she came to her death," is not supported by proof that after the beating, and after the husband had gone to bed, she voluntarily left his house, and unnecessarily remained out in the open air; State *v.* Preslar, 3 Jones, Law (N. C.), 421.

[p] Ibid.

[q] R. *v.* Lowe, 4 Cox, C. C. 449.

[r] R. *v.* Spence, 1 Cox, 352, decided in 1846; though this seems inconsistent with R. *v.* Allen, 7 C. & P. 153, and R. *v.* Green, Ib. 156, where it was held by Parke, J., and Alderson, B., in 1835, that to make the captain of a vessel liable for negligence in running down another vessel, some act of *commission* was necessary; see ante, § 1008.

[s] R. *v.* Pargeter, 3 Cox, 191.

[t] R. *v.* Haines, 2 C. & K. 368.

[u] R. *v.* Carr, 8 C. P. 163.

[v] R. *v.* Haines, 2 C. & K. 368.

[w] Whar. on Hom. 147, 210; Foster, 259–261; 1 Hale, 472, 473; 1 Hawk. c. 29, s. 5; Penna. *v.* Levin, Addison, 279; Fenton's Case, 1 Lewin, 179.

[x] Foster, 260.

of the peace. It was on this principle that, in Ward's case, who was challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts, although the occasion were sudden, yet having killed his opponent, he was holden guilty of manslaughter.[y]

Death produced by practical joking is manslaughter. Thus, it was held manslaughter to throw stones into a coal-pit, though in sport, whereby a person is killed;[z] to build a fire of straw around a drunken man, though only to frighten him, into which, however, he rolled, and was killed;[a] to administer in sport such excessive quantities of spirituous liquors to a person as to cause his death.[b]

§ 1013. So, if a man shooting at game, by accident kill another, it is homicide by misadventure merely.[c] So, if a man intending to kill a person attempting to commit a forcible and atrocious crime against his person or property, by mistake kill one of his own family, it is homicide by misadventure merely.[d] Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure.[e]

§ 1014. (*f.*) *Undue correction by persons in authority.*—When death ensues, in consequence of the correction of parents, masters and others having lawful authority, and such correction be considered nothing more than reasonable, the death will be considered accidental.[f] Where, however, the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose, it will be either murder or manslaughter according to the circumstances. If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon, likely to kill or maim, as a pestle or great staff, it will be murder; due regard being had in both instances to the age and strength of the party.[g] So, as was said in a case already cited, if a seaman in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who notwithstanding compels the seaman by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, and his death is occasioned by such misconduct in the master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.[h]

§ 1015. (*g.*) *Medical mal-practice.*—In this country it has been ruled, that if one assuming to be a physician, however ignorant of the medical art, administer to his patient remedies which result in his death, he is not guilty

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[y] Whar. on Hom. 147, 210; 1 East, P. C. 269.

[z] Fenton's case, 1 Lewin, C. C. 179. [a] R. *v.* Errington, 2 Lewin, C. C. 217.

[b] R. *v.* Martin, 3 C. & P. 211; R. *v.* Packard, 1 C. & M. 246.

[c] Whar. on Hom. 209, 210; Foster, 259; Com. *v.* York, 9 Metc. 93.

[d] See Cro. Cas. 538. [e] 1 Hawk. c. 29, s. 2; ante, § 1004.

[f] 1 East, P. C. 261; Whar. on Hom. 128–130.

[g] Wharton on Hom. 124–129; Fost. 262; Kel. 28, 133; 1 Hale, 454, 457, 473, 474; 1 Hawk. c. 29, s. 5; 1 Leach, 378; R. *v.* Conner, 7 C. & P. 438; R. *v.* Cheeseman, 7 C. & P. 455.

[h] U. S. *v.* Freeman, 4 Mason's C. C. R. 505.

of manslaughter unless he has so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate wilful rashness. It was said at the same time, that where, however, such person had opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty of manslaughter, even though he might not have intended any bodily harm to his patient.[i] In England, however, a severer accountability is exacted; it being held, that where a person holds out to practise as a physician or surgeon, he is bound to bring to bear competent skill and information, and if, through gross ignorance, unskilfulness, or inattention on his part, death ensues, it is manslaughter.[j]

The following points, however, are to be observed: 1. Between a *licensed* and an *unlicensed* practitioner, there is now no difference as to responsibility.[k] 2. An ignorant person stands in a different position if a volunteer, when proper professional attendance could be had elsewhere, than he would if forced to act in the necessary absence of such absentce.[l]

§ 1016. (*h.*) *Negligence on both sides.*—It is no defence, as has already been incidentally seen, that the deceased or his companions by their own negligence, contributed to the result, if that result would not have happened without the misconduct of the defendant.[m] Thus, even where the deceased when attacked with violence by the defendant, in well-founded apprehension, threw himself into the river and was drowned, it was held manslaughter in the defendant.[n]

§ 1017. But there must have been some positive misconduct on the part of the defendant, in such a state of facts, to justify his conviction. Thus, where the deceased was in a boat, bargaining with a schooner in the river Thames, and a sort of rough joking ensuing between the defendant, a seaman on the schooner, and the deceased, the defendant gave the deceased's boat a push, whereupon the deceased, in order to prevent the boat afterwards drifting away, caught hold of a barge, and was swept into the water, and was drowned, this was held not to be manslaughter.[o]

§ 1018. Analogous cases to these under this head, will be found in those already noticed, where a defendant is held liable for a mortal blow, notwithstanding the immediate cause of death may have been the neglect to use proper remedies, or the mistreatment of a physician, and notwithstanding the fact that the deceased might have recovered by the exercise of more care and skill.[p]

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[i] Wharton on Hom. 131, 145; Com. *v.* Thompson, 6 Mass. 134; Rice *v.* State, 8 Mis. 561; Fairlee *v.* People, 11 Ill. 1; Holmes *v.* State, 23 Alab. 17.

[j] R. *v.* Spiller, 5 Car. & P. 632; R. *v.* Senior, 1 Mo. C. C. R. 346; R. *v.* Williamson, 3 C. & P. 635; Webb's case, 1 M. & R. 405; R. *v.* Long, 4 C. & P. 398; R. *v.* Whitehead, 3 C. & K. 202; see Whar. on Hom. 131–144, where these cases are discussed.

[k] R. *v.* Long, 4 C. & P. 398.

[l] Webb's case, 2 Lewin, C. C. 196.

[m] See ante, § 1008, &c.; R. *v.* Longbottom, 3 Cox C. C. 439; R. *v.* Swindall, 2 C. & K. 230; R. *v.* Walker, 1 C. & P. 320; R. *v.* Haines, 2 C. & K. 638.

[n] R. *v.* Pitts, 1 C. & M. 284.

[o] R. *v.* Waters, 6 C. & P. 328.

[p] Ante, § 941.

5th. Homicide from necessity in defence of a man's own person or property, or of the persons or property of others.

§ 1019. (*a.*) *General nature of right.*—A man may repel force by force in the defence of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either.[q] In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if, in a conflict between them, he happen to kill, such killing is justifiable. The right of self-defence in cases of this kind is founded on the law of nature; and is not, nor can be, superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him, or any other person present, may interpose for preventing mischief, and if death ensue, the party so interposing will be justified.[r]

Where, in an affray, A. knocked down B., and C., a bystander, believing the life of B. to be in danger, B. having retreated as far as he could with safety, gave B. a knife to defend himself, to prevent further mischief, it was held that C. was justified in giving B. the knife.[s]

§ 1020. (*b.*) *As a general rule the danger must be actual and urgent.*—To make homicide excusable on the ground of self-defence, the danger must be actual and urgent.[t] No contingent necessity will avail; and when the pretended necessity consists of the as yet unexecuted machinations of another, the defendant is not allowed to justify himself by reason of their existence.[u] In cases of personal conflict, also, in order to prove such defence, it must appear that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.[v] If it appear that the conflict was in any way premeditated by the defendant, the defence can no longer be set up.[w] It must be proven that the assault was eminently perilous.[x] Thus, where, in an

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[q] Whar. on Hom. 121–230; U. S. *v.* Mingo, 2 Curtis, C. C. R. 1.

[r] Com. *v.* Daley, 4 Penn. L. Jour. 153; Selfridge's case, per Parker, J., 160; 1 East, P. C. 271; Com. *v.* Riley, Thatcher's C. C. 471; Whar. on Hom. 213.

[s] Com. *v.* Riley, Thatch. C. C. 471; Whar. on Hom. 71, 77.

[t] Whar. on Hom. 212–214; U. S. *v.* Vigol, C. C. 2 Dallas, 346; Com. *v.* Crause, 3 Amer. Law Jour. 299; Lander *v.* State, 12 Texas, 462. Mr. Fox, with his usual precision and thorough comprehension of the English system hits this very position in his statement of the circumstances attending the execution of Charles I. "Mr. Hume," he says, "not perhaps intentionally, makes the best justification of it, by saying, that while Charles lived, the projected Republic could never be secure. *But to justify taking away the life of an individual, upon the principle of self-defence, the danger must be, not problematical and remote, but evident and immediate.*"

[u] People *v.* M'Leod, 1 Hill, N. Y. R. 377; State *v.* Morgan, 3 Iredell, 186.

[v] 1 Hale, 481, 483; State *v.* Wells, Coxe, 424; U. S. *v.* Travers, U. S. C. Ct., 2 Wheel. C. C. 498-507, per Story, J.; People *v.* Sullivan, 3 Selden, 396. See the recent cases, post, § 1026, &c.

[w] Wharton on Hom. 230; People *v.* M'Leod, 1 Hill, N. Y. R. 377; Hayden *v.* State, 4 Blackford R. 547; Stewart *v.* State, 1 Ohio St. R. 66; Mitchell *v.* State, 22 Geo. 211; ante, § 972.

[x] Stewart *v.* State, 1 Ohio St. R. 66.

old case, the prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed; his father ordered him to go to bed, which he refused to do; whereupon a scuffle happened between the father and son. The deceased, who was then in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him and beat him, the prisoner lying upon the ground, with his brother upon him, not being able to avoid his blows or make any escape from his hands; and as they were striving together, the prisoner gave his brother the mortal wound with a pen-knife. At a conference of all the judges after Michaelmas term, 1704, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity, so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to have intended to chastise him for his misbehavior to his father; and to excuse homicide upon the ground of self-defence there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable.[y] At the conference in the above case, Powell, J., put the case; if A. strike B. without any weapon, and B. retreat to a wall, and there stab A., that will be manslaughter; which Holt, Chief Justice, said was the same as the principal case; and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, that the intent was death; and without there be a plain manifestation of a felonious intent, no assault will justify killing the assailant.[yy]

The question whether there was such a "plain manifestation," is to be tested by the *defendant's* disposition and temper, not that of the jury.[z]

§ 1021. (*c*.) *Where the defendant may slay, without retreating to the wall.*— There may be cases sometimes occurring, though very rare, and of dangerous application, where a man, in case of personal conflict, may kill his assailant without retreating to the wall.[a] The assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter, he would not escape if he could. Thus, if A. assault B. so fiercely that giving back would endanger his life, in such case it is agreed that the party thus attacked need not retreat in order to bring his case within the rule of necessity in self-defence; or if, in the assault, B. fall to the ground, whereby he could not fly, in such case if B. kill A., it is in self-defence upon chance-medley.[b] Such were the principles laid down in Selfridge's case, which produced in that instance, as they will in all others where they are presented without the qualifications attached to them by the common law authorities, a verdict which surprised

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[y] 1 East, P. C. 277; Pierson *v.* State, 12 Ala. 149.

[yy] M'Pherson *v.* State, 22 Geor. 478.

[z] See § 641, 642; post, § 1026; see Com. *v.* Wilson, 1 Gray, 337; Com. *v.* Hilliard, 2 Gray, 294.

[a] Whar. on Hom. 213, 214.

[b] 1 Hawk. c. 29, s. 14; 4 Black. Com. 185; 3 Inst. 56.

the profession, and tended to lessen the sanctity of human life. Thus, as is said by Mr. East, if B., in the case already put, had returned A.'s assault so fiercely that he could not retreat without danger; or if A. had fallen to the ground, and then had killed B. who was aiming at his life, still this should not be interpreted to be done in self-defence upon chance-medley, because it has been said, a fall not being voluntary, as a flight is such, it does not thereby appear that A. declined fighting; and, therefore, B. cannot safely quit the advantage he has gotten. So that in the case of the assailant there must be an actual, unequivocal retreat and quitting of the combat as far as he can, in order to reduce the killing by him to self-defence upon chance-medley, and this his intention must not be shown by any ambiguous or casual act, such as his falling; otherwise, as Lord Hale observes, all cases of murders or manslaughters would by interpretation be turned into self-defence. Nor in any case will a retreat avail, if it be feigned in order to get an opportunity or interval by parting to enable him to take advantage of this excuse. If there be any pause in the conflict, or any slowness in the defendant in neglecting any oportunity to withdraw from it, the offence becomes manslaughter, for it is not to be tolerated that the plea of necessity should be received when that necessity was the result of the defendant's own election.[c] Neither, under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A. this is murder, because of the previous malice and concerted design.[d]

§ 1022. (*d.*) *An attack provoked or renewed by the defendant will be no defence.*—That a provoked attack cannot constitute a necessity in the eye of the law has been already shown.[dd]

If the attack of the deceased be for a moment desisted, and the defendant, on his own part, renew the conflict, the killing is no longer excusable.[e] Where, in a case in New York, the deceased had pursued the defendants, who were women, for some distance, till he stopped to tie his shoe, when one of them turned and gave him a mortal blow, it was held manslaughter; first, because the defendants were not pursued to the wall, and secondly, because the deceased had desisted temporarily from the pursuit.[f] Where, in the course of the quarrel, the prisoner was menaced by the deceased, whose strength was greater than his own, with a brickbat, and could have escaped by flight, but not choosing to do so, turned round and mortally wounded his assailant with a dagger which he had concealed on his person, it was held manslaughter.[g]

§ 1023. Necessity ceases to exist when the defendant, though originally

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[c] Whar. on Hom. 197, 230; Foster, 277; 1 Hawk. c. 29, s. 17; Stewart *v.* State, 1 Ohio St. R. 66.

[d] 1 Hale, 479; People *v.* M'Leod, 1 Hill, 377.

[dd] Ante, § 990; see Vaiden *v.* Com. 12 Gratt. 717.

[e] Whar. on Hom. 213.

[f] People *v.* Garretson, 2 Wheeler, C. C. 348.

[g] People *v.* Anderson, Ibid. 408.

in imminent danger, escapes, arms himself with a dangerous weapon, returns, and slays his antagonist.[h] Thus, on the trial of Hare, one of the Kensington rioters, it was argued that there was no cessation of the mutual firing between the combatants, from the first onslaught; that Rice (the deceased) was acting with the original assailants, armed and engaged in the firing; and that he met his death in the resistance made to the murderous assault committed by himself and his associates, on the defendant and those united with him. "If it is true," said the learned judge, in charging the jury, "that the attack with deadly weapons on the meeting of the 7th of May, was instantly returned by those unlawfully assailed; that they continued it, in order to the preservation of their own lives, which, by no other practicable and reasonable means, could have been preserved, by reason of the sudden, fierce and deadly nature of the assault upon them; if Rice was engaged in this assault, and fell from the resistance of the assailed, rendered absolutely and indispensably necessary, from the suddenness, violence, and extent of the assault, a case of homicide in self-defence, and as such, justifiable in law, has been made out, and the defendant is entitled to an acquittal. But still, if the return of the fire was not an immediate act; if the proof shows that the assaulted party retired, armed themselves, returned to the scene of original violence, and there voluntarily, and without any necessity, in order to the preservation of their lives, renewed the combat, for the object of inflicting even, what they supposed, just chastisement on their opponents, the doctrine of self-defence has no relevancy to the case. The plea of self-defence rests on the natural right every man has to protect his own life against an unlawful assault upon it by another. If, however, when secure from danger, by his actual removal from the threatened assault, he voluntarily return to meet his adversary, and renews the combat, it cannot be pretended he acts in defence of his own life against impending and inevitable destruction. He assumes, under such circumstances, a new character. He becomes a party voluntarily entering into an unlawful conflict, and is responsible for all the consequences following his new position. You are, however, the exclusive judges of the facts of this case, and if you are of the opinion that Hare was actually present and participated in the affray that led to the death of Rice, but are satisfied from the proof that a case of excusable self-defence has been made out within the principles of law, as expounded by the court, you ought to acquit him."

§ 1024. (*e.*) *Right extends to defence of master, servant, parent, child, husband, wife, or property against a felonious attack.*—It is not to the protection of self that the law of self-defence is confined. With the same limitations as those above given, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.[i] So, where an attempt is made to commit arson or

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[h] Whar. on Hom. 213, 214.

[i] Whar. on Hom. 230; 1 Hale, 484; 4 Blac. Com. 182; 1 Russ. 542.

burglary on the habitation, the owner[ii] or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. Here, likewise, nature and social duty co-operate. A riotous and tumultuous body attempt to commit an arson on a church, or to maliciously burn and rob a bank; they may be resisted to the extreme extent required to repel them, and life itself may be taken, if the necessity of the defence demand it. In these cases the party killed is engaged in the commission of a crime of the highest grade, next to murder or treason, and he may be lawfully resisted even unto death.[j]

§ 1025. (*f.*) *But not to a defence against a trespass.*—But as has been already stated, when an attack not in itself felonious is threatened, the rule changes. If one man deliberately kill another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder;[jj] and, consequently, an assault with intent to kill cannot be justified on the ground that it was necessary to prevent a trespass on property.[k] If such killing take place in the passion and heat of blood, the killing is manslaughter, but under no circumstances can it be less. For the rule of law is, that where such trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do so, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the provocation: but if the injury be inflicted with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter, the law so far recognizing the adequacy of the provocation arising from the trespass.[l]

A man has a right to order another to leave his house, but has no right to put him out by force till gentle means fail; and if he attempt to use violence in the outset and is slain, it will not be murder in the slayer even if there be no previous malice.[m]

§ 1026. (*g.*) *If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defence.*—Although this proposition in its present state has been accepted with great reluctance by the courts, and should always be applied with extreme caution, it has frequently been practically recognized. Thus in one of the earliest reported English cases, where it appeared that the defendant being in bed and asleep in his house, his maid-servant, who had hired the deceased to help her to do her work, as she was going to let her out about midnight, thought she heard thieves breaking open the door; upon which she ran up stairs to her master,

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[ii] M'Pherson *v.* State, 22 Geo. 478.

[j] Com. *v.* Daley, 4 Penn. Law Journ. 154; Whart. on Hom. 466.

[jj] State *v.* McDonald, 4 Jones' Law (N. C.), 353; People *v.* Horton, 4 Mich. 67.

[k] Whar. on Hom. 215, 232; State *v.* Morgan, 3 Ired. 186; Com. *v.* Drew, 1 Mass. 391; Monroe *v.* State, 5 Georgia, 95; Oliver *v.* State, 17 Ala. 588; Carroll *v.* State, 23 Ala. 28; Noles *v.* State, 26 Alab. 31; Harrison *v.* State, 24 Alab. 67; Keener *v.* State, 18 Geo. 194.

[l] Com. *v.* Daley, Penn. Law Journ. 154; Whart. on Hom. 466; Claxton *v.* State, 2 Humph. 181.

[m] M'Coy *v.* State, 3 Eng. 451.

and informed him thereof; who rising suddenly and running down stairs with his sword drawn, the deceased hid herself in the buttery, lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving she had been a thief, cried out, "Here they be that would undo us." Thereupon the defendant ran into the buttery in the dark, not knowing the deceased, but taking her to be a thief, and thrusting with his sword before him, killed her. This was ruled to be a misadventure.[n]

Sir William Hawkesworth being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law; came himself into his park at night, as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, was shot by the keeper. This, says Lord Hale, was holden excusable homicide by the statute *de malefactoribus in parcis;* because the keeper was in no fault.[o]

It was said, in Selfridge's case, that when, from the nature of the attack, there is reasonable ground for a man to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.[p] And it has been further said it is for the jury to

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[n] Lovet's case, Cro. Car. 438; 1 Hale, 42, 174. See this subject discussed in its relations to insane delusions, ante, § 17.

[o] 1 Hale, 40.

[p] Selfridge's Trial, Whart. on Hom. 417. Selfridge's trial was the first in the line of cases in this country, in which the law of homicide was confounded, by the jury at least, with the law of honor. The deceased, Charles Austin, was a student in Harvard University, about eighteen years of age, "tall, but not stout, and not called strong," and the son of a gentleman who had been for some time, as appeared in evidence, an active politician in the Democratic ranks. The defendant was a member of the Suffolk bar, a man somewhat advanced in his profession and of mature years, conspicuous as a Federalist, and distinguished, it was said, no less for the urbanity of his manners than the excellence of his attainments. A quarrel had arisen between the defendant and the father of the deceased, on the subject of a political celebration on the fourth of July; and so great was the party heat of the times, that it seemed advisable to the defendant and his friends, and appeared quite natural to the jury, that the dispute should be settled by stress of arms. Mr. Selfridge was informed, it was said, by a friend, on the morning of the homicide, that he was to be attacked; and he stated to another, a few minutes before the meeting, that he understood Mr. Austin, the father of the deceased, had procured some one to bully him, though it is difficult to see why such a declaration, not part of the *res gestæ*, but evidently set up for the purpose of contingent justification, should have been admitted. Much variance of testimony existed on the subject of the conflict. John M. Lane testified that he was standing at the door of his shop, on the north side of State Street, between Wilson's Lane and Exchange Lane, and saw the defendant standing on the pavement when young Mr. Austin was approaching, and that the defendant, when the deceased was at arm's length, took deliberate aim at him and fired; after which the deceased aimed several strokes at him, and fell. Edward Horn testified, that as he was passing by, he heard a loud talking, and, looking round, he saw Selfridge with a pistol in his hand, heard the pistol immediately fired, and then saw the deceased aim one or two convulsive blows at the defendant and fall. Ichabod Frost testified substantially to the same facts. On the part of the defendant it was shown that the deceased, Charles Austin, usually carried a rattan, but that morning had procured a larger stick—and a series of witnesses were produced to show a state of facts different from that proved by the commonwealth's evidence. John Bailey testified, that Charles Austin had been standing in front of his

determine from all the facts in the case, and from the peculiar character of the hostile party, whether there was such reasonable ground for apprehension, and such appearance of imminent danger, as the law requires to sustain the

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shop that morning, in conversation with a fellow student—that shortly after Selfridge approached—that Austin then, lifting his cane, with the heavy end in his hand, moved towards Selfridge, and that he raised the cane as if to strike, and while it was in the act of descending, the pistol was fired. Zadock French swore to the same effect. Richard Edwards saw Selfridge with the pistol extended—saw Austin aim a blow at him, and heard the pistol discharged, though not until the blow had fallen. Horatio Bars could not say who struck the first blow. Lewis Glover swore distinctly that Austin had struck at Selfridge, before the pistol was fired. It was shown, in addition, that the day before, Selfridge had posted the father of the deceased as "a coward, liar, and a scoundrel;" and that the latter said that "he considered it derogatory to enter into a newspaper controversy with one T. O. Selfridge," &c. It was shown also that the deceased had mentioned to a college friend, that so long as he remained connected with the college, he could not, consistently with that connection, take any notice of the publication of that morning; but that after he left college, neither T. O. Selfridge nor any one else should asperse his father, or any of his connections with impunity. On the other hand, it was shown that the deceased was accustomed to carry a stick of the same size, whenever he walked in from Cambridge; and that, while he had passed the morning in such a way as to make the idea of a preconcerted attack absurd, his father, when called to the stand, expressly swore, that so far from having schemed, either for himself or his son, a collision with the defendant, the thing was furthest from his mind, and, to use his strong language, "I appeal to God he would have passed me as safely as he stands at this bar."

Such were the facts on which the jury thought proper to acquit the defendant of manslaughter, to which the bill of indictment was limited, he having previously *been admitted to two thousand dollars bail by the Supreme Judicial Court.* That the whole case—bill, bail, and verdict—exhibit a singularly loose estimate of the value of human life, must be admitted. If the commonwealth's witnesses, by whom it was shown that the defendant had previously prepared a pistol for the encounter, were to be believed —and the commonwealth's witnesses alone could have been heard on an application to hold to bail, and before the grand jury—the case would have been one, taking the previous posting into consideration, of murder. But it is strange to see how anything lower than manslaughter could be extracted from the defendant's own case. He had not retreated to the wall, for he had fired instantaneously, at the first encounter—and it cannot be said that a man of thirty, armed with a pistol, can be reduced to desperate danger by the onset of another of eighteen, with a cane in his hand, of which he was holding the heavy butt-end, in a street in which there were a dozen spectators. The whole case showed an intention, on the part of Selfridge, to shoot down any one who should meet him; but it is difficult to collect, from the conduct of Charles Austin, that there was any settled purpose of revenge on his mind, or any other feeling than that which would naturally occupy the breast of a young man of eighteen, who had just seen his father posted as a scoundrel. Nothing but high political excitement can account for such a verdict; and the fact, given in an able article on the subject in the Law Reporter (vol. iv. p. 97), that it was generally counted as correct, shows how powerful is prejudice over even a sworn judgment. The defence, shadowed out rather than expressly delineated by Mr. Dexter, in a speech of consummate ability, was the same as that presented by Mr. Selfridge, in a statement subsequently published. "The honor of a gentleman should be as sacred as the virtue of a woman; but the female is authorized to take his life who would violate her honor. Why is not a man bound to maintain his honor at the same hazard?" That Selfridge's trial was made a political issue appears from a cotemporaneous letter from Mr. Cunningham to Mr. Adams (Cunning. Corr. 70), in which he says:—

"I happened to be at the first court at Worcester which was holden after the acquittal of Mr. Selfridge. There I was told by Mr. Speaker Begden, and others, that I was accused of having apostatized from federalism. I informed them that the expression of my firm conviction, that Selfridge had been guilty of murder, and ought to have been hanged, was the sole ground of the accusation; and that if that was enough to constitute a secession from federalism, I wish to be considered as seceding. But I was not ejected. The great political parties in the State, arranged under their respective standards on the simple question of the guilt or innocence of an individual under a criminal accusation, was a curious spectacle."

defence.[pp] The principle has been pushed still further in Tennessee, where it has been ruled, that if a man, though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defence.[q] Perhaps, as illustrated by the learned judge who pronounced it, the doctrine given in Selfridge's trial is law, and when received with such qualification, together with the case in Tennessee, may be accepted as in accordance with the principles of the common law. The illustration given by Parker, J., shows that he limited the application of the principle to cases when not only there is reasonable ground to believe that there is a design to destroy life, but when that reasonable belief is based, not on surmises or inferences, however intelligent, but on an actual, immediate, and physical attack from the assailant. "A., in the peaceable pursuit of his affairs," he said, "sees B. rushing rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before, or at the instant, the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol?" It will be noticed, first, that B. employed a weapon likely to kill, and accompanied it with menaces of killing; secondly, that the parties were in actual conflict at the time; and thirdly, that A. used a weapon not in itself mortal. With such restrictions, the rule in Selfridge's case is the same with that which obtains in England, and is now the settled law of this country.[r] Thus, in a late case of great moment, it was said by the Supreme Court of New York: "A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict bodily injury, unless prevented by the resistance he opposes."[s] The right of resorting to force upon the principle of self-defence, it was laid down, does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury.[t] So the belief that a person designs to kill me, it was said in a late case in North Carolina, will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately.[u] A delusion that I am in imminent danger, will be no defence, unless the attack be real, extreme, and urgent, or at any rate, unless

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[pp] Cotton *v.* State, 31 Miss. (2 George) 504.

[q] Granger *v.* State, 5 Yerger, 459; and see Young *v.* State, 11 Humph. 200, ante, § 1020.

[r] See Carroll *v.* State, 23 Ala. 28; Noles *v.* State, 26 Alabama, 31; Meredith *v.* Com. 18 B. Mon. (Ky.) 49.

[s] People *v.* M'Leod, 1 Hill, 420; S. P. Payne *v.* Com. 1 Metc. (Ky.) 370.

[t] Ibid. 377; and see People *v.* Austin, 1 Parker, C. C. 154.

[u] State *v.* Scott, 4 Iredell, 409.

it be plainly shown that from the peculiar constitution of my character, I really and honestly believe it to be so.[v]

How far the deceased's temper and strength may be taken into consideration in determining the grade of the defendant's guilt, has been already discussed.[w]

§ 1027. It is, of course, admissible for the defendant to show threats or other circumstances of a recent nature, which would tend to lead him to believe that his life was in danger.[x] But such threats, without any overt act,

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[v] See Wharton on Homicide, 212, 214, 216, where this subject is fully discussed; see also Harrison *v.* State, 24 Ala. 67, where the positions taken in the text are reaffirmed.

[w] Ante, § 641-2; see State *v.* Chopin, 10 La. R. 458.

[x] Ante, § 641-2; Com. *v.* Wilson, 1 Gray, 337; Monroe *v.* State, 5 Geo. 85; People *v.* Shorter, 4 Barb. 460; Campbell *v.* People, 16 Illinois, 17; State *v.* Jackson, 12 La. Ann. Rep. 679; State *v.* Hawley, 4 Harring. 562.

This and the cognate questions were ably examined in a recent case in New York: Where a party on his trial for murder, it was determined, makes no proof of a necessity to take the life of the person killed, or of an attempt to decline or discontinue the combat, or of an inability to do so, he has no right to ask the court to charge the jury, that although the prisoner was mistaken in believing there was reasonable ground to apprehend a design on the part of the deceased, to do him some great personal injury, and that there was imminent danger of such design being accomplished, yet that he was justified in killing the deceased, if he believed himself to be in such danger.

"The statute," says Marvin, J., "specifies the cases of justifiable homicide. (2 R. S. 660, § 3.) By the second subdivision of that section, the homicide is justifiable, when committed, 'in the lawful defence of such person, or his or her husband, or wife, parent, child, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such a design being accomplished.' The charge is very nearly in the language of this section. It is argued, however, that if the prisoner did apprehend a design on the part of Brush to do him some great personal injury, and believed he was in great danger, he had then a right to act upon that belief, and take the life of Brush, although there was no actual imminent danger. In other words, if he believed in the danger, he had a right to act as though the danger was actually present, and the injury about to be inflicted upon him, and that the consequences of this mistaken belief must fall upon the deceased, and the prisoner must, in the eye of the law stand entirely justified. Several particulars are to be noticed in this section, as applicable to the present case. The homicide, if justifiable, must have been committed in the lawful defence of the person of the prisoner, at a time when there was reasonable ground to apprehend a design to do him some great personal injury. Who is to judge of the reasonable ground to apprehend a design to do injury? The grounds must be made to appear on the trial, and the jury must be satisfied that they were reasonable grounds upon which to found an apprehension of a design to commit the felony, or to do some great personal injury. It is true the party assailed must, at the time, judge of the ground for his apprehension, but he judges and decides at his peril, so far as the question of entire justification is concerned. It will not do to hold that he who has taken the life of another is entirely justifiable when he acts upon unreasonable grounds of apprehension, though he may have acted upon an honest apprehension of a design, on the part of the person killed to commit a felony, or to do him some great bodily injury. In such a case, the crime might be only manslaughter, and that too of the lowest degree. But to justify the act of killing in such a case, would be to establish a rule for the security of human life, resting upon the uncertain apprehension of men who may act upon unreasonable and improbable grounds. The statute also adds this farther condition: 'And there shall be imminent danger of such design being accomplished.' The language is here changed. The question no longer depends upon reasonable grounds to apprehend imminent danger, from which a belief may be formed.

"It is to my mind clear and explicit, and requires that there should be imminent danger of the commission of a felony or of some great personal injury. The man assaulted may have reasonable ground to apprehend a design on the part of his assailant to do him some great personal injury, and yet there may in fact be little or no

when sought to be introduced by the defendant in justification of a homicide, must be shown to have been communicated to him.[y]

[y] Keener *v.* State, 18 Geo. 194; Atkins *v.* State, 16 Ark. 568.

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danger of the accomplishment of the design. Suppose the party committing the assault was unarmed, and weak and infirm as compared with the party assaulted, and this disparity of strength is such that the party assaulted is able to protect his person from injury. The imminent danger of accomplishing the design would not exist, and yet the design may have been fully formed, and manifested in a way so as to leave no doubt of it. In such a case the killing of the assailant could not be justified.

"What is meant in the statute by 'such design?' Does this language imply that a design to commit a felony, or to do some great personal injury, had been actually formed? If so, then a reasonable ground to apprehend a design, &c., as declared in the previous part of the section, is not sufficient; but there must be added to it not only the imminent danger, but the actual design. This is not the true construction of the language. If there is a reasonable ground to apprehend the design, and there is imminent danger that such apprehended design will be accomplished, it is sufficient. The party assailed may have reasonable ground to apprehend a design on the part of the assailant to kill him, and he may be in imminent danger, from the acts of the assailant, of being killed, and yet his assailant may not have formed the design to kill him or to do him great personal injury. His acts may, however, be such as actually to put the life of the person assailed in imminent danger. In such a case, the killing would be justifiable. I am satisfied that the legislature considered the common law carefully, and that they adopted it, in the section relating to justifiable homicide, and that they have thereby provided that a homicide shall not be justifiable unless there was, first, reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury; and secondly, there was imminent danger of such apprehended design being accomplished; that is, that there was imminent danger that a felony would in fact be committed, or that some great personal injury would be inflicted, unless the party was arrested by death. If I am right in this construction of the statute, the charge of the learned justice was in strict accordance with the law."

"When one who is without fault himself," said Bronson, J., when the same case was in the Court of Errors, "is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice Parker, of Massachusetts, on the trial of Thomas O. Selfridge. 'A., in the peaceful pursuit of his affairs, sees B. walking rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A.' Upon this case the judge inquires—'Will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol! Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defence; and when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of apprehension, no danger can be supposed to flow from this principle.' The judge had before instructed the jury, 'that when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.' (Selfridge's Trial, p. 160; 1 Russ. on Crimes, 699, ed. of '24; p. 485, note, ed. of '36.) To this doctrine I fully subscribe; a different rule would lay too heavy a burden on poor humanity. I have stated the case of Selfridge the more fully, because it is not

It has been ruled in Mississippi and California, however, that in a trial for murder, evidence that, from the weak and crippled condition of the defendant,

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only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question.

"I shall not stop to consider the common law distinctions between justifiable and excusable homicide, because our statute has placed killing in self-defence under the head of justifiable homicide. (2 R. S. 660, § 3.) The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's case, recited by Jones, J., in Cook's case (Cro. Car. 538), to the following effect: Levett was in bed with his wife and asleep, in the night, when the servant ran to them, in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down, and was searching the entry for thieves, when his wife espying some one, whom she knew not, in the buttery, cried out to her husband in fear—'Here they be that would undo us.' Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting his rapier before him, killed Frances Freeman, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the court held, that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances, which were wholly false, and yet, as he had reasonable grounds for believing them true, he was held guiltless. Foster (Crown Law, p. 299) says of this case, 'Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used.' I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in Levett's case, and most of them have fully approved it. East, in his Pleas of the Crown (vol. i. p. 274, 375), has done so. Hale (1 P. C. 42, 474) mentions it among cases where ignorance of the fact will excuse from all blame. Hawkins (I P. C. 84, Carwood's ed.) says, the killing has not the appearance of a fault. Russell on Crimes (vol. i. p. 550. ed. of 1836) approves the decision, which he introduces with the remark, that 'important considerations will arise in cases of this kind (he was speaking of homicide in defence of one's person, habitation, or property), as to the grounds which the party killing had for supposing that the person slain had a felonious design against him, more especially where it afterwards appears that no design existed.' Roscoe (Crim. Ev. p. 639) says: 'It is not essential that an actual felony should be about to be committed, in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified.' And he then gives Levett's as an example.

"The case of Sir William Hawkesworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle. (I Hale's P. C. 40; 1 East's P. C. 275; I Russ. on Cr. 549.) Other cases are put in the books, where the killing will be justified by the appearances, though they afterwards proved false. A general, to try the courage or vigilance of his sentinel, comes upon the sentinel in the night, in the posture of an enemy, and is killed. There, the ignorance of the sentinel that it was his general, and not an enemy, will justify the killing. (I Hale's P. C. 42; 1 East, 275; I Russ. 540.). The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class. (1 Hale's P. C. 40, 476; I Russ. 540.) In Hampton's case (Kelyng, Rep. 41), the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster (Crown Law, 263, 264) calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution, the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still, the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster (p. 265) mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge, being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In Meade's case (I Lewin's

he was rendered nervous and peculiarly sensitive to fear from external violence, is to be rejected.[z] It has also been said in Georgia that not the fears of a coward, but those of a reasonably courageous man, justify homicide.[a]

[z] State *v.* Shoultz, 25 Mis. (4 Jones) 128; People *v.* Hurley, 8 Cal. 390.
[a] Teal *v.* State, 22 Geo. 75.

Cr. Ca. 184), the prisoner had killed with a pistol one of a great number of persons, who came about his house in the night-time, singing songs of menace, and using violent language. Holroyd, J., told the jury, that if there was nothing but the song, and no appearance of violence, if they believed there was no reasonable ground of apprehending danger, the killing was murder. And in the People *v.* Rector (19 Wend. 569), Cowen, J., said, alarm on the part of the prisoner, on apparent, though unreal grounds, was pertinent to the issue. In the U. S. *v.* Wiltberger (3 Wash. C. C. 515, 521), the judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be apparent, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent; meaning, undoubtedly, that it must wear that appearance. The State *v.* Wills (1 Coxe, N. J., Rep. 424), is entirely consistent with this doctrine. The Supreme Court of Tennessee has gone still further, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearances, for the killing. (Grainger *v.* State, 5 Yerger, 459.) This was, I think, going too far. It is not enough that the party believed himself in danger unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

"We have been referred to two cases, where it was said, in substance, that the killing must be necessary (Reg. *v.* Smith, 8 Car. & Pa. 160, and Reg. *v.* Bull, 9 Id. 52), and other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, ether actual or apparent, for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as have been mentioned.

"The unqualified language, that the killing must be necessary, has, I think, never been used, when attention was directed to the question whether the accused might not safely act upon the facts and circumstances, as they were presented at the time. I have met with no authority for saying, that a homicide which would be justifiable, had appearances proved true, will be criminal when they prove false.

"But it is said that our statute has changed the rule of the common law on this subject; and that there must in fact be danger of great bodily harm, or the killing cannot be justified. We know that such a change was not intended by the revisers; for they said in their notes, that the provision 'was according to the views of most of the writers upon the subject, and the express decisions in Massachusetts and New Jersey.' Those writers and decisions have already been noticed. As I read the statute, it affirms the rule in common law. The words are, homicide in self-defence is justifiable 'when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.'—(2 R. S. 660, sect. 3, sub. 2.) The words 'imminent danger,' in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must, in fact, be an impending evil, which is ready to fall; but only that there is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design, and apparent danger that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished must be actual, and not merely apparent. Such a construction would make the last part of the clause nullify the first; for if there must be actual danger that the design will be accomplished, there must of necessity be an actual design to be accomplished." Shorter *v.* The People, 2 Comstock, 197–202, Bronson, J.

In connection with these opinions, it is important to consider the recent charge of a very enlightened and upright Pennsylvania judge, in a capital trial. (Com *v.* Seibert, Oyer and Terminer of Luzerne County, Jan. 1852.)

Upon the trial of this case, the killing being admitted, the defendant contended that the act had been done to save his own life, from a furious attack of the deceased. The

But it is submitted that while this is undoubtedly true when such fears are voluntarily and consciously unreal, yet it is otherwise when the defendant

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court, for the purpose of aiding in the discovery of the character of the homicide, permitted the defendant to prove the general character and disposition of the deceased: as a quarrelsome, fighting, vindictive and brutal man of great physical strength; refusing, against the earnest argument of the able counsel of the defendant, evidence of particular instances of his brutality in fighting, &c. It was at this time in evidence that the parties had had a violent contest on the day previous to the alleged killing, and that the defendant was then saved from very considerable injury, and perhaps death, only by the interference of a third person. Judge Conyngham, P. J., a jurist whose legal ability and high moral tone entitle his opinions to the highest weight, charged the jury at great length, explaining the several degrees of homicide, of which, under the indictment, the defendant could be convicted, and the legal distinction between the several offences. He told them that, the killing being admitted, the act could not be justified, but that the defendant could be acquitted, if the jury believed the taking of the life was excusable, under the principles of law to be laid down to them. Upon this point of the case, he said: "When an assault is made upon another with a manifest intent to take life or to do great bodily harm, and the party assailed has no means of escape, either from the situation in which he is placed or the sudden violence of the attack, he may take the life of the assailant to save his own. In the words of the judge in People *v.* M'Leod (cited Whar. C. L. 260), 'a force, which the defendant has a right to resist, must itself be within striking (or, I should say also, *attacking*) distance; it must be menacing, and apparently able to inflict physical injury, unless presented by the resistance he opposes.'

"As a general rule, before a man can resort to the life-taking remedy, he must, as the old books say, flee to the wall, or until he meet with some unreasonable hinderance or impediment, which prevents his further retreat; in his own house, however, a man is not bound to abandon his premises to the mercy of an assailant. In the present case, if there was an attack of the deceased, violent, menacing, and accompanied by acts or declarations showing a deadly intent, as contended by the defendant's counsel, the law would not require that the assailed party, in his own room, with no mode of backward egress or escape, should retire a step or two merely to the wall of this small room, if by this there could not only be no prospect of escaping an attack likely to take life or do serious bodily harm, but the step would probably expose the party the more to the danger of the assailant. The jury will remember that it is necessity alone which can excuse the homicide, and this can be only ascertained by the consideration of all the circumstances of the case as shown in the evidence; a light and trivial assault, not attended by menaces or personal violence, calculated to induce a reasonable belief of the danger of death or enormous bodily injury, will not excuse the taking of life, though it may reduce the offence to manslaughter. Provocation, by mere words not accompanied by acts, making, or menacing an immediate assault, as has been already said, will not, when death is produced by the use of a deadly weapon, as in the present case, lessen the offence to manslaughter, nor will it do so in any case, where the provocation is only used to cover pre-existing malice and grudges."

The judge then referred to the evidence in detail, and afterwards again stated as follows: "When you ascertain from the evidence the manner of the admitted killing, if you find it to have been done in defence of an attack by the deceased, in deciding upon the character of the offence, you are called upon to examine and revise everything which goes to explain the true situation of the parties at the time; their respective feelings and intentions, shown by their acts, their threats and menaces, as may be proven: and you may consider, too, their relative characters as individuals, including their strength and physical ability. You may inquire, too, whether the deceased, making, as is contended, the first assault, was bold, strong, and of a violent and vindictive character, and the defendant much weaker and of a timid disposition, and how far their power was equalized by the weapon in the hands of the latter. Legal rules are general, but in their application, they must at times depend upon the special circumstances of particular cases. In the assault of a strong man upon a boy or a female, of a powerful individual upon a weaker, the necessity of taking life in self-defence under an ordinary attack will be more easily discoverable, than in an attack by one man upon another under more equal circumstances: the probable ability to defend without the fatal recourse, must depend upon the means and power of the defence in the assaulted.

"Moral power, too, is important in sustaining physical power. Timidity of disposition will never excuse rashness, and will not justify the creation or sustaining of

honestly entertains them, though they may be in fact unfounded. In such case a morbid condition of brain or nerves is as admissible to prove the reality of such fears, as is derangement to prove the reality of an hallucination. In accordance with this principle, in a case tried in Philadelphia in 1846, where the defendant, during the Kensington Irish and Native American riots, killed an innocent person under the alleged belief that she was one of a party seeking his life, the defence was permitted to set up extreme nervous excitement and tension, producing a belief in a constant conspiracy to take his life.[b] This does not differ much from the ruling in Levett's case already noticed.

§ 1028. (*h.*) *Where one or more persons must be sacrificed in order to preserve the life of others.*—There is one class of homicide in self-defence, where the party slain is equally innocent as he who occasions his death; as, for instance, the case mentioned by Lord Bacon,[c] where two persons being shipwrecked, and getting on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned: this homicide, according to the elementary writers, is excusable through unavoidable necessity, and upon the principle of self-defence.[d] No case is given in

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imaginary fears, so as to excuse the taking of the life of another; but we say now, as we had occasion to say in this court some years since, upon the trial of Joseph Davis, that the jury may, in deciding upon the degree or kind of homicide, the nature of the attack, and the necessity of the defence, consider this ingredient in the character of the slayer as an adjunct to his proper physical power, or rather weakness.

"You are to look at the parties in this unhappy transaction in their relative knowledge of each other's character and strength, to consider the circumstances attendant upon the contest of Saturday, their respective feelings and all the other circumstances, as already called to your notice; to inquire whether the defendant, as the evidence shows him *to be*, the man that *he is* and *was*, not as one of great courage and strength may be, but as *he was*, when he did the act, had clear reason to believe, that in case of an attack upon him by the deceased (the *man* that the evidence shows him to have been) he would be in danger of loss of life or enormous bodily harm; and if you do so find, and further that an attack, apparently of such intent and character, was made upon him, in a room described as this has been, with no other means of escaping the contest, as contended by the defendant's counsel, under the evidence, but by taking the life of the assailant; he would be excused in so doing, even though this, to him reasonable belief of the terrible result of such a contest should be produced partially by the constitutional timidity of his own character, doubly excited by the comparative weakness of his own bodily ability, proved in the contest with the assailant of the day previous. Look you into the heart of the defendant at the time of the transaction, search out his motives, as his acts and declarations show them, and say whether he, constituted as nature made him, and with all his means of defence, had reason to believe, and did believe, that he was in the serious danger above spoken of.

"We further say to you, that if under all the circumstances attending the transaction, there was no reason to believe that his person was in danger of death or enormous bodily harm, but that an ordinary battery was all that he had any reason to fear from the acts and declarations of the deceased, or that he had shot rashly and prematurely, when the mere presentation of his pistol, as argued here upon the part of the commonwealth, would have been fully sufficient to defend him from the attack, the provocation, connected even with the facts of the Saturday difficulty, would not free the defendant from crime in the eye of the law, but would reduce the offence to manslaughter.

"If, however, he shot the deceased under the influence of revengeful feelings and the grudge of the day before's quarrel, or without any new attack, or the danger heretofore referred to, standing either within or without the room, it would be murder, as we have already explained to you."

[b] Flavel's case, Mss.

[c] Elem. c. 5; see also 1 Hawk. c. 28, s. 26.

[d] Rutherford's Institutes, c. 16, 187, 8, 9, 190; Puffendrof's Law of Nature, 204; Herbert's Legal Maxims, 7.

the books in which the principle appears to have been practically decided, and it was not till a very late period that the subject was brought before a court of justice. In March, 1842, Alexander William Holmes was indicted, in the United States Circuit Court for the Eastern District of Pennsylvania, before Baldwin, J., for manslaughter. From the evidence it appeared that the ship William Brown left Liverpool on the 13th day of March, 1841, having on board sixty-five passengers and a crew composed of seventeen seamen, the whole number amounting to eighty-two, most of the passengers being Irish and Scotch emigrants. The voyage was very favorable until the evening of the 19th of April, at which time, while all were in their beds except the watch, consisting of seven persons, among whom was Alexander William Holmes, the prisoner, a Swede by birth, the vessel struck an iceberg, and immediately commenced leaking. The sails were shortened, and resort was had to the pumps. Upon examination, it was found that the injury the vessel had received rendered her loss inevitable, and that the crew could only be saved, if saved at all, by taking refuge to the boats at once. The boats were immediately launched; in the long-boat were crowded thirty-two passengers, besides a portion of the crew, in all forty-two persons; in the jolly-boat were placed nine persons. The two boats pushed away from the ship, and the ropes by which they were attached to her were cut just before the ship went down. They remained together until the next morning, when they separated. During the first day the weather was moderate and the sea calm. From the moment the long-boat reached the water it was necessary to bail; she was leaky, and the plug was insecure and insufficient for the purpose. She was so loaded that the gunwale was but a few inches from the water. Towards evening the sea became rough, and at times washed over the sides of the boat. On the second night, not much more than twenty-four hours after the abandonment of the ship, the sea becoming more and more tempestuous, and the danger of destruction imminent, the defendant, together with the remaining sailors, proceeded to throw overboard those passengers whose removal seemed necessary for the common safety. Relief shortly afterwards came, but great conflict of evidence existed as to whether the boat could have held out in its original crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide, was one of great doubt. But a new principle was introduced into the case by the learned and able judge who presided. Holding that in such an emergency, there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, with great power of argument, that in such a case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must go, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from the ranks of the passengers. But under any circumstances,

it was held, the proper method of determining who was to be the first victim out of the particular class, was by ballot. The defendant, under the charge of the court, was convicted, but was sentenced to an imprisonment of comparatively light duration.[b]

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[b] The trial of Alexander William Holmes, Pamphlet, Philadelphia, 1842. As this case has not yet been reported in such a way as to render it generally accessible to the profession, the argument of the learned judge who tried the case is not here out of place.

"It is," he said, "not a case of necessity, if any other means of preservation remain; all must be exhausted; the peril must be imminent, present and apparently avoidable only by the destruction of another, as in the ordinary cases of self-defence against lawless violence, designed to take away one's life, or to inflict a grievous injury to the person. On a kindred principle to self-defence, the law overlooks the taking of life under circumstances of imperious necessity—of a character similar to those which are now in evidence before you; as where two or more persons have, by an accident not attributable to either, and who owe no duty to the other which is not mutual, are by accident placed in a situation where all cannot survive; no one is bound to save the life of another by the sacrifice of his own, or commits a crime by saving his own in a struggle for the only means of safety. Of this description are the cases which have been put to you by the learned counsel in this cause, from writers of authority upon the principles of national and municipal law, where each person is alike innocent of crime or fault, incurring the danger to the lives of all, and the sacrifice of one or more is necessary to save the remainder, cases which we rather leave to your imagination than attempt to describe. Yet in such cases we must look not merely to the jeopardy in which the persons are placed; we must look to the relation in which they stood to each other; inquire whether the law has imposed any duty or obligation on one or more, from which the other was exempt; if in this respect, each and all stand in the same relative position, the law of self-preservation applies. And when this great and paramount law does apply, and the exemption it affords from punishment is not lost by its improper exercise on the devoted victim, the shedding the blood or taking the life of an innocent person, is divested of all immorality by reason of the overpowering necessity under which it was committed.

"It is a common saying, that necessity has no law; it is also a maxim of jurisprudence, for laws are made to meet the ordinary occurrences of life, where man is a free agent; with a volition to do an act as he chooses; but the law makes no provision for cases where a man acts from an impulse which he can neither resist nor suppress by the exercise of his reasoning faculties: he then becomes his own legislature, and may surrender his own life, or save it as he can, when no law or duty imposes on him the obligation to devote himself to destruction to save another. But before the protection of the law of necessity can be invoked, a case of necessity must exist; the slayer must be faultless; he must owe no duty to the victim; be under no obligations of law to make his own safety a secondary object; and if, in any of these particulars, his case is defective, he is answerable to the law of the land, without any immunity under the shield of necessity."

"It cannot be a passenger's duty to take on himself the protection of a sailor, when he has the right to call on the sailor for protection; the former need not take, and the latter cannot throw off the dread responsibility; there must indeed be a sufficient number of seamen to navigate and preserve the boat; but if there are more than sufficient for these purposes, the residue have no right to call for the sacrifice of a passenger for their protection. There can be no contribution in such a case; the sailors and the passengers are not in an equal position; in the language of the writer, quoted by the defendant's counsel, the sailor 'owes more benevolence towards another than to himself;' is bound to set a greater value on their life than on his own, and the law makes it his duty to say, in the words cited by Lord Bacon, 'It is necessary that I should go, not that I should live.' This may be deemed a harsh rule, partaking of cruelty to the sailor, who has thus far done his duty; but when no hope remains save the dreadful alternative of sacrificing a sailor or a passenger, it would be still more harsh and cruel to make the passenger the victim, to save the sailor who was not wanted for the preservation of the boat. If its safety requires the services of all the sailors, and some of the passengers must go, they stand on an equal footing towards each other; so if there are no passengers, and some of the sailors must go; in either case they may contend with each other for their own preservation. Two sailors may struggle with each other for the plank which can sustain but one, but if the passenger is on it, even the law of necessity justifies not the sailor who takes it from him."

6th. Homicide of or by officers of justice or others keeping the peace.

§ 1030. (*a.*) *Of officers under legal process.*—Officers of the law, when engaged in the performance of their duties, are invested with a peculiar pre-

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"The emergency which creates the necessity for one or more victims, gives no authority to any one to make a selection among those, between whom and himself there are equal and mutual relations. Some mode should be adopted which exposes all to an equal peril, and gives each an equal chance of life. What that mode is or ought to be, is neither defined by writers on the law of nature, by statute, or settled rules of the common law, for obvious reasons arising from cases of necessity which can neither be foreseen nor provided for. There is, however, one case on which all writers agree, and one rule which seems to meet with universal consent, when the ship or boat is in no danger of sinking, and all sustenance is exhausted, whereby it becomes necessary to make one a sacrifice to appease hunger; the selection is by lot, that being resorted to as the fairest mode, and deemed to be in some measure an appeal to Providence to choose the victim."

"We have neither heard, read, nor known any other mode, and can conceive none so consonant to justice and humanity. A sudden, unforeseen peril, may preclude any deliberation or consultation, when destruction may follow upon all while casting lots, or the darkness of the night prevent it. But when the source of the danger has been seen, and no new cause has arisen, so that there was time to consult, to cast lots, or select the victim, it is a duty to do it, in order to guard against partiality, oppression, violence, or contention, and thereby put the weak and the strong on the same footing. Imagination cannot conceive a scene more horrible than a struggle between sailor and sailor, passenger and passenger, or in a mixed affray, in which each endeavors to destroy the other, under circumstances which most loudly call for some fair and just means of deciding whose life must be given up for the common safety. When it is done by lot, the victim submits to his fate; if attempted by force, their common destruction might be inevitable, in the struggle which each would make to preserve himself, and has a right to make, when the law of necessity is enforced contrary to those rules by which alone it can be justified. If the lot is cast, the person to whom it falls must submit; if he resists, force may be employed to put him over, or if the necessity of a sacrifice arises from famine, the allotted victim may be seized and slain. When thus administered, the law of necessity supersedes all other laws. It operates as a dispensation from punishment, with all the lasting effects of a pardon for the act. When the survivors can make out such a case, they need not fear human laws, which do not doom them to death, to prison, or fines for taking the victim's life, or that innocent blood will be laid to their souls hereafter; but a fearful peril awaits those who take on themselves the destruction of life, by assuming that it is necessary when no necessity exists, or its rules are not observed. In this respect those who execute the laws of necessity by the infliction of death, stand in the same position of responsibility to the penal laws of the country as the public officer who executes a death warrant on a convicted criminal: he stands justified in both cases, when he acts pursuant to the warrant of the law, but without justification when he disobeys or departs from its requirements, in any particular whereon his authority depends.

"The captain and such of the seamen as are necessary to the preservation of the ship or boat, are not bound to draw lots, for unless these abide in the ship, all will perish. This is the sailor's privilege, his high prerogative, conferred on him for the common safety, clothed with which he is exempted from other risk of life than what attends the seaman after the immolation of those who have been doomed to death for the sake of others. But this privilege or exemption is founded on reasons which must not be disregarded. The law does not favor him merely because he is a sailor, it is as the instrument of common preservation—not to prefer his life to others, or absolve him from any duty incumbent on him in virtue of his occupation, or relieve him from any of its incidental perils. When the reason of the exemption ceases, the supernumery or the useless sailor stands without any privilege, the common safety not requiring it. He must submit his fate to the casting of lots, and if it fall on him, the law does not justify him in resisting, or putting another in his place. Nor is the seaman less an offender against the law if the ship or boat is in a situation where there can be a consultation as to the degree of danger, and the necessity of drawing lots; if

rogative. If resisted when so employed, and the party resisting be killed in the struggle, such homicide is justifiable. And, on the other hand, if the party having such authority, and exercising it properly, happen to be killed, it will be murder in all who take part in such resistance,[c] though there be no malice.[cc] The rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same; and, therefore, if he cometh to do his office, and meeting great opposition retireth, and in the retreat is killed, this will amount to murder. He went in obedience to the law, and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And, upon the same principle, if he meeteth with opposition by the way, and is killed before he cometh to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him.[d]

§ 1031. (*b.*) *By officers under legal process.*—If an officer successfully resist those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty, he is justified, even should the lives of the assailants, their aiders and abetters, be taken, from the necessary extent of the resistance so made.[dd] In every case, however, the officer should proceed with due caution; and although it is not necessary that he should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty. And, therefore, where a collector, having distrained for a duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide; yet they were clearly of opinion that he

the exigency has not happened, though probable or certain at some future time, and neither takes place to justify or excuse the omission of either consultation or lot, there must be a case of necessity made out, strong, clear, and decisive, on the minds of those whose duty it is to closely scrutinize, on his trial, the conduct of the man who takes the life of his fellow-man.

"Without consultation, who is to decide who shall the victim be, and how many? Who that looks to the consequences here or hereafter, will not shudder at such an appalling responsibility? Where is the warrant for his being the judge, and making his opinion fatal to the devoted objects of his assumed powers? Holy writ tells us what was done on an occasion where there was a sacrifice of one man made for many, and points to the compass by which mariners must steer when their voyage is beset with peril to the lives of all."

Since the publication of the first edition of this work, this case has been published at large in the very interesting cases lately published by Mr. J. W. Wallace. The charge, as there reported, and as finally reviewed by the author, will be found to vary in several particulars from that given above, which is from a contemporaneous report, printed from the manuscript of the judge immediately after the trial.

[c] See Wh. on Hom. 54, 83, 235; Fost. 273, 308; I Hale, 457; 1 East, P. C. 295.

[cc] Boyd *v.* State, 17 Geo. 194.

[d] See ante, § 981–2–3.

[dd] 4 Penn'a Law Journ. 29; see Whar. on Hom. 47–54, where this subject is fully discussed; and see also ante, § 981–2–3.

was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and yet the officer kills, it will be murder. So, if the officer kill the party after the resistance be over, and the necessity has ceased, it is manslaughter at least; and, if the blood had time to cool, it would, as is stated by Mr. East, be murder.[e]

Where an officer of justice has knowledge of the commission of a felony, he is bound to make every exertion to prevent an escape; and if, in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.[f] This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it: for if, in these cases, fresh pursuit be made, and, *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit, are under the same protection of the law. The same rule holds, if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him. But if he may be taken, in any case, without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not.[g]

§ 1032. In civil cases, so long as a party, liable to arrest, endeavors peaceably to avoid it, he may not be killed; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act will be excusable.[h]

§ 1033. If the party pursued turn and kill one of the pursuers, it is murder. Upon a robbery committed by several, the party robbed raised a hue and cry, and the country pursued the robbers.[i] One of them turned on the pursuers, the rest being in the same field, and having often resisted them; and the one refusing to yield, killed one of the pursuers. It was ruled, 1st. That this was murder; because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and here was a felony committed, and that by the persons pursued. 2dly. That, although there was no warrant of a justice of peace to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and therefore the killing of any of the pursuers was murder. 3dly. That, inasmuch as all the robbers were of a company, and made a common resistance, and so one animated the other, all those who were of the company of the robbers, in the same field, though at a distance from Jackson, who killed the pursuer, were principals. 4thly. That, one of the malefactors having been apprehended and in custody before the party was hurt, was not guilty; unless it appeared that, after his apprehension, he had animated Jackson to commit the murder.

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[e] See Whar. on Hom. 47-49; 1 East, P. C. 297; 1 Hale, 481, 489, 494; 2 Hale, 84; Coffe's case, 1 Ventr. 216.

[f] Whar. on Hom. 50.

[g] Whar. on Hom. 50, 52; 1 Hale, 481, 489; 2 Hale, 75, 76, 91, 101, 102; Foster, 271, 309; St. 9 Ann. c. 16; 1 Hawk. c. 28, s. 11; 2 Hawk. c. 12, s. 1; 4 Blac. Com. 180; 3 Inst. 118, 220, 221.

[h] State *v.* Anderson, 1 Hill's S. C. R. 327; Whar. on Hom. 48, 58.

[i] Whar. on Hom. 54, &c.; Jackson's case, 1 East, P. C. 298.

§ 1034. (*c.*) *Of officers or others when the arrest is illegal.*—If, however, as has been before observed under another head, the arrest be made unlawfully, the killing, if it turn out no felony has been committed, is not murder.[j] If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him: if the party attempting the arrest were a constable, the killing is murder;[k] if a private person, manslaughter;[l] because the constable has authority, by law, to arrest in such case, but a private person has not. The same rule is good in all the cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony.[m]

The use of a deadly instrument in resisting an illegal arrest, is not sufficient to constitute the killing murder. The killing in resisting an illegal arrest is manslaughter, in the absence of proof of malice.[n]

§ 1035. If a constable take a man without a warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it: and therefore the attempt to retake the prisoner was illegal also.[o] In another case, where the defendant took his tools and left his work, saying that he would do for any bloody constable that offered to stop him, and his master applied to a constable to take the defendant, but made no charge against the defendant, and the master and the constable followed the defendant, and found him in a public privy, as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives you in charge of me, you must go with me;" and the defendant immediately stabbed the constable; it was holden, by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest, when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only.[p] So in a case which has been already given under another head, where an affray had taken place, and a quarterly sergeant appeared, and ordered the wranglers to desist, and, on their not doing so, reported to the orderly sergeant, who called at the room, and ordered the persons engaged to the guard-house; but the prisoner remained behind on some pretence connected with his clothes; and, when the sergeant was temporarily absent, declared that he would be the death of any man who attempted to take him to the guard-house, retired to a corner of the room, where a number of unloaded muskets had been left, loaded one,

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[j] Whar. on Hom. 54, 74, 82; Com. *v.* Drew, 4 Mass. 391; U. S. *v.* Travers, 5 Wheel. C. C. 495; R. *v.* Phelps, 1 C. & M. 188.

[k] 1 Hawk. c. 28, s. 12; 2 Hale, 84, 87, 91; Whar. on Hom. 64, 68.

[l] See 2 Hale, 83, 92.

[m] Samuel *v.* Payne, Doug. 359.

[n] Jones *v.* State, 14 Mis. 409; Roberts *v.* State, Ibid. 138.

[o] Whar. on Hom. 59, 74; R. *v.* Curvan, 1 Mood. C. C. 132.

[p] R. *v.* Thompson, 1 Mood. C. C. 80.

and, when the sergeant entered with another, accosted him: "Stand off; if you approach I will take your life.". He immediately afterwards fired, and mortally wounded the sergeant and his companion. The case depended on the question, whether or not, at the time, the defendant was legally liable to arrest; and the court, Story, J., and Davis, J., charged the jury, that if such was the case, the offence was manslaughter, if otherwise, murder.[q]

§ 1036. But on a charge for assaulting a constable with intent to kill, it appeared that the defendant had been given in charge to the constable for having a forged note in his possession, and upon the constable attempting to handcuff him, had fired a pistol at the constable and wounded him, and afterwards cut him with the cock of the pistol, it was argued that the charge imported no legal offence, for if he did not know the note to be forged, the defendant was no felon, and the arrest was illegal; but it was holden that the defect in the charge was immaterial, and that it was not necessary for the charge to contain the same accurate description of the offence as an indictment, and that the charge must have been considered as importing a guilty knowledge.[r]

§ 1037. Where a constable having a charge of felony against a defendant takes him without a warrant, and the defendant, knowing the constable, kills him, it will be murder, even though the constable do not tell him of the charge, and the defendant in fact has done nothing for which he is liable to be arrested.[s] So, if a man actually commit a felony, and another, in whose presence he committed it, attempt to arrest him for it, and be resisted and kill;[t] or if a person present at an affray interfere for the purpose of restraining the offenders and keeping the peace, and be killed;[u] or, if a person present when another attempts to commit a treason or a felony, lay hold of him in order to prevent him, and be killed;[v] the killing in these cases would be murder, whether the person arresting or interfering, &c., be a constable or not; for either has power to arrest or interfere, &c., in such a case.[w]

§ 1038. (*d.*) *By officers of a foreign government.*—A homicide committed within the territory of the United States, by a subject of Great Britain, in time of peace, though avowed to be under the directions of the local authorities of Great Britain, may be prosecuted in our courts as murder.[x]

§ 1039. (*e.*) *By or of private citizens when attempting to prevent felony.*—A sincere and apparently well-grounded belief that a felony is about to be perpetrated will extenuate a homicide committed in prevention of it, though the defendant be but a private citizen,[y] but not a homicide committed in pursuit, unless special authority be given.[z]

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[q] 2 Wheel. C. C. 495; Whar. on Hom. chap. v. p. 54–89. [r] R. *v.* Ford, R. & R. 329.

[s] R. *v.* Woolmer, 1 Mood. C. C. 334; Boyd *v.* State, 17 Geo. 194.

[t] 2 Hawk. c. 12, s. 1.

[u] 3 Inst. 52; 1 Hawk. c. 31, s. 48, 54; Foster, 310, 311; State *v.* Ferguson, 2 Hill, S. C. R. 619. [v] 2 Hawk. c. 12, s. 19.

[w] R. *v.* Hunt, 1 Mood. C. C. 93; R. *v.* Curran, 3 C. & P. 397; R. *v.* Price, 8 C. & P. 282; and R. *v.* Wier, 1 B. & C. 261.

[x] People *v.* M'Leod, 1 Hill, 397; ante, § 1024–5–6. [y] Dill *v.* State, 25 Alab. 15.

[z] State *v.* Rutherford, 1 Hawks, 457; Selfridge's Trial, 160; R. *v.* Haworth, 1 Mood. C. C. 207; R. *v.* Williams, Ibid. 387; R. *v.* Longden, R. R. 228; Whar. on Hom. 168.

The slayer, in such cases, must not only show that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.[a]

§ 1040. Private persons interfering for the furtherance of public justice should expressly avow their intention, or the killing will be but manslaughter.[b] If the intention, however, be shown, the law is otherwise. Thus, in a case already cited, the prisoner and one W. engaged in a fight, and were separated by the deceased; some time after the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance, who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavored to avoid him) with a knife, and inflicted a mortal wound; it was held that this was a case of murder.[c]

§ 1041. (*f.*) *What is sufficient notice of an officer's authority.*—If a constable command the peace,[d] or show his staff of office,[e] this, it seems, is a sufficient intimation of his authority. In such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient.[f] Where he shows his warrant,[g] or where it appears that he is known to the defendant to be an officer; as, for instance, when the defendant said, "Stand off, I know you well enough, come at your peril;"[h] if after this the officer be killed, it will be murder. If the constable interfere to prevent an affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be constable, it will be murder in him, manslaughter in the rest.[i] Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment, wounded him with his sword, and killed him: this was holden to be manslaughter.[j]

§ 1042. A constable who had verbal orders from the magistrates to apprehend all thimble-riggers, attempted to apprehend the defendant and his companions, who were playing at thimble-rig in a public-fair, and succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public-house, endeavored to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party: it was holden that the constable had an authority to apprehend the defendant.[k]

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[a] Whar. on Hom. 60, 61; State *v.* Roane, 2 Dev. 58.
[b] Whar. on Hom. 89; Foster, 310, 311; U. S. *v.* Travers, 2 Wheel. C. C. 510.
[c] State *v.* Ferguson, 2 Hill, S. C. R. 619.
[d] 1 Hale, 561.
[e] Foster, 311.
[f] 1 East, P. C. 315; ante, § 713.
[g] 1 Hale, 461.
[h] R. *v.* Pew, Cro. Car. 183.
[i] 1 Hale, 438.
[j] Ibid. 470.
[k] R. *v.* Gardner, 1 Mood. C. C. 390.

IV. Homicide as affected by slavery.[1]

§ 1043. What would be provocation where the parties are on an equal footing is not considered as such when by the usages of society the one has the right to administer correction to the other.[m] Thus, if a master administer moderate correction to his apprentice, and the apprentice slay the master thereupon, the offence is murder. So, if a slave kill his master, whilst the latter is correcting him, it is murder at common law; and those present aiding and abetting are guilty of the same offence. They would even be guilty as principals in the first degree, although the actual perpetrator himself were guilty of no crime, if they made use of him as the instrument to effect their own deliberate purpose of destroying the deceased.[n]

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[1] This subject is fully discussed in Whar. on Hom. chap. xi. p. 286, &c.

[m] Nelson *v.* State, 11 Humph. 159.

[n] State *v.* Crank, 2 Bail. 66. The degree of guilt incurred under such circumstances, as affected by the relations of master and slave, has been so ably and so justly exhibited in a late opinion of the Supreme Court of Tennessee, than I cannot do better than to give, as the best commentary on the subject, the argument there pronounced. "This is a case," it was said, "which has been productive of much feeling and solicitude, and has excited the deep attention and consideration with the public, the bar, and the court, which its magnitude, involving, as it does, some of the most vital principles of our social relation, has well merited. It has been thoroughly investigated and ably argued, both on the part of the state and prisoner, and the opinion to which the court has arrived, has been the result of its maturest examination and deliberation; prompted, on the one hand, by a deep anxiety to preserve the peace and harmony of society, and on the other, by the fixed determination, resulting from a high sense of duty, to extend to the unfortunate individual nnder trial the fullest protection which the law of the State guaranties to him. He is a slave. Slavery exists in Tennessee, having been handed down to us from generation to generation for centuries. It is secured, protected, and regulated by law. With the abstract justice of the institution we have nothing to do; our duties being confined exclusively to declaring the law, upon questions of controversy arising out of the relation it creates. In the case now under consideration, the slave has deprived his master of his life, and it is for us to pronounce what atonement the law, under the circumstances, demands at his hands. It appears from the proof that the prisoner struck the fatal blow with a butcher-knife, while his master was in the act of attempting to chastise him for disobedience of orders, neglect of duty, and saucy, impertinent language. The case shows great forbearance on the part of the master, an entire absence of any inhumanity or cruelty, and nothing but a determined design to inflict such punishment, in proper moderation, as the offence merited, and as was necessary for the due subordination, regulation, and control of his slave. The blow was struck with a deadly weapon, with a fixed and deadly design, without justification, excuse, or mitigation, unless the mitigation is to be found in the assault and battery inflicted upon his person, in the attempted chastisement. It has been argued that it is; that the statute of 1819, ch. 35, which makes murder, when committed by a slave, a capital offence, does not define the offence; that its definition is to be sought in the common law of Great Britain; that there being no slavery in that country, the relation of master and slave has no existence: that, therefore, there is no distinction taken between a homicide committed by a slave and a free person, and of consequence, that inasmuch as a blow stricken will, in the case of a free person, mitigate the offence to manslaughter, the same result must follow in the case of a slave. This is the whole argument, and upon it the case rests. The common law has been aptly called the *lex non scripta*, because it is a rule prescribed by the common consent and agreement of the community, as one applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits, manners, and customs of a people; its seat, in the breast of the judges who are its expositors and expounders. Every nation must of necessity have its common law, let it be called by what name it may; and it will be simple or complicated in its details, as society is simple or complicated in its

§ 1044. The word "manslaughter," when applied to the killing of a slave in South Carolina, has, under the act of 1821, a restricted sense, and is con-

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relations. A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce, and arts, and agriculture, enriched a nation. The common law of a country will, therefore, never be entirely stationary, but will be modified and extended by analogy, construction, and custom, so as to embrace new relations, springing from time to time, from an amelioration or change of society. The present common law of England is as dissimilar from that of Edward III. as is the present state of society. And we apprehend that no one could be found to contend that hundreds of principles, which have in modern times been examined, argued, and determined by the judges, are not principles of the common law, because not found in the books of that period. They are held to be great and immutable principles, which have slumbered in their repositories, because the occasion which called for their exposition had not arisen. The common law, then, is not like the statute law, fixed and immutable, by positive enactment, except where a principle has been adjudged as the rule of action. If, then, one generation be not hedged in by the principles of the common law, established by another, as to be prohibited from extending them, by analogy and construction, to new relations and modifications of society, by what principle shall a sovereign state which has adopted the common law of another as one of its rules of action be so prohibited? It will be perceived that we are approaching the examination of the question presented for consideration in this case, upon the assumed ground that there is no adjudged principle of the common law of England regulating the relation of master and slave (for we lay out of view the old and exploded relation of master and villein, not feeling it necessary to base our argument upon it), and that there is nothing limiting expressly the slave's right of resistance to his master, beyond what one free man is limited in his resistance of another. And we ask, if this be so, as the common law is at present, and was expounded in England at the time we adopted it, if it of necessity follows that, with a creation of the new relation of master and slave, it may not be so extended by analogy and construction to embrace it, and give security and protection to all rights arising under it, as well of life as property, of master and slave? The argument extended would deprive the master of the right of property in his slave. Our system of slavery in its inception is not based upon positive enactment, but upon the common consent of the community, to hold Africans as property. It is true its existence has been since recognized by various acts of Parliament in relation to the colonies, by various acts of the legislatures of North Carolina and Tennessee, and by our amended Constitution; but still, when we come to inquire what kind of property a man has in his slaves, what are the remedies provided to secure him in its enjoyment, we are forced to the common law for information. From it we learn that it is personal property, that it passes by alienation, descends, and is distributed like other personal property, that the same actions are provided for redress of injuries affecting it, an action of trespass or case for wrongs done it, and trover, or detinue for its conversion or detention. But on what principle do we call it personal property, or bring these actions? By analogy. It is of the nature of personal property as described by the common law, and as such these are the proper actions for molestation in its enjoyment. Such then is the common law, that though principles once established by judicial determination can only be changed by legislative enactment, yet such is its malleability—if we may use the expression—that new principles may be developed, and old ones extended by analogy, so as to embrace newly-created relations and changes produced by time and circumstances. Such it is in Great Britain at the present moment—such it was when we adopted it, and such it now is with us. Let us then proceed with these views in hand, to examine what the common law is in relation to the offence with which the prisoner stands charged and convicted. Homicide is declared to be either justifiable, excusable, or felonious; it is not in the present case pretended to be either justifiable or excusable; it is therefore felonious, and either murder or manslaughter. Murder is 'where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, with malice aforethought express or implied.' (3d Inst. 47.) Manslaughter 'is the unlawful and felonious killing of another, without any malice express or implied;' as where upon a sudden quarrel two persons fight, and one of them kills the other, or where a man greatly provokes another by some personal violence, and the other immediately kills him. An assault is in general such provocation, as that if the party struck, strikes again, and death ensues, it is only manslaughter; yet it is not every trivial assault which will furnish such a justification; for if a man kills another suddenly, without

fined to killing in sudden "heat and passion."[o] The manslaughter described in the act as the killing of a slave in "sudden heat and passion," includes any killing of a slave by undue or excessive correction.[p]

[o] State v. Fleming, 2 Strobh. 464.

[p] Ibid.

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any, or without any considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only. (Kel. 135; 1 Hale, 466; Fost. 290.) In considering, however, whether the killing upon provocation amount to murder or manslaughter, the instrument with which the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed, to extenuate the offence to manslaughter; if with a weapon, or other means not likely or intended to produce death, a less degree of provocation will be sufficient: in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. (Archbold's Crim. Law, 392.) Again, as evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such cases, not even previous blows or struggling will reduce the offence to manslaughter. (1 Russell, 440; Mason's case, Fost. 132; 1 East P. C. 239; Roscoe, Crim. Evidence, 627.) In the case of the King v. Thomas, 7 C. & P. 817, Lord Tenterden observes: 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; that if there had been any evidence of an old grudge between them, the crime would probably be murder.' So tender is the law of human blood, that it watches with a jealous eye, whilst it is making provisions for the weakness and imperfections common to our nature, lest advantage be taken of its mercy, and vengeance be perpetrated under the garb of frailty.

"The present case was one of no sudden outbreak; the controversy had been pending for several days; a previous attempt had been made to chastise the prisoner, by the deceased, which was resisted and resented; information had been given on several occasions that the punishment would be inflicted, and inquiry made if he were willing and ready to receive it; but he obstinately stood out against it; he did more: he prepared himself in the interim, coolly and deliberately, with a deadly weapon with which to resist, and resist unto death, if it became necessary to protect himself from personal chastisement. He did resist, and with a remorseless disregard of consequences, struck the blow which instantly destroyed his kind and indulgent master. Who shall say, that there was not in this more of vengeance, than sudden heat and passion? If there was, it is murder by the common law, as above expounded, though the controversy had been between freemen and equals. But this exposition of the law upon the subject of murder and manslaughter as between equals, is based upon the ground, that the personal violence resented is a wrong inflicted; but are there no cases adjudged by the common law, where the personal violence cannot be resisted, because it is legally inflicted, and if it be, and death ensues, the person perpetrating it is guilty of murder or manslaughter, according to the circumstances and the nature of the weapon used? Assuredly there are. A master may correct in moderation his apprentice, a schoolmaster his scholar, a guardian his ward, a parent his child, an officer may arrest and imprison offenders, he may inflict legal punishment upon criminals. In all those cases, the personal injury inflicted, if it exceed not the bounds of moderation, is lawful correction, and if the person upon whom it is inflicted resist and slay, he is guilty of murder and not of manslaughter, for the law cannot admit of the provocation. The peace, the harmony, the good order and well-being of society, require, in the existence of these relations, that such should be the right of power and command on the one part, and duty and submission on the other. If the right of resistance were warranted in such cases as it is between freemen and equals, the foundation of society would be broken up, and in place of obedience and submission to the laws, the land would be filled with violence and bloodshed. The common law then has made provision for resistance where resistance is lawful, but has prohibited it in all those relations where the infliction of punishment, as a lawful correction, is necessary for the proper organization and discipline of society. If slavery were introduced into England, can it be a matter of doubt, that the common law would at once expand, so as to embrace the relation of master and slave, as it had already done those of a kindred character, master and apprentice, schoolmaster and scholar, parent and child, officer

§ 1045. If a slave, without authority, with a design to produce harmless sleep, administer laudanum to an infant, and, contrary to expectation, it causes death, she is guilty of manslaughter and not of murder.[q]

[q] Ann *v.* State, 11 Humph. 159.

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and prisoner? None, as we think, whatever. Why may not this be done in this State? Why it may not, no satisfactory reason has been or can be given. Assuming the position, then, that the common law as it exists in the State of Tennessee, is of sufficient scope and power to regard the institution of slavery, to preserve the harmony of its relation, to protect the master and slave in the mutual enjoyment of the rights secured to them, let us proceed to examine what those rights are in relation to the subject under investigation. Unconditional submission is the duty of a slave; unlimited power is, in general, the right of the master; but unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, or inflict upon him what the law calls great bodily harm, to wit, maiming or dismembering him, or such punishment as puts his life in great and useless peril, and that the slave has a right to defend himself against such unlawful attempts on the part of the master. But the right to obedience and submission, in all lawful things, on the part of the slave, is perfect in the master; and the power to inflict any punishment, not affecting life or limb, which he may consider necessary for the purpose of keeping him in such submission and enforcing such obedience to his commands, is secured to him by law, and if in the exercise of it, with or without cause, the slave resist and slay him, it is murder and not manslaughter; because the law cannot recognize the violeuce of the master as a legitimate cause of provocation. Such we hold to be the law. This is, we believe, the first case in which the courts of this State have been called upon for an application of this principle; but it has been adjudged in other places, to which we may refer for light and instruction, as we do upon all other principles of the common law, of doubtful or difficult application. In the case of State *v.* Will, 1 Dev. & Bat. 121, Judge Gaston (than whom no man is higher authority), in delivering the opinion of the court, says: 'Had the prisoner resisted an arrest (previously to the shooting), and in the course of the struggle inflicted the mortal wound on the deceased, there is no doubt his crime, in legal contemplation, would have been murder; nothing had then occurred, which could have excited in any but a cruel and wicked heart, in a heart fatally resolved on illegal resistance, at whatever risk of death or great bodily harm, a passion so violent and destructive in its consequences. It is not to passion, as such, that the law is benignant, but to passion springing from human infirmity.' The principle thus announced is directly applicable to the present case. The prisoner did resist an arrest; there had been no attempt on the part of his master to endanger his life, and he did kill him in this his illegal resistance, and the conclusion follows, that he is guilty of murder.

"In the case of the State *v.* Jarret, 1 Iredell, 76, it is held, 'that the same matters which would be deemed in law a sufficient provocation to free a white man, who has committed homicide in a moment of passion, from the guilt of murder, will not have the same effect, where the party slain is a white man, and the offender a slave. The rule, that where parties become enraged and suddenly heated in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies to equals and not to the case of a white man and a slave, if the slave kill the white man under such circumstances. And an ordinary assault and battery committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide, of the former by the latter, from murder to manslaughter.' These authorities meet our approbation, they are supported by reason and necessity, and we think expound the law correctly, and are decisive of the present case. We might here, if it were deemed necessary, enter into a more minute examination of the relation of master and slave, with a view to the extraction of principles, which might be more applicable to cases not like the present, arising out of it hereafter, but we do not think it expedient or proper. If cases arise, presenting shades of difference from the present, it will then be time enough to examine them; this blow has been struck; it is all that has now to be expiated; and 'sufficient for the day is the evil thereof.' Some criticisms have been made at the bar upon the charge of the judge below; but we think it substantially correct. It is true he might have been more explicit, upon the distinction between murder and manslaughter, and if, from the facts of the case, there had been any pretence for holding the killing to be manslaughter, he should have been. But there is none, and a charge upon the subject would have been a charge upon abstract principles, having nothing to do with the facts of the case. It

§ 1046. On an indictment, under the Texas act of 1821, for the murder of a slave, the jury returned a verdict of manslaughter. On motion in arrest of judgment, it was held, that sentence might be passed upon the verdict.[r]

An ordinary provocation, by a white man upon a slave, will not be sufficient to reduce the offence to manslaughter; though it is otherwise with a battery endangering the slave's life.[s]

The felonious killing of a slave without malice, by a free white person, is manslaughter.[t]

§ 1047. The great distinction between homicide committed with malice, and that committed in a transport of passion, suddenly excited by a grievous provocation, is as steadily to be kept in view, in the trial of a slave charged with the murder of a white man, as in that of a white charged with the murder of his equal, or of a slave. But the same matters which would be deemed in law a sufficient provocation to free a white man, who has committed homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man, and the offender a slave; for though among equals, the general rule is, that words are not, but blows are, a sufficient provocation, yet there may be words of reproach so aggravating when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice; and this rule holds without regard to the personal merit or demerit of the white man.[u]

§ 1048. If a white man wantonly inflict on a slave over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing by the means used great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination.

§ 1049. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present, and instantly kills the assailant, without in like manner evincing, by the means used, great wickedness or cruelty.[v]

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will be observed, that the question made as to murder or manslaughter, does not arise out of a controversy about facts, but about the application of a principle of law, and upon the settlement of the principle, the question is settled, so that no good would have resulted to the prisoner from more minuteness on the part of the judge. The judgment of the court below is therefore affirmed." Green, J., delivered the following opinion: "I think proper to announce distinctly, as my opinion, that there may exist cases, in which the killing of the master by his slave would be manslaughter. What circumstances of torture, short of endangering life or limb, would so reduce a homicide, it is not easy to indicate. Every such case must rest upon its own peculiar facts. The rights and duties of the parties must form the criteria by which an enlightened court and jury should act. But the present case is destitute of a single mitigating circumstance, and is most clearly one of murder." (Jacob *v.* State, 3 Humphreys, 513.)

[r] Chandler *v.* State, 2 Texas Rep. 305.

[s] State *v.* Jarrett, 1 Iredell, 76. In John *v.* State, 16 Georgia, 200, the extreme position is taken, that in no case can the killing of a free white man by a slave be manslaughter. The grade, it is said, must be either justifiable homicide or murder. Jim *v.* State, 15 Georgia, 535.

[t] State *v.* Fleming, 2 Strobh. 464.

[u] State *v.* Jarrett, 1 Iredell, 76; Jacob *v.* State, 3 Humph. 493.

[v] State *v.* Cæsar, a slave, 9 Iredell, Law R. 391. "From the nature of the institution of slavery," says Pearson, J., "a provocation, which given by one white man to

If a slave, by a misdirected blow aimed at another slave, kill a white person, the homicide is murder, involuntary manslaughter, or excusable, as his intent is felonious, simply unlawful, or justifiable, and evidence of a previous quarrel between the slaves is admissible.[vv]

[vv] Bob v. State, 29 Ala. 20.

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another, would excite the passions and 'dethrone reason for a time,' would not, and ought not to produce the effect, when given by a white man to a slave. Hence, although, if a white man receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be murder; for accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to 'dethrone reason,' and must be ascribed to a 'wicked heart, regardless of social duty.' That such is the law, is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in Tackett's case. 1 Hawks, 217. 'Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter.' The reason of this decision is, that from our habits of association, and modes of feeling, insolent words from a slave are as apt to provoke passion as blows from a white man. The same reasoning by which it is held, that the ordinary rules are not applicable to the case of a white man, who kills a slave, leads to the conclusion, that they are not applicable to the case of a slave who kills a white man."

"The announcement of this proposition, now, directly made for the first time, may have somewhat the appearance of a law, made after the fact. It is, however, not a new law, but merely a new application of a well settled principle of the common law. The analogy holds in the other relations of life, parent and child, tutor and pupil, master and apprentice, master and slave. A blow given to the child, pupil, apprentice or slave, is less apt to excite passion than when the parties are two white men, 'free and equal;' hence, a blow, given to persons filling these relations is not, under ordinary circumstances, a legal provocation, because it is less apt to excite passion than between equals. The analogy fails only in this: in the cases above put, the law allows of the infliction of blows. A master is not indictable for a battery upon his slave; a parent, tutor, master of an apprentice, is not indictable, except there be an excess of force; whereas the law does not allow a white man to inflict blows upon a slave who is not his property; he is liable to indictment for so doing. In other words, in this last case, the blow is not a legal provocation, although the party giving it is liable to indictment; while, in other cases, wherever the blow subjects one party to an indictment, it is legal provocation for the other party. This is a departure from the legal analogy, to the prejudice of the slave. It is supposed a regard to due subordination makes it necessary; but the application of the new principle, by which this departure is justified, should, I think, be made with great caution, because it adds to the list of constructive murders, or murders by malice implied. Assuming that there is a difference, to what extent is the difference to be carried? In prosecuting this inquiry, it should be borne in mind, that the reason of the difference is, that a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, and a sense of injustice: all or either of which, are calculated to excite passion; whereas a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain, and a sense of wrong; for, in the language of Chief Justice Taylor, in Hale's case, 2 Hawks, 482, 'The instinct of a slave may be, and generally is, turned into subserviency to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission; for he knows the extent of the dominion assumed over him, and the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights and prompt the slave to resistance."

"We have seen that the general rule is, that whenever force is used upon the person of another, under circumstances amounting to an indictable offence, such force is a legal provocation; otherwise it is not."

"By this rule, 'Will's case,' I Dev. & Bat. 121, would have been a case of murder, for it was settled in 'Man's case,' 2 Dev. 263, that a master is not indictable for a battery on his own slave, however severe or unreasonable. But Will was held guilty of manslaughter only, the court feeling itself constrained to make some allowance for the feelings of nature. By this rule, if a slave who has been guilty of insolence, receives a blow from a white man, it is a legal provocation, for the white man has committed an

§ 1050. In North Carolina, a person who wilfully kills a slave is guilty of murder, without benefit of clergy.[w] Such is the law also in Mississippi,[x] in Tennessee,[y] and Virginia,[z] though a different view appears to be taken at

[w] State *v.* Scott, 1 Hawks, 24.
[x] State *v.* Jones, Walker, 83.
[y] Worley *v.* State, 11 Humph. 172–176.
[z] Souther *v.* Com. 7 Grat. 673; see Whar. on Hom. 287.

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indictable offence. (Hale's case, 2 Hawks, 582.) This case would be as strong an authority, to show that the case above put was but manslaughter, except for reasons of policy, and the necessity of keeping up due subordination, as Man's case was to show, that Will's case was a case of murder except for an allowance for the feelings of nature."

"In the case above put, a blow is supposed, unaccompanied by bodily pain or unusual circumstances of oppression, the only incentive to passion being a sense of degradation, which a slave is not allowed to feel. When bodily pain or unusual circumstances of oppression occur, one or both is sufficient to account for passion, putting a sense of degradation out of the question, and there would be legal provocation.

"I think it clearly deducible from Hale's case, and analogies of the common law, that if a white man wantonly inflicts on a slave, over whom he has no authority, a severe blow, or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes, and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy, and the necessity for subordination.

"This latter consideration, perhaps, requires the killing should be *at the instant;* for it may not be consistent with due subordination, to allow a slave, after he is extricated from his difficulty, and is no longer receiving blows or in danger, to return and seek a combat. A wild beast, wounded or in danger, will turn upon a man; but he seldom so far forgets his sense of inferiority as to seek a combat.

"Upon this principle, which man has in common with the beast, a slave may, without losing sight of his inferiority, strike a white man when in danger, or suffering wrong; but he will not seek a combat after he is extricated.

"If the witness, Dick, while one white man was holding his hands, and the other was beating him, had killed either of them, there would have been no difficulty in making the application of the above principles, and deciding that the killing was but manslaughter, and of a mitigated grade, contrasted with Will's case, although he did not seek the combat, but was trying to escape, killed his *owner* with a knife, after being guilty of wilful disobedience; and the conclusion would derive confirmation from the reasoning of Judge Gaston, in Jarrot's case, where the prisoner had it in his power to avoid the combat, if he would, and struck *several blows after the white man was prostrated.*

"In making the application of the principles before stated to the case of the prisoner, another principle is involved. The prisoner was not engaged in the fight—he was the associate and friend of Dick, and was present, and a witness to his wrongs and sufferings.

"We have seen, that had he been a white man, his offence would have been but manslaughter, 'because of the *passion* which is *excited*, when one sees his friend assaulted.' (See the case cited from Coke's Reports, and the other authorities.) But he is a slave, and the question is, Does that benignant principle of the law, by which allowance is made for the infirmity of our nature, prompting a parent, brother, kinsman, friend, or even a stranger, to interfere in a fight, and kill, and by which it is held, that, under such circumstances, the killing is ascribed to *passion*, and not to *malice*, and is manslaughter not *murder?* Does this principle apply to a slave, or is he commanded, under *pain of death,* not to yield to these feelings and impulses of human nature, under any circumstances? I think the principle does apply, and am not willing, by excluding it from the case of slaves, to extend the doctrine of constructive murder beyond the limits now given to it by well settled principles. The application of this principle will, of course, be restrained and qualified to the same extent, and for the same reasons, as the application of the principle of legal provocation, before explained. A slight blow will not extenuate; but if a white man wantonly inflicts on a slave, over whom he has no authority, a severe blow, or repeated blows, under unusual circumstances, and another, yielding to the impulse natural to the relations above referred to, strikes at the instant, and kills, without evincing, by the means used, great wickedness or cruelty, the offence is extenuated to manslaughter."

common law in South Carolina and Georgia.[a] If death ensue from a master's chastisement of his slave, inflicted apparently with a good intent for reformation or example, and with no purpose to take life, or to put it in jeopardy, the law would doubtless tenderly regard every circumstance, which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have led the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance, and the instruments, accompanied by other hard usage, and painful privations of food, clothing and rest, it loses all character of correction, in *foro domestico*, and denotes plainly that the master must have contemplated a fatal termination to his barbarous cruelties; and in such cases, if death ensue, he is guilty of murder.[b]

§ 1051. It is competent for one charged with the murder of a slave, to show that he was turbulent, and insolent, and impudent to white men.[c] But in an indictment against an overseer for the murder of his employer, it was held not competent for the prisoner to offer evidence of the general temper and deportment of the deceased towards his overseers and tenants.[d]

V. INDICTMENT.[e]

1st. TIME AND PLACE.[f]

§ 1052. It has been said that the indictment at common law should aver

[f] See ante, § 261–285, as to the general manner of leading time and place, and ante, § 599–605, as to variance in proving the same.

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[a] State *v.* Fleming, 2 Strobh. 464; Neal *v.* Farmer, 9 Georgia, 555.
[b] State *v.* Hoover, 4 Dev. & Batt. 365; Kelly *v.* State, 3 Smedes & Marsh. 518.
[c] State *v.* Tackett, 1 Hawks, 210.
[d] State *v.* Tilley, 3 Iredell, 424; see ante, § 641–2.
[e] For forms of indictments in Homicide, see Wh. Prec., as follows:—
(114) General form of indictment.
(115) Murder. By shooting with a pistol.
(116) Murder. By cutting the throat.
(117) Murder. Against principal in the first and in the second degree, for shooting a negro slave with a pistol.
(118) Against principal in the first and principal in the second degree. Hanging.
(119) Second count. Against same. Beating and hanging.
(120) Murder. Striking with a poker.
(121) Murder. By riding over with a horse.
(122) Murder. By drowning.
(123) Murder. By strangling.
(124) Second count. By strangling and stabbing, with unknown persons.
(125) Murder. By poisoning with arsenic.
(126) Murder. By burning a house where the deceased was at the time.
(127) Second count. Averring a preconceived intention to kill.
(128) Murder. First count, by choking against two—one as principal in the first degree, and the other in the second degree.
(129) Second count, by choking and beating. Against two—one as principal in the first degree, the other in second degree.
(130) Murder by poisoning. First count with arsenic, in chicken soup.
(131) Second count. Against one defendant as principal in the first, and the other as principal in the second degree.
(132) Third count. Against one as principal and the other as accessary before the fact.
(133) By placing poison so as to be mistaken for medicine.

that the deceased died in the county in which the indictment is found,[g] though a better opinion is that this is not necessary.[h] It has, however,

[g] Whar. on Hom. 254; Hawk. b. 2, c. 25, s. 26; 1 Ch. C. L. 178; 3 Ibid. 732; State *v.* Orrell, 1 Dev. 139; Com. *v.* Linton, 2 Va. Cas. 205.

[h] Riley *v.* State, 9 Hump. 646; Stoughten *v.* State, 13 Sm. & M. 255; State *v.* Toomer, 1 Chevas. 106; Nash *v.* State, 2 Greene (Iowa), 286; R. *v.* Burdett, 4 B. & Ald. 95, 173; 2 Hawk. P. C. 302; 1 Stark. C. P. 5, 6.

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(134) Murder of a child by poison.
(135) By mixing white arsenic with wine, and sending it to deceased, &c.
(136) Murder by poisoning. First count, mixing white arsenic in chocolate.
(137) Second count. Mixing arsenic in tea.
(138) Murder by giving to the deceased poison, and thereby aiding her in suicide.
(139) Murder in the first degree in Ohio. By obstructing a railroad track.
(140) Murder in the first degree in Ohio. By sending to the deceased a box containing an iron tube, gunpowder, bullets, &c., artfully arranged so as to explode on attempting to open it.
(141) Murder in the first degree in Ohio. By a father, chaining and confining his infant daughter several nights during cold weather without clothing or fire.
(142) Second count. Not alleging a chaining.
(143) By forcing a sick person into the street.
(144) Murder of an infant by suffocation.
(145) Murder by stamping, beating, and kicking.
(146) Murder by beating with fists and kicking on the ground, no mortal wound being discovered.
(147) For stabbing, casting into the sea, and drowning the deceased on the high sea, &c.
(148) Knocking to the ground, and beating, kicking, and wounding.
(149) Murder by striking with stones.
(150) Murder by casting a stone.
(151) Murder by striking with a stone.
(152) By striking with an axe on the neck.
(153) By striking with a knife on the hip, the death occurring in another State.
(154) Against a slave for murder with an axe.
(155) Murder by stabbing with a knife.
(156) Murder. Against J. T. for shooting the deceased, and against A. S. for aiding and abetting.
(157) Murder of a bastard child.
(158) Throwing a bastard child in a privy.
(159) Smothering a bastard child in a linen cloth.
(160) Murder, in Pennsylvania, of a bastard child by strangling.
(161) Murder. By starving apprentice.
(162) Manslaughter by neglect. First count, that the deceased was the apprentice of the prisoner, and died from neglect in prisoner to supply him with food, &c.
(163) Second count, charging killing by overwork and beating.
(164) Manslaughter. Against a woman for exposing her infant child so as to produce death.
(165) Manslaughter. By forcing an aged woman out of her house in the night, tarring, feathering, beating, and whipping her.
(166) Against the keeper of an asylum for pauper children, for not supplying one of them with proper food and lodging, whereby the child died.
(167) Manslaughter, by striking with stone.
(168) Manslaughter. By giving to the deceased large quantities of spirituous liquors, of which he died.
(169) Against driver of a cart for driving over deceased.
(170) Manslaughter. Against a husband for neglecting to provide shelter for his wife.
(171) Murder, in a duel fought without the State. Rev. Sts. of Mass., ch. 125, § 3.
(172) Manslaughter in second degree against captain and engineer of a steamboat, under New York Rev. Statute, p. 531, s. 46.

been ruled that, if a person be stabbed in Virginia, and die of his wounds in another State, he cannot be tried at common law for murder in any county in Virginia; but he may be tried for the stabbing in the county where the blow was inflicted.[i] And Judge Washington once ruled that where the party injured expired on land, the United States had no jurisdiction, though the blow was struck on the ocean.[j] On the other hand, at common law, death in one jurisdiction, from a blow in another, does not give the former jurisdiction.[a]

In Pennsylvania, the revised acts (1860) provide as follows: If any person shall be feloniously stricken, poisoned, or receive other cause of death in one county, and die of the same stroke, poisoning, or other cause of death in another county, then an indictment found therefor by jurors of the county where the death shall happen, shall be as good and effectual in law, as well against the principal in such murder as against the accessary thereto, as if the stroke, poisoning, or other cause of death had been given, done, or committed in the same county where such indictment shall be found; and the proper courts having jurisdiction of the offence shall proceed upon the same as they might or could do in case such felonious stroke, poisoning, or other cause of death, and the death itself thereby ensuing, had been committed and happened all in one and the same county.[b]

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(173) Against the engineer of a steamboat, for so negligently managing the engine that the boiler burst and thereby caused the death of a passenger.
(174) Against agent of company for neglecting to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed.
(175) Against the driver and stoker of a railway engine, for negligently driving against another engine, whereby the deceased met his death.
(176) Involuntary manslaughter in Pennsylvania, by striking an infant with a dray.
(177) Murder on the high seas. General form as used in the United States Courts.
(178) Murder on the high seas, by striking with a handspike. Adapted to United States Courts.
(179) Striking with a glass bottle, on the forehead, on board an American vessel in a foreign jurisdiction. Adapted to United States Courts.
(180) Against a mother for drowning her child, by throwing it from a steamboat on Long Island Sound.
Second count. Omitting averment of relationship, and charging the sex to be unknown.
(181) Murder on the high seas, with a hatchet.
(182) Manslaughter on the high seas.
Second count. Same on a long boat belonging to J. P. V., &c.
(183) Misdemeanor in concealing death of bastard child by casting it in a well, under the Pennsylvania statute.
(184) Same, where the means of concealment are not stated.
(185) Endeavor to conceal the birth of a dead child, under the English statute.

[i] Com. *v.* Linton, 2 Va. Cas. 205. This is now rectified by statute, ante, § 921.

[j] U. S. *v.* Magill, 1 Wash. C. C. 463.

[a] State *v.* Carter, 3 Dutch, 498.

[b] Bill II. § 46. "This section has been introduced to remove a difficulty which might arise in a case of homicide, where a man had died in one county from an injury, or other cause of death, received in another county. Hawkins, in his Pleas of the Crown, book 2d, chapter 25, section 36, says, that 'at the common law, if a man had died in one county of a stroke received in another, it seems to have been the more general opinion that, regularly, the homicide was indictable in neither of them, because the offence was not complete in either, and no grand jury could inquire of what happened

If any person shall be feloniously stricken, poisoned, or receive other cause of death within the jurisdiction of this State, and shall die of such stroke, poisoning, or other cause of death at any place out of the jurisdiction of this State, an indictment therefor found by the jurors of the county in which such stroke, poisoning, or other cause of death shall happen as aforesaid, shall be as good and effectual, as well against the principal in any such murder as against the accessary thereto, as if such felonious stroke, poisoning, or other cause of death, and the death thereby ensuing, and the offence of such accessary, had happened in the same county where such indictment shall be found; and the courts having jurisdiction of the offence shall proceed upon the same, as well against principal as accessary, as they could in case such felonious stroke, poisoning, or other cause of death, and the death thereby ensuing, and the offence of such accessary, had both happened in the same county where such indictment shall be found.[c]

§ 1053. In Mississippi, by statute, the indictment must be found in the county where the death occurred, and must so state.[k] In Ohio, it must be where the mortal blow was struck.[l]

An indictment for murder which stated that A. B., late of Bladen County, &c., with force and arms, in the county aforesaid, &c., was held to contain a sufficient description of the place where the murder was alleged to have been committed.[m]

In North Carolina, in an indictment for murder, where the assault is alleged to have been committed in one county in the State, and the death to have occurred in another State, it is not necessary that the indictment should conclude, "against the form of the statute."[n]

§ 1054. An indictment for manslaughter alleged that T., on the 26th of September, at Groton, in the county of Middlesex, "in and upon one L., then and there being, feloniously and wilfully did make an assault, and with a stone, which said T. then and there had and held, in and upon the head of said L., then and there feloniously and wilfully did cast and throw, and with

out of their county.' This inconvenience was remedied by 2d and 3d Edward VI. chapter 24, by which it was enacted, that in such cases the trial should take place in the county where the death happened. This statute is not among those reported by the judges of the Supreme Court, as being in force in Pennsylvania. Hence the expediency of this section to meet such a case, should it hereafter arise."—*Reviser's note.*

[c] "In the case of a wound, or other cause of death, being given in this State, and the party receiving the same dying in another State (a thing which might very readily occur, as in the case of duels), by the existing law it is at least doubtful whether a prosecution for homicide could be maintained in either; Hawkins, book 1, chapter 31, sections 11 and 12. If a mortal injury, or poison is given and administered maliciously in the State, and death ensues therefrom out of the State, the act which caused the death, and the malice which influenced the act, the two great essential elements of felonious homicide, have been perpetrated and manifested within our jurisdiction. It seems, therefore, fitting, that in such cases jurisdiction over the crime should be exercised by the State. The section is new, but manifestly necessary in any penal system claiming to be complete."—*Reviser's note.*

[k] See Turner *v.* State, 28 Mississippi, 684; Stoughten *v.* State, 13 S. & M. 255; Riggs *v.* State, 26 Mississippi, 51.

[l] Crimes Act, sect. 37; ante, § 927.

[m] State *v.* Lamou, 3 Hawks, 175.

[n] State *v.* Drinkley, 3 Iredell, 116.

the said stone, so as aforesaid cast and thrown, the aforesaid L. then and there feloniously and wilfully did strike, penetrate and wound, giving to the said L., by casting and throwing of the stone aforesaid, in and upon the head of said L., a mortal wound;" &c. It was held that it was sufficiently averred that T. gave L. a mortal wound, on the 25th of September, at Groton.[o]

An indictment for murder, charging that the accused, on or about a certain day, did wilfully, feloniously, and with malice aforethought, kill, murder and put to death a certain person with a pistol and knife, without specifying further the facts and manner, is bad.[oo]

2d. "In the peace of god."

1055. The allegation that the defendant was "in the peace of God and of the commonwealth," does not require proof. If the deceased, however, were an alien enemy, and killed in the actual heat and exercise of war, this is a matter of justification which may be proved upon the part of the defendant.[p]

The omission of this averment is no ground for arrest of judgment.[pp]

3d. Name, etc.

§ 1056. The accuracy with which the name of the defendant and of the deceased must be established has already been discussed;[q] and it has been noticed that while an error in the name or addition of the defendant can only be taken advantage of by plea in abatement (unless where there is no name at all or addition at all, where at common law a motion to quash is good), any variance in the sound in the name of the deceased, apart from the local statutes of jeofail,[r] is fatal. It is plain however, that where the name of the deceased is unknown, it can be averred to be such by the grand jury; and on the same principle, as will be in a moment seen, the instrument of death, when unknown, can be so averred.

4th. "Force and arms."

§ 1057. The term "force and arms," though usual, is not necessary in this or in any other species of indictment.[s]

5th. Clerical and grammatical errors.

§ 1058. Mere clerical or grammatical errors in the statement of the offence, as has already been observed, will not vitiate the indictment;[t] and in this as

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[o] Turns v. Com. 6 Metcalf, 225.

[oo] People v. Aro, 6 Cal. 207.

[p] Ante, § 943; Whar. on Hom. 259; 1 Hale, 943.

[pp] Com. v. Murphy, 11 Cush. (Mass.) 472.

[q] See ante, § 233–259, 595–598; and see Whar. on Hom. 251.

[r] See ante, § 250–8.

[s] 1 Hawk. b. 2, c. 23, s. 85; see ante, § 403.

[t] See ante, § 405–9; and see 3 Ch. C. L. 734; 13 Price, 172.

well as in all other branches of pleading, an arrest of judgment will not be granted where there is a clear and intelligible statement of the mode of committing the offence.

6th. Instrument of Death.

In Pennsylvania, the revised acts provide :—

Indictments for murder and manslaughter.—In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient, in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.[tt]

§ 1059. The common law rule in pleading the instrument of death is that where the instrument laid and the instrument proved are of the same nature and character there is no variance; where they are of opposite nature and character, the contrary.[u] Thus, evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. An illustration of this distinction has been already noticed, in a late Pennsylvania case.[v] The defendant was charged with having erected a stuffed *Paddy* with intent to libel the Catholic Irish; and he endeavored to defend himself by proof that the device was a stuffed *Shelah*, and the object was to annoy the Protestant Irish. The instructions of the court were invoked as to whether there was a variance; and Gibson, J., said that if there was a mere averment of a Paddy, and evidence of a Shelah, the object and character of the figures being similar, there was no variance; but that if on the contrary they were devices of an antagonistic character, the indictment could not be supported. Where the method of operation is the same though the instrument is different, no variance exists; where the former is not the case, the rule is otherwise. The same reasoning applies to indictments for homicide. Where the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal;[w] and the same if the indictment state a poisoning, and the evidence prove a starving. Thus where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises of which he died, and it appeared in evidence that the death was by the deceased falling on the ground, in consequence of a blow on the head received from the defendant, it was holden that the cause of the death was not properly stated.[x] But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill or the like, capable of producing the same

[tt] Rev. Act. 1860, pamph. p. 435.

[u] Whar. on Hom. 261; State *v.* Smith, 2 Redfield, 369; State *v.* Fox, 1 Dutch. (N. J.) 566.

[v] Com. *v.* Haines, 6 Penn. L. J. 232.

[w] R. *v.* Briggs, 1 Mood. C. C. 318.

[x] R. *v.* Thompson, 1 Mood. C. C. 139.

kind of death as the instrument stated in the indictment, the variance will not be material.[y] So if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment.[z]

An indictment having charged that the prisoner, with both her hands about the neck of the deceased, the neck and throat of the deceased did squeeze and press, and by such squeezing, &c., did suffocate and strangle the deceased; and the evidence being that the prisoner suffocated the deceased by placing one hand on his mouth and the other on the back of his head: Patteson, J., held that it was sufficient if the death was caused by suffocation, and that the evidence supported the indictment.[a] And in another case the offence being charged to have been committed with a certain sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, Parke, B., held the indictment proved, and said the degree of sharpness was immaterial.[b]

§ 1060. Where an indictment for the murder of a bastard child stated that the defendant forced and thrust moss and dirt into its throat, mouth, and nose, and that by forcing and thrusting the moss and dirt into the throat, mouth, and nose of the child, the child was choked, &c., and it appeared that the child was not immediately suffocated by the moss and dirt, but that the moss and dirt caused an injury and inflammation in the throat, which closed the passage to the lungs and stomach, of which the child died; it was declared that the evidence supported the indictment, and that it was sufficient to state the proximate cause of the death, without stating the intermediate process resulting from that proximate cause.[c]

Where the prisoner was indicted for cutting the throat of the deceased, and a surgeon proved that what was technically called the throat was not cut, as the wound did not extend so far round the neck, Patteson, J., held that the indictment must be understood to mean what is commonly called the throat.[d]

§ 1061. Where the indictment alleged that the defendant suffocated the deceased by placing her hand on the mouth of the deceased, and the jury found that the death was caused by suffocation, but could not say how it was occasioned, Denman, C. J., held the indictment proved.[e] But under an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol, Bolland, B., Park and Parke, Js., held the indictment not proved.[f]

The same principle was applied in a case before cited, where an indictment charged that the defendant struck the deceased with a brick, and it appeared

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[y] R. *v.* Mackally, 9 Co. 67 a; Gilb. Ev. 231; R. *v.* Briggs, 1 Mood. C. C. 318.
[z] Ib.; and see 2 Hale, 115, 185; 2 Hawk. c. 23, s. 84.
[a] R. *v.* Culkin, 5 C. & P. 121.
[b] R. *v.* Grounsell, 7 C. & P. 788.
[c] R. *v.* Tye, R. & R. 345.
[d] R. *v.* Edwards, 6 C. & P. 401.
[e] R. *v.* Waters, 7 C. & P. 250.
[f] See R. *v.* Hughes, 5 C. & P. 126.

that he knocked the deceased down with his fist, and that the deceased fell upon a brick, which caused his death.[g]

In New York, a far more liberal rule has been announced, it having been substantially held that the use of a pistol might be proved under an indictment charging the wound to have been by striking, &c., with an instrument unknown.[h]

§ 1062. A count of an indictment charging the death of a child to have been caused by its mother casting and throwing it on a heap of ashes, and leaving it there in the open air exposed to the cold air, whereby it died, was held good; but it was said that, if it had charged the death to have been caused by mere nonfeasance in the neglect of the prisoner's maternal duties, it would have been bad, unless the child were alleged to have been of such an age, or in such a situation, as to be unable to take care of itself.[i]

Acts which hasten the death of a woman, already suffering with a disease of which she must probably have soon died, may be laid in an indictment for the murder, as the sole cause of her death, without mentioning the disease.[ii]

In one count of an indictment for murder, the death was stated to be by a blow of a stick, and in another by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally, on both counts, and the judges held the conviction right; and that judgment could be given upon it; and, *semble*, that these are not inconsistent statements of the modes of death, but that, if they had been so, no judgment could have been given on the verdict.[j]

§ 1063. An indictment against a medical practitioner, charging that he made divers assaults on the deceased (a patient), and applied wet cloths to his body, and caused him to be put into baths, it was held, that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty.[k]

An indictment charging a joint assault with a "knife which they in their right hand then and there had and held," was determined in Missouri to be bad, as charging an impossibility.[l] This, however, may be doubted, since the blow struck by one of them may be treated constructively as the blow struck by all.[m]

§ 1064. The evidence must show that the death was caused by the particular blow described and proved. Thus very recently, in a case remarkable for the conflict of opinion among the assembled judges on other points, as well as for the public interest excited by the trial, all the judges concurred in the opinion, that where certain assaults were put in evidence, and relied on by the crown, as being the cause of death, but where the clear surgical

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[g] R. v. Kelly, 1 Mood. C. C. 113.
[h] People v. Colt, 3 Hill, 432; Ibid. 1 Harris, C. C. 612.
[i] R. v. Waters, 2 Car. & Kir. 862.
[ii] Com. v. Fox, 7 Gray, Mass. 585.
[j] R. v. O'Brian, 2 Car. & Kir. 115; see ante, § 424.
[k] R. v. Ellis, 2 Car. & Kir. 469.
[l] State v. Gray, 21 Mo. 492.
[m] See ante, § 592-3-4; post, § 1074.

testimony was, that the death was caused by a blow on the head, of which there was no evidence whatever, the defendants were entitled to an acquittal.[n]

If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact, and under the circumstances the want of specification will be excused, on the same principles as allow the non-setting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession.[o] Thus, in a recent case of great and painful interest, the fourth count of the indictment averred that the defendant, "in and upon the said G. P., feloniously, wilfully, and of his malice aforethought did make an assault, and him, the said G. P., *in some way or manner, and by some means, instruments and weapons, to the jurors unknown*, did then and there feloniously, wilfully, and of malice aforethought, deprive of life: so that he, the said G. P., then and there died." "The rules of law," said Chief Justice Shaw, when charging the jury, "require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and if the circumstances will not permit of a fuller and more precise statement of the mode in which the death is occasioned. This count conforms to the rules of the law. I am therefore instructed by the court to say, that if you are satisfied upon the evidence that the defendant is guilty of the crime charged, this form of indictment is sufficient to sustain a conviction."[p]

7th. Assault.

§ 1065. In an indictment for murder, where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.[q] In such case the time when the mortal stroke was given, and the time of the death, must be alleged, and it is not sufficient to allege, that "he instantly did die."[r]

8th. Scienter in poisoning.

§ 1066. It is not sufficient reason *for allowing a writ of error, after conviction*, upon an indictment for a murder by poison, that the indictment did not aver that the prisoner knew the substance employed to be a deadly poison, though such an averment is always safe.[s]

9th. Strike and beat.

§ 1067. Where the death is occasioned by a wound, bruise, or other assault, the stroke must be expressly laid. But an indictment charging "that A. B., with a certain stick, &c., in[t] and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D. then and

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[n] R. *v.* Bird, 15 Jur. 193; 2 Eng. R. 448; see ante, § 822–3.
[o] See ante, § 311.
[p] Bemis' Webster case, 3, 473; Com. *v.* Webster, 5 Cushing, 295.
[q] Whar. on Hom. 260; Lester *v.* State, 9 Miss. 666.
[r] Ibid. See as to "then and there;" ante, § 272.
[s] Com. *v.* Earle, 1 Wharton, 525; see as to scienter generally, ante, § 297.
[t] Whar. on Hom. 269.

there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle giving, and the words then and there, connect the allegation with the mortal wound in the second clause.[u]

The word *percussit* (did strike) is not technical, but when the blow is made with a dirk, the words stab, stick, and thrust, are equivalent thereto.[v]

An indictment charging "that the defendant, with a certain stone which he held in his right hand, in and upon the right side of the head of the deceased, feloniously, &c., did cast and throw, and that the defendant with the stone aforesaid, so as aforesaid cast and thrown, the deceased in and upon the right side of the head feloniously did strike," &c., was held to contain a sufficient allegation that the defendant threw the stone and struck the deceased with it.[w]

§ 1068. Where the allegation in an indictment for murder, was, "that the prisoner in and upon M. F., &c., feloniously, &c., did make an assault with a certain gun, called a rifle gun, &c., then and there charged with gunpowder and two leaden bullets, which said gun, he, &c., had and held, and against the said M. F., then, &c., feloniously, &c., did shoot off and discharge, and that the said M. F., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., as aforesaid, did, &c., feloniously, &c., strike, penetrate and wound the said M. F., in and upon the left side of the said M. F., &c., giving to her, the said M. F., &c., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., and by such striking, &c., the said M. F., as aforesaid, one mortal wound in and upon the left side of the said M. F.," &c.; on a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off, or that the contents were discharged, it was said that the inference seemed to be one of absolute certainty, that the contents of the gun were shot off and discharged, for there is nothing else to which the words "did shoot off and discharge," with a gun charged with gunpowder and leaden bullets, could be applied.[x]

10th. Description of wound.

§ 1069. The indictment must show in what part of the body the wound was inflicted,[y] but if the wound be stated to be on the right side, and be proven to be on the left, the variance is not fatal.[z]

The legal meaning of the term "wound" has been already noticed.[zz]

It was formerly thought that where the death is charged to have been oc-

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[u] State *v.* Owen, 1 Murphey, 452.
[v] Gibson *v.* Com., 2 Virg. Cases, 111; see ante, § 399; Whar. on Hom. 269.
[w] Com. *v.* White, 6 Binney, 183; ante, § 309. [x] State *v.* Freeman, 1 Spear, 57.
[y] State *v.* Jones, 20 Mo. 58.
[z] 2 Hale, 186; Archbold's C. P. 384; Dias *v.* State, 7 Blackf. 20.
[zz] Ante, § 832.

casioned by a wound, a description of the wound should be set forth in the indictment with its length, breadth, depth, &c., where they are capable of description. Such is not now the case, however,[a] though it may be prudent to insert such a description.[b] Where the death was occasioned by a bruise, a description of its dimensions, &c., is clearly not necessary.[c] And though for a long time it was thought necessary to describe the dimensions of an *incised* wound, yet the better opinion now is that such is no longer the case.[d] And whatever be the averment, it is not necessary in general that the description of the wound should be accurately supported by evidence.[e]

But it has been held that a count, in an indictment for murder, charging that the prisoner did strike the deceased on the *left* temple, giving him a mortal wound on the *right* temple, &c., is inconsistent and void.[f]

The wound must be alleged to have been *mortal*.[g]

11th. "FELONIOUSLY," AND "MALICE AFORETHOUGHT."

§ 1070. In an indictment for murder, it is indispensable that the killing and murder should be charged to have been done "with malice aforethought."[h] It is necessary that it should be specifically repeated in the concluding averment.[i] In a late case, however, in Arkansas, it seems to have been thought that the words, "and wickedly, did kill and murder, against," &c., are sufficient, without the words "of his malice aforethought."[j]

§ 1071. It has been said that in an indictment charging "that A. feloniously, and of his malice aforethought, assaulted B., and with a sword, &c., then and there struck him, &c.," the first allegation of feloniously and of his malice aforethought, applied to the assault, runs also to the stroke to which it is essential,[k] though the point has elsewhere been determined otherwise.[l]

In Massachusetts, in an indictment for murder, it is not necessary to aver that the assault was made wilfully, and with malice aforethought.[m]

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[a] Lazier *v.* Com., 10 Grattan, 708; Com. *v.* Chapman, 11 Cush. (Mass.) 422, Dillon *v.* State, 9 Ind. 408; State *v.* Conley, 39 Maine (4 Heath), 78; Turner's case, 1 Lewin, 177.

[b] Whar. on Hom. 273.

[c] State *v.* Owen, 1 Mar. 452; see State *v.* Moses, 2 Dev. 452, contra.

[d] Lazier *v.* Com., 10 Grattan, 708; Stone *v.* State, 12 Scammon, 326; R. *v.* Mosley, 1 Moody, C. C. 98, contra; State *v.* Moses, 2 Devereux, 452 (afterwards cured in N. C. by statute); and, *semble*, Com. *v.* Chapman, 7 Bost. Law Rep. N. S. 155; see Bennett & H. Lead. Cas. 58.

[e] 2 Hale, 186; 1 Mood. C. C. 97.

[f] Dias *v.* State, 7 Blackf. 20.

[g] State *v.* Conley, 39 Maine (4 Heath), 78.

[h] Com. *v.* Gibson, 2 Virg. Cas. 70; Sarah *v.* State, 28 Mississippi, 268; Whar. on Hom. 260, 276; ante, § 399.

[i] State *v.* Heas, 10 La. R. 195.

[j] Anderson *v.* State, 5 Pike, 445.

[k] State *v.* Owen, State *v.* Cherry, 3 Murphy, 7; 1 Mur. 452; see State *v.* Rabon, 4 Rich, 260; ante, § 272.

[l] Resp. *v.* Honeyman, 2 Dallas, 228; Whar. on Hom. 260, 276.

[m] Commonwealth *v.* Chapman, 11 Cush. (Mass.) 422; see ante, § 399, &c.

12th. Averment of time and manner of death.

§ 1073. An indictment which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and "of the said mortal sickness died," is good, without also stating that the deceased died of the poisoning.[o]

The words *languishingly did live*, are not a material part of the indictment, and may be struck out.[p]

An indictment concluding with an allegation that the prisoner did kill and murder, omitting the name of the deceased in such conclusion, was held in Indiana to be insufficient.[q]

An indictment stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on, until the 8th November, in the year aforesaid, and then said, "on which 8th day of *May*, in the year aforesaid, the deceased died." To this indictment the prisoner pleaded not guilty. It was held, that the insertion of May for November, was a mistake, apparent on the face of the indictment, and would not exclude proof of the death, subsequent to the 7th November, or be cause for arresting the judgment.[r]

An indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause.[s] The date of the death, therefore, as well as that of the stroke, must distinctly appear.[t] Where, however, an indictment charged a prisoner with having inflicted upon the deceased a mortal wound, of which mortal wound he did languish, and languishing did live, "on which said 20th day of June, in the year aforesaid, the said Richard O'Leary, in the county aforesaid, died," it was held, that it sufficiently charged that the deceased died of the mortal wound inflicted by the prisoner.[u]

13th. Principals and accessaries.

§ 1074. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of crime, may be indicted as principals; and though the indictment should state that the mortal injury was committed by him who is absent, or no more, yet if it be substantially alleged that those who are indicted were present at the perpetration of the

[o] R. v. Sandys, 1 Car. & Mars. 345.

[p] Penn'a v. Zell, Addison, 171, 175; State v. Conley, 39 Maine (4 Heath), 78; Whar. on Hom. 274.

[q] Dias v. State, 7 Blackf. 20.

[r] Ailstock's case, 3 Gratt. 650.

[s] State v. Orrell, 1 Dev. 139; People v. Aro, 6 Cal. 207; People v. Kelley, 6 Cal. 210.

[t] State v. Conley, 39 Maine (4 Heath), 78.

[u] Lutz v. Commonwealth, 29 Penn. State R. 441.

crime, and did kill and murder the deceased, by the mortal injury so done by the actual perpetrator, it shall be sufficient.[v]

If several be charged as principals, one as principal perpetrator, and the others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present is, in legal consideration, the injury of each and every one of them.[w]

In a late English case, the second count of the indictment charged J. O. B. that he, "on the 27th of May, feloniously, and of his malice aforethought, struck the deceased with a stick, of which said mortal blow the deceased died on the 29th day of May; that T. R., D. D., &c., on the day and year first aforesaid, at the parish aforesaid, feloniously, and of their malice aforethought, were present, aiding and abetting the said J. O. B., the felony last aforesaid to do and commit;" and concluding "the jurors, &c., say that the said J. O. B., T. R., D. D., &c., him the deceased in manner and form last aforesaid, feloniously, and of their malice aforethought, did kill and murder." The third count charged T. R. that he, "on the 27th day of May, a certain stone feloniously, and of his malice aforethought, cast and threw, and which said stone, so cast and thrown, struck deceased, of which said mortal blow the deceased died on the 29th of May, and that J. O. B., D. D., &c., were present, aiding and abetting," &c., as in the first count. It was objected— 1st, that the indictment was inconsistent, in charging the principals in the second degree with committing the felony, at the time of the stroke, whereas it was no felony till the time of the death; and, 2d, that the general verdict of guilty, left it uncertain which was the cause of death, the stick or the stone, and that, therefore, no judgment could be entered on either. It was held— 1st, that the form of the indictment was good; and, 2d, that the alleged generality of the verdict was immaterial, the mode of death being substantially the same.[x]

VI. Murder in the first and second degrees.

§ 1075. As the beginning of this chapter the Pennsylvania and Virginia acts were given, by which it is perceived murder, as it existed at common law, is distinguished into two divisions. A similar distinction has been established in Maine, New Hampshire, New York, New Jersey, Alabama, Tennessee, and Michigan. In Massachusetts and Ohio, there is a division which, though based on a different principle, may serve, in some degree, to illustrate the distinction at present the subject of observation.

Maine.

§ 1076. Whoever shall, unlawfully, kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder.—(Rev. Stat. ch. 154, sect. 1.)

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[v] State v. Fley & Rochelle, 2 Brev. 338.

[w] Foster, 551; 1 East, P. C. 350; State v. Fley & Rochelle, 2 Brev. 338; State v. Mair, 1 Coxe, 453; Com. v. Chapman, 11 Cush. (Mass.) 422; see ante, § 592–3–4.

[x] R. v. O'Brian, 1 Den. C. C. 9; 2 Car. & Kir. 115.

Whoever shall commit murder, with express malice aforethought, or in perpetrating, or attempting to perpetrate, any crime punishable with death, or imprisonment in the State prison for life, or for an unlimited term of years, shall be deemed guilty of murder of the first degree, and shall be punished with death.—(Ibid. sect. 2.)

Whoever shall commit murder, otherwise than is set forth in the preceding section, shall be deemed guilty of murder in the second degree, and shall be punished by imprisonment for life in the State prison.—(Ibid. sect. 3.)

Section 4 provides that, upon an indictment for murder, the jury shall inquire and find whether the offence be of the first or second degree, or, if confessed, the court shall make the inquiry.

MASSACHUSETTS.—See ante, § 889(*a*).

NEW HAMPSHIRE.

§ 1077. All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, is murder of the first degree; and all murder not of the first degree is of the second degree. If the jury shall find any person guilty of murder, they shall also find, by their verdict, whether it is of the first or second degree.—(Rev. Stat. chap. 214, sect. 1.)

If any person shall plead guilty to an indictment for murder, the court having cognizance thereof shall determine the degree.—(Ibid. sect. 2.)

The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be solitary imprisonment, not exceeding three years and confinement to hard labor for life.—(Ibid. sect. 3.)

NEW YORK.—See ante, § 912(*a*).

PENNSYLVANIA.—See ante, § 913–5.

NEW JERSEY.

§ 1078. Be it enacted, by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate, by their verdict, whether it be murder of the first or second degree; but if such person shall be convicted on confession, in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly.—(An act, supplementary to an act, entitled, "An act for the punishment of crimes," passed the seventeenth day of February, eighteen hundred and twenty-nine, sect. 1.)

And be it further enacted, That every person convicted of murder of the first degree, his or her aiders, abettors, counsellors, and procurers, shall suffer death; and every person convicted of murder of the second degree, shall suffer imprisonment at hard labor, for any term not less than five, nor more than twenty years.—(Section 2.)

VIRGINIA.—See ante, § 919.

OHIO.—See ante, § 924-5.

ALABAMA.

§ 1079. Every homicide, which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; so, also, every homicide perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any human being, other than him who is slain, or perpetrated by an act eminently dangerous to the life of others, and evincing a depraved mind, regardless of human life, although without any preconceived purpose to deprive of life any particular individual; and every person, guilty of murder in the first degree, shall, on conviction, suffer death, or confinement in the penitentiary for life, at the discretion of the jury trying the same.—(Penal code, chap. 111, sect. 1; Clay's Digest, 412.)

[The next section provides, that all other cases of murder at common law, shall be murder in the second degree; and punishable by imprisonment for not less than ten years.]

TENNESSEE.

§ 1080. All murder which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious, and premeditated killing, or shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain, in their verdict, whether it be murder in the first or second degree, but if such person shall confess his guilt, the court shall proceed, by the impanelling of a jury, and examination of testimony, to find and determine the degree of the crime, and to give sentence accordingly.—(Act 1829, sect. 3, Laws of Tennessee, p. 316.)

MICHIGAN.

§ 1081. All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and shall be punished with death; and all other kinds of murder shall be deemed murder of the second degree, and shall be punished by confinement in the penitentiary for life, or any term of years, at the discretion of the court trying the same.—(Rev. Stat. part 4, tit. 1, ch. 3, sect. 1.)

§ 1082. Murder, in the first degree, in each of the above given statutes, is first defined generally, and is then extended in such a way as to cover certain enumerated instances; it being provided that all cases not either enumerated or falling within the general definition, shall be murder in the second degree. The following table will serve to show, what in each state is the general definition of murder in the first degree, and what the additional particular instances:—

MURDER IN THE FIRST DEGREE.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
Maine, . . .	Murder "in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years."	Murder with "express malice aforethought."
New Hampshire,	Murder by "poison, starving, torture," or "in the perpetration or attempt at the perpetration of arson, rape, robbery, or burglary."	Murder by "deliberate and premeditated killing."
Massachusetts, .	Murder "in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty."	Murder "committed with deliberately premeditated malice aforethought."
New York, . .	Murder which shall be perpetrated "by means of poison, or lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, or in any attempt to escape from imprisonment."	Murder perpetrated "by any other kind of wilful, deliberate, and premeditated killing."
Pennsylvania, .	Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary."	Murder perpetrated "by any other kind of wilful, deliberate, and premeditated killing."
New Jersey, .	Ibid.	Ibid.
Michigan, . .	Ibid.	Ibid.
Alabama, . .	Ibid.	Ibid.
Virginia, . .	Murder by "poison, by lying in wait, imprisonment, starving, or by wilful, deliberate, and premeditated killing, or other cruel treatment or torture," or in "the commission of or attempt to commit any arson, rape, robbery, or burglary."	
Tennessee, . .	Murder committed "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or larceny."	Murder perpetrated "by any (other) kind of wilful, deliberate, malicious, and premeditated killing."

§ 1083. The general expression, "any kind of wilful or deliberate killing," is to be separated, it is said, from the context, and to be so interpreted as to constitute a distinct and substantive definition. "The counsel for the prisoner," said a learned judge, now occupying a seat in the Supreme Court of the United States, in a case before the General Court of Virginia, "has supposed, and argued in support of his supposition, that the words, 'any other kind of wilful, deliberate, or premeditated killing' ought to be construed, and of necessity, as referring to the character or kind of killing, or murder specified in the previous enumeration (by means of poison, lying in wait, duress of imprisonment or confinement, starving, wilful, malicious, or excessive whipping, beating, or other cruel torture), as if it read, 'any other kind of such wilful, deliberate or premeditated killing;' because, otherwise, as he supposes, the preceding particular enumeration would be useless. Now, a plain and invincible answer to this argument, is the import of the terms used: other and such. Other killing, means any other whatever, which is different from the same; such killing would refer to the modes of killing enumerated, and confine itself to the kind of killing enumerated, and the means by which it was effected. To admit this construction of the prisoner's

counsel, would be to allow that the legislature meant nothing, or did not understand what it meant, when it used, upon this very important subject of life and death, those words of plain and obvious import, 'any other kind of wilful, deliberate, and premeditated killing.' This is what this court cannot admit. Poison may reach the life of one or more not within the design of him who lays the bait; lying in wait, may be with a view of great injury, abuse, and bodily harm, without the settled purpose to kill; imprisonment or confinement, or starving, may be with a view to reduce the victim to the necessity of yielding to some proposed conditions, as well as a punishment for the failure of prompt obedience, without any fixed determination to destroy life; and the same may be said of malicious or excessive whipping, beating, or other cruel torture. In all these enumerated cases, the legislature has declared the law, that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused, sought. And the same authority has declared the law, that any other kind of killing, which is sought by the will, deliberation, and premeditation of the party accused, shall also be murder in the first degree; but as to this other kind of killing, proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused, sought. But to this general rule the same authority adds an exception, which is, that any death consequent upon the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree: and all other murder at common law, shall be deemed murder in the second degree. So that the cases within the exception, as now put, and the cases enumerated as first mentioned, are, in fact, placed upon the same principle; there is no necessity of proof in either to establish the fact that a homicide was intended. And it follows, of course, that all other homicide which was murder at common law, is now murder in the second degree, except when it shall be proved that the homicide was the result of a 'wilful, deliberate, and premeditated killing;' and it also follows, of necessity, that, when by the proof the mind is satisfied that the killing was wilful, deliberate, and premeditated, such killing must be taken and held to be murder in the first degree."[t]

§ 1084. In Pennsylvania, New Jersey, Virginia, Alabama, and Michigan, the killing, to commit murder in the first degree, must be "wilful, deliberate, and premeditated." The omission of "wilful," in New Hampshire, and the addition of "malicious," in Tennessee, cannot, it is apprehended, vary the construction given to the statutes. By the general concurrence of each of the States in which the distinction has been the subject of examination, the practical workings of the statutes has been to divide murder, as limited by the common law, into two classes, leaving the original boundaries between murder and manslaughter unaltered. The statutes, it has been held, in re-

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[t] Com. *v.* Jones, 1 Leigh, 610–612, per Judge Daniel; Burgess' case, 2 Virg. Cases, 488; Whiteford's case, 1 Leigh, 610.

quiring murder in the first degree to be deliberate, did not change the common law doctrine in that respect with regard to murder; the degree of deliberation requisite in both cases being the same. The distinctive peculiarity attached by the statutes to murder in the first degree, however, is, that it must necessarily be accompanied with a premeditated intention to take life. The "*killing*" must be "*premeditated.*" Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offence, if consummated, is murder in the first degree; if there is *not* a specific intention to take life, it is murder in the second degree.[u] "To constitute murder of the first degree,[v] the intent of the party killing must have been to take life, whereas, by the common law, if the mortal blow is malicious, and death ensues, the perpetrator is guilty of murder, whether such an intention does or does not appear to have existed in his mind. The injury being malicious, the common law holds the offender responsible for all the consequences following his unlawful act. The first inquiry, therefore, of a Pennsylvania jury, after a felonious and malicious homicide is established, not committed by means of poison, or lying in wait, or in the perpetration of one of the felonies enumerated in the act, is, whether the mortal blow was given with an intent to take life, or merely to do great bodily harm. If the former is proved by the evidence, the crime is murder in the first degree; if such an intent does not satisfactorily appear, the jury should return a verdict of murder in the second degree."[w]

§ 1085. In order to constitute murder in the first degree, it has been said in Tennessee, a design must be formed to kill wilfully, that is, of purpose, with the intent that the act by which the life of a party is taken should have that effect; deliberately, that is, with cool purpose; maliciously, that is, with malice aforethought; and with premeditation, that is, the design must be performed before the act by which the effect is produced is performed.[x] And it is added in another case, that the intervention[y] of provocation, between the formation of the purpose to take life and the slaying, will not reduce the offence to manslaughter.[z] In a case of much consideration in Virginia, where a verdict of murder in the first degree had been rendered, the prisoner, to adopt the statement of the learned judge by whom the opinion of the Court of Appeals was delivered, "although excited by strong drink, and by an insult

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[u] Resp. *v.* Bob, 4 Dallas, 146; Penn'a *v.* Honeyman, Addison, 148; Penn'a *v.* Lewis, Addison, 283; Com. *v.* Green, 1 Ashmead, 289; Com. *v.* Murray, 2 Ashmead, 41; Com. *v.* Daley, Whar. on Hom. 466; Com. *v.* Hare, Ibid.; Com. *v.* Gable, 7 Serg. & R. 428; Bennett *v.* Com. 8 Leigh, 745; Slaughter *v.* Com. 11 Leigh, 681; Com. *v.* King, 2 Va. Cas. 78, in note; Whiteford *v.* Com. 6 Randolph, 721; Burger's case, 2 Va. Cas. 483; Com. *v.* Jones, 1 Leigh, 610; Dale *v.* State, 10 Yerger, 551; Mitchell *v.* State, 5 Yerger, 340; State *v.* Anderson, 2 Tenn. R. 6; Davis *v.* State, 2 Humph. 439; Anthony *v.* State, 1 Meigs, 265; Swan *v.* State, 4 Humph. 136; Com. *v.* Crause, 3 Amer. Law Jour. 299; Clark *v.* State, 8 Humph. 671; Riley *v.* State, 9 Humph. 646; State *v.* Spencer, 1 Zabriskie, 196; State *v.* Shoultz, 25 Mis. (4 Jones) 128; People *v.* Potter, 5 Mich. 1; State *v.* Hicks, 27 Missouri (6 Jones), 588; People *v.* Josephs, 7 Cal. 129.

[v] King, P. J., in Com. *v.* Daley, Whar. on Hom. 466, as afterwards adopted by Rogers, J., in the Supreme Court, in Com. *v.* Sherry, Whar. on Hom. 481.

[w] 4 Penn. Law Jour. 156, 157; Whar. on Hom. 460, 461.

[x] Dale *v.* State, 10 Yerger, 351; Anthony *v.* State, 1 Meigs, 265.

[y] Bratton *v.* State, 10 Humph. 103.

[z] Clark *v.* State, 8 Humph. 671.

offered to a woman, which he thought himself bound to resent, and by a severe blow on himself for which he had a right to redress, was not, by any of these causes, or all combined, so deprived of his mental faculties, according to any evidence in the cause, that he could not distinctly understand what he willed and was about to do; or so that he could not reflect, and reason, and deliberate, and determine, and choose what he would or would not do. According to the evideuce, the first moving cause to commit the act, which constitutes his offence, was the injury done to a woman, for whom he felt an attachment: to her he promised redress for the insult and injury she had received; and before he had himself received any personal injury, he avowed that the measure of redress which she should receive, should be filled with the heart's blood of the deceased before sunset. And after he had shed the blood of the deceased, as he had threatened, he said, 'he had killed the damned rascal, and was glad of it; that he would do the like to any man who should strike the woman he loved, and that any man of spirit would do the like.' It is true, he had received a severe blow in the mean time, which was calculated to increase, and no doubt did increase his resentment against the deceased. But still he referred the revenge he had sought and taken, to the original cause of the offence, the blow given to the woman he loved. A considerable time elapsed between both causes of offence, and threats of deadly revenge were made before he executed his purpose; at least three-quarters of an hour, in which time his resentment might have cooled. He employed this time not in hasty but in deliberate preparation to execute the purpose he had avowed of shedding the blood of the deceased. He dressed his wound, adjusted his clothes, and being apparently composed, deliberately armed himself with a dirk, or being already thus armed, went abroad a considerable distance in quest of a gun; chose one with cautious circumspection and judgment; deliberately tried its fitness for the object he had in view, a sure fire; primed, snapped, and flashed it; procured powder and lead, and loaded it; and thus armed with a drawn dirk and a loaded gun, traversed the public streets, passed the market place, where perchance he might meet the deceased, and, finally, sought him at his boat, where he found him; and then, with deliberate aim, shot him to death, while the deceased was unarmed, unresisting, and in actual flight from him." "This must certainly," said the learned judge, "be a wilful, deliberate, and premeditated killing," and the Court of Appeals, therefore, refused a new trial on the merits.[a]

§ 1086. In another case, from the evidence given it appeared that the defendant was a drummer in the marine corps, and attached to the navy-yard in the district of Southwark, and that on the 19th of October, 1825, he had been out of the yard, but returned between the hours of two and four o'clock, and went to room No. 3. Soon after his return a noise was made by some one in the room, and the deceased (who was drill sergeant of the station) was at the time engaged in drilling some recruits in front of the room. The deceased ordered silence, and went into the room, where

[a] Com. *v.* Jones, 1 Leigh, 612–614, Opinion of Daniels, J.

words were heard between the defendant and Clunet, the deceased. The order was not obeyed, and the noise continued. In a few minutes Clunet called upon Evan W. Gamester, who was sergeant of the guard, to arrest Green, the defendant. He went to the room where Green was, and ordered him to come with him immediately to the guard-house. He said he would go for Gamester, but not for Clunet. In a few minutes he called Clunet "a damned son of a bitch," or words to that effect. Clunet, who had left him and gone back to the troops, stepped into the room and said, "If you repeat them words again, you damned scoundrel, I'll knock you down with the musket." Clunet then held his musket at an advance, and came towards Green, and raised his musket with the butt towards Green, as if he meant to give him a shove back. Green then threatened that if he struck him with the musket, he would strike him back, or knock him down if he could. Gamester then caught Green by the left arm, and pulled him towards the door, to take him to the guard-house. Green then made use of some aggravating expressions. Clunet came at him again with the musket; as he came within reach, Green jumped from Gamester and made some attempts to strike him. He caught Green and held him, and told him he should go to the guard-room. Clunet then came up with his musket and struck him an overhand blow upon the head. Green said, "it was a rascally or cowardly blow." Green was then taken to the guard-house. After he got there, he asked permission to go to the hospital to get his head, that was bleeding, dressed, which was given to him. He returned in about fifteen minutes with his head dressed. He was ordered up stairs, where he went. Ten or fifteen minutes before parade, Green was in the guard-room sitting by the stove quiet, and showed no passion or temper. Afterwards Green said, that "*Clunet never should strike another man; that he would shoot him the first opportunity he could get;*" he further said, that "*if he could get a loaded musket, he would shoot him as he passed the guard-room to the canteen.*" He then walked across the room once or twice; when he got to the desk near the door, he made a jump to the door, and seized a musket leaning against the pillar of the arcade, and fired. Clunet reeled and fell. When he fired, he bit his lips with great anger, and said, "he was damned glad he did not shoot Sergeant Duffy." The ball entered the back between the tenth and eleventh rib, about three inches to the right of the spine, passed through the diaphragm, penetrated the upper circumference of the liver, and came out of the front of the body on the right side, between the seventh and eighth rib. Immediately after discharging the musket, he brought it down to a charge, and let it drop, and rushed into the guard-room, muttering something not understood. He was followed up into the second story of the guard-room, where he was commanded to surrender. He submitted, and was secured in irons, during which time he was asked how he came to commit the offence. Green said, "*I am not sorry for it, any man would have done the same,* and I demand that you deliver me over to the civil authority." He was then placed in a solitary cell, where he was visited frequently during the night. He several times asked if Sergeant Clunet was dead, and said, "O God, I

must submit to my fate, and if he dies, I must be hung." On the second or third day, as the officer on guard opened the cell door, he heard Green exclaim, "I am damned glad I shot him. I hope I hit him in the right place, and I am not sorry for it." He told him he ought to take better care of what he said, and to think of something else; on which he observed, "O, Mr. Barton, I did not know you were here, and I did not know what I was saying." The day Sergeant Clunet died, which was the eighth day after receiving the wound, Green, who was informed of the fact, exclaimed, "Oh, my God, I am a murderer, and must be hung." It further appeared from the evidence produced, that the afternoon Clunet was shot, Green had been drinking, but was not intoxicated. In charging the jury, Judge King said, after directing attention to the question, first, whether there was deliberation, and secondly, whether there was a specific intention to take life, and assuming, from the evidence, that both were shown to exist, "Here I conceive a state of things arises, which as imperatively calls upon the court to pronounce their opinion upon what they believe to be the law of the case, as it is incumbent on the jury to pronounce their opinion on the law and evidence. We will neither shrink from nor temporize with our duty in this respect, but by an unequivocal expression of our judgment, take that portion of the solemn responsibility of this cause which is attached to us, as the organs through which the justice of the commonwealth is to be vindicated. Upon the supposition assumed, we are of opinion that the prisoner at the bar is guilty of wilful, deliberate, and premeditated murder; of murder in the first degree, as it is understood by our act of assembly."[b]

§ 1087. The deceased, in a case occurring shortly afterwards, on the evening of the 9th of June, between 8 and 10 o'clock, while standing near the door of his dwelling with his brother and sister, received a stab in his belly by the hand of one who had approached and saluted him in a friendly manner; and it appeared that this man was recognized by both as the prisoner; and that the deceased himself, "a short time before he breathed his last, declared that black Williams stabbed him." Besides which it also appeared in evidence, that the night previous to the murder, the prisoner and one York, who had been tried with Williams and acquitted, had been knocked down, without provocation, by some persons who fled into a house close by, and escaped through a back passage, and that the prisoner swore he would have satisfaction for it. It was also proved, that, on the day of the murder, the prisoner, with several blacks, had called at three different times at the house, inquiring in angry tones for the deceased; that after the murder, the prisoner was found concealed, with great care, under the stairway in a cellar, in the vicinity of the murder, and that when arrested, and while being conveyed to the prison, in reply to a remark made to him, had said, "Yes, but it is done, and I can't help it." The jury, having convicted him of murder in the first degree, the court refused to disturb the verdict.[c]

§ 1088. The first case under the Pennsylvania act underwent a careful

[b] Com. *v.* Green, 1 Ashmead, 289.

[c] Com. *v.* Williams, 2 Ashmead, 69.

examination from McKean, C. J., a very able judge. It appeared that a considerable number of negroes assembled; and about 10 o'clock at night a quarrel arose between mulatto Bob, the prisoner at the bar, and negro David, the deceased. For awhile, the parties fought with fists; and the prisoner was heard to exclaim "Enough!" The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighboring pile of wood, and furnished himself with a club. He was advised not to use it, but he declared that he would, and entered the crowd with it in his hand. After remaining there about ten minutes, he left the crowd without his club; and, again repairing to the woodpile, took up an axe. Being likewise dissuaded from returning to the crowd with the axe, he said "he would do it;" and striking the instrument, with great passion, into the ground, swore that he would "split down any fellows that were saucy." Accordingly, he mixed once more among the people; a struggle was immediately heard about the axe; the prisoner then struck the deceased with it on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound. "From these facts," said the chief justice, in summing up the evidence, "we are to inquire what crime the prisoner has committed? Murder in the first degree, is the wilful, deliberate, and premeditated killing of another. There are various inferior kinds of homicide; but, on the present indictment, our attention is confined to a consideration of the highest and most aggravated description of crime. Then, let us ask, did the prisoner wilfully kill the deceased? It is not pretended that there was any accident in the case; and, therefore, the act must have been wilful. Was the killing deliberate and premeditated? or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and losing that weapon, afterwards armed himself with an axe. It cannot surely be thought that the original combat was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled by a battery more violent; but the life of a fellow creature must not be taken, unless in self-defence. It has been objected, however, that the amendment of our penal code renders premeditation an indisputable ingredient to constitute murder of the first degree. But still, it must be allowed that the intention remains, as much as ever, the true criterion of crimes, in law, as well as in ethics: and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would 'split the skull of any fellows who should be saucy;' and he actually killed the deceased in the way which he had menaced. But, let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence. The construction which is now given to the act of assembly, on this point, must decide, whether the law shall have a beneficial or a

pernicious operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder; all the circumstances implying that malice, which is the gist of the definition of the crime at common law; and if he escapes with impunity, under an interpretation of the act different from the one which we have delivered, a case can hardly occur to warrant a conviction for murder in the first degree. Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged beyond the control of reason and the limit of justice, for the sake of individuals, the peace, order, and happiness of society will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations: but as far as respects the public, I have felt it a sacred duty to submit them to your consideration." The jury rendered a verdict of guilty of murder in the first degree.[d]

§ 1099. In a case in Virginia, it appeared on trial, that about nine o'clock of the morning on which the homicide was committed, the prisoner and the deceased were seen together, in the streets of Dumfries, as if about to engage in a personal conflict, but before any blow they were separated. They had both remained in town from that time until between one and two o'clock of the same day, but how employed it did not appear; about the latter hour the prisoner was seen passing a tavern on the street, about four hundred yards distant from the spot where the murder was committed, and, on being accosted by the witness, who was in the said tavern, he said he had been much injured by a man, whose name he knew not, who had kicked him in the face; and the witness saw, on the side of the prisoner's nose, a fresh wound, from which the skin had been abraded to the superficial extent of a four-pence-half-penny, or nine-penny piece. The prisoner seemed angry, and said he was determined to kill the man who had thus injured him. He then proceeded on about thirty yards farther, to the house of a butcher, and calling out the wife of the butcher, who was then at dinner, told her that her father (who was also concerned with her husband in the trade of a butcher) had sent him to borrow her husband's butcher-knife, which she immediately delivered to him. The shop where this took place was about four hundred and thirty yards from that where the murder was committed. Upon his return in about five or six minutes from the last-mentioned shop with the knife in his hand, as he was passing the tavern before mentioned, a short conversation took place between him and the first-mentioned witness, in which he reiterated his determination to kill the deceased, and was warned against the act by the witness. He proceeded along the same street about three hundred yards farther, and stopped at the wareroom of a merchant, where he asked the young man who was in attendance for a steel to sharpen the butcher's knife, declaring his intention to kill the man who had injured him. About twenty yards from the wareroom he turned into a cross street, and was heard denouncing loud threats of vengeance against the deceased, and declaring

[d] Resp. *v.* Mulatto Bob, 4 Dallas, 145. See, also, as a case where a verdict of murder in the first degree was sustained, Bennett *v.* Com. 8 Leigh, 781.

his intention to kill him. At the further corner of the first square, after entering the cross street, the prisoner found the deceased on the steps of a house, with his head hanging on his breast, apparently asleep. He roused the deceased by kicking him, and as the deceased, who was unarmed, and made no attempt at resistance, rose, the prisoner said he had come to kill him, and as the deceased answered that "he reckoned no man wanted to kill him," the prisoner thrust the butcher's knife into the breast of the deceased. The deceased cried out, "You have stabbed me," and the prisoner replied, "Damn you, if you don't hush, I will put the knife into you again." The deceased walked about one hundred and fifty yards, fell, and expired. The prisoner immediately going into a shop where he had a bundle, took it up, and walked quietly out of town to a house about two miles distant, where he was domesticated. To the owner of this house he related the incidents, and said he had given the deceased his death wound, and would keep out of the way some days, until he could ascertain whether or not he was dead. The prisoner and the deceased were both laborers. It was proved that the deceased was a turbulent man, and reputed a hard fighter. Nothing was said of the character of the prisoner. It did not appear that they had ever been together until the day preceding the death, when they were at a cock-fight; but whether they had any association there did not appear. At the time of the murder, the prisoner either did not know, or had forgotten the name of the deceased. Under the charge of the court a verdict of murder in the first degree was rendered.[e]

§ 1100. In another case under the Pennsylvania act, it appeared that the prisoner was an honest and industrious man, but addicted to intoxication, and when in that state was quarrelsome. It also appeared that his wife occasionally drank too much; and that on the day of the fatal occurrence they had fallen into a drunken squabble. During the quarrel the wife threw several stones at him, one of which struck him on the arm. A few moments after, they were seen struggling together, but soon after the wife was discovered fleeing with her infant in her arms, the prisoner pursuing her with an axe in his hand. When he came within reach of her he aimed a blow at her which fell on the head of the child as it lay upon the wife's shoulder, and caused a mortal wound, of which the child died. The prisoner soon recovered himself and showed many signs of repentance, and manifested much distress at the manner of the child's death. The learned judge who tried the case, in the course of his charge to the jury, said, "We now come to this point: what was the intention of the prisoner at the bar, when he killed Daniel Dougherty, his child? for, if his intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree; as much as if he had prepared a cup of poison for his wife and his child had drunk it. You, however, are in this case to judge of the law and facts. If you are of the opinion the injury the prisoner received from his wife throwing stones at him, and hitting him, kept

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[e] Burgess v. Com. 2 Virg. Cases, 484.

his passion boiling until he gave the fatal blow, we think it your duty to find him guilty of manslaughter. But if you are of the opinion his passion had time to cool, or in fact had cooled, after the assault on him by his wife, it is your duty to convict him of murder in the first degree." The verdict was manslaughter.[f] It should be observed, however, that, so far as this case goes, to assert that the same guilt attaches to the homicide of an unintended third party, that would to the homicide of the person originally intended, it has been disputed by a recent case in Tennessee.[g]

§ 1101. In a case which, at the time, excited much interest, Richard Smith and Ann Carson were tried at the Court of Oyer and Terminer in Philadelphia, for the murder of John Carson. It appeared that the deceased had been married about fifteen years to the defendant, Ann Carson, and had lived with her the first eleven years of their marriage, but, after that period had left the country, and had not been heard from, as was alleged on the part of the defendants, till a short time before his decease. In the mean time, the defendant Carson, believing or pretending to believe that her husband was dead, married the defendant Smith; Carson, however, returned, and finding the defendant, Smith, in possession of his marital rights, a quarrel ensued, which was, however, temporarily adjusted. On the seventeenth of January, the prisoner and the deceased dined together at the house of the latter, on which occasion Carson got enraged, at seeing the prisoner assume the direction of his children and his servants, and seizing a knife made an attempt to strike Smith, who laid hold of his arm, on which the deceased, with the other hand, took up another knife. Smith fled down the stairs pursued by Carson with the two knives in his hands. The evening of the same day the prisoner was seen in the kitchen with a pair of pistols, one of which was loaded, and it appeared that he then declared that if Carson should enter the door, to lay hands on him, he would shoot him. On the following Saturday evening the prisoner came to the house of Carson, and found several persons there, among whom was Jonathan B. Smith, of whom the prisoner demanded a pistol, but was refused. Mrs. Carson then said, "Let us go, you know where there is one." The prisoner swore that if Carson attempted to touch him, he would kill him. Immediately after this the prisoner went up stairs, and went into the parlor, where he found John Carson, Mrs. Carson, and several other persons. John Carson got up, and told Smith he had come to take peaceable possession of his house, that out of the house he must go. The prisoner then said, "Very well," and turning to Mrs. Carson, said, "Ann, shall I go?" who replied, "No, stay." The prisoner then went to the northeast corner of the room, and Carson following him, told him several times he must leave the house. Carson had nothing in his hands. Upon this, Smith drew a pistol from under his coat, and shot Carson in the mouth, and throwing the pistol on the floor ran down stairs. It was further in evidence, that Smith might have left the corner in the parlor without running

[f] Com. *v.* Dougherty, 7 Smith's Laws of Penn. 695.

[g] Bratton *v.* State, 10 Humph. 103; Whart. on Hom. 368-9.

against anybody. The learned judge who tried the case charged the jury, that the second marriage was invalid, that there had been ample cooling time since the first quarrel, that as a principle of law no affront, by word or gesture, would extenuate a homicide, and that a single moment's deliberation was sufficient to constitute premeditation, under the act of assembly. Applying such a view of the law to the facts of the case, he charged them that the offence, if anything, was murder in the first degree; and a verdict in accordance with the charge of the court as to defendant Smith, being rendered, he was subsequently executed.[h]

§ 1102. Where a youth of fifteen, with some other youths of his own age, was playing marbles, when the deceased, a full-grown man, interfered in the game, and upon being remonstrated with for so doing, became turbulent, and commenced inflicting personal chastisement upon one of the boys, and while doing so, the prisoner threw a stone at him, which struck him upon the head, and inflicted a wound of which he died, it was held that the boy was improperly found guilty of murder in the second degree, but that the case was one of mere manslaughter.[i]

§ 1103. In 1846, Chief Justice Hornblower, in a charge in a capital case, after quoting the New Jersey act, which, as has been observed, is the same as that of Pennsylvania, said, "This statute, in my opinion, does not alter *the law of murder* in the least respect. What was murder before its passage is murder now—what is murder now, was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases: or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and that in *all other kinds of murder*, the convict shall be punished by imprisonment. But the law of murder is the same.[j] It becomes then the duty of the court, in the first place, to define and declare what constitutes, and what will amount to the crime of murder at the common law; and if the jury believe that a defendant has been guilty of murder, it will be the duty and the province of the jury to say whether the prisoner is guilty of the murder in the *first* or in the *second degree.*

"Murder is defined to be the killing of a person under the peace of the State, with malice aforethought, either express or implied in law.[k] Independent, however, of the common law presumption of malice, all will agree, that killing by poison, by lying in wait, or by wilful and deliberate and premeditated design, is proof of express malice, and so killing by the use of a deadly weapon shows a clear intent to take life.

"Again, if a man in the act of perpetrating, or attempting to perpetrate, arson, rape, sodomy, robbery, or burglary, kill another, this is evidence of express malice; because such conduct evinces a depraved mind, and shows malice against all mankind. In all these cases, therefore, the killing is murder in the first degree. Again, the premeditation or intent to kill, need not

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[h] Com. *v.* Smith, Whart. on Hom. App. 389.
[i] Holly *v.* State, 10 Humph. 141.
[j] See Com. *v.* Dougherty, in I Brown, Append. p. 18.
[k] Russell on Crimes, 421.

be for a day, or an hour, nor even for a minute. For if the jury believe there was a design and determination to kill, distinctly formed in the mind at any moment before, or at the time the pistol was fired, or the blow was struck, it was a wilful, deliberate, and premeditated killing, and therefore murder in the first degree.

"Murder in the second degree under our statute, includes those cases of constructive murder which are not accompanied with an intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some less crime than those which I have above enumerated.

"Notwithstanding the difference is thus distinctly marked between murder in the first, and murder in the second degree, yet by the terms of the statute, it is to be referred to the jury to say in which degree the defendant is guilty, if guilty at all."[l]

§ 1104. A verdict of murder in the first degree was sustained in Tennessee, where it appeared that the deceased was killed on the night of the 3d of October, 1841; that the prisoner and he had had angry difficulties from a period long anterior up to the time of the commission of the offence, which resulted from mutual wrongs done or charged; that the prisoner accused the deceased of having harbored his wife, to his great personal injury, and the deceased accused him of having fired his house; that on the 11th day of September, 1841, not many days before the murder, the prisoner left the country in a steamboat, with threats in his mouth of vengeance for his injuries, which he declared he would have before he left; that one week before the murder, he returned in the steamboat Pensacola, and kept himself so concealed that but one person saw him certainly, others saw what they took to be his tracks, and one, a person in disguise, whom he supposed might have been him; that on the night the deceased took possession of the building which had formed the subject of the controversy between them, he was killed, cowardly and treacherously; and that the prisoner immediately fled the country again, and being captured at Memphis, denied that he had been in the county of Obion since his first departure on the 11th of September, but admitted that he had returned up the river in the steamboat Pensacola to within fifty miles of the residence of the deceased.[m]

§ 1105. In another case it appeared from the bill of exceptions that it was proved at the trial by two witnesses on behalf of the prosecution, that in the month of March, 1842, the prisoner, Wade Swan, the deceased, T. G. Moore, and one Joel Blackwell, the last a penitentiary convict, were assisting the witness to roll logs. While engaged at this employment the prisoner and the deceased both became intoxicated; they were friendly during the whole day, so far as witnesses knew. The two witnesses at the close of the day went to the house, leaving the other three in the field. When supper was ready, they were called to come and partake of it, and came; both the prisoner and deceased being still intoxicated. After supper the deceased took a seat by the door, and owing to his chair-post slipping through a crack of the floor,

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[l] State v. Spencer, 1 Zabriskie, R. 196.

[m] Stone v. State, 4 Humph. 34.

he knocked his head against the door-cheek. One of the witnesses, William Dye, asked deceased if he was hurt, and he said, "Not much." The prisoner then got a torch, and as he started out of the house tripped his foot and stumbled; the deceased said, "Take care and not fall." The prisoner replied, "Take care and not fall yourself," and left the house. The witness thought prisoner had gone home, but in about two minutes he returned and called to a little boy to take his torch; the witness told the boy to do so, and he took it. The prisoner was then seen having a handspike drawn in both hands, holding it to one side, and immediately stepping into the house he struck Moore, the deceased, two or three blows on the forehead, giving him a deep cut over the left eye two or three inches long, and breaking the bone over the eye. Two or three red spots on the forehead of the deceased were also noticed. The deceased was sitting down, with his head leaning against the wall, and made no resistance to the assault. This took place about eight o'clock at night, and Moore died about nine o'clock on the morning of the next day. The handspike was of young gum, about four and a half or five feet long, and very large. The weapon was considered very dangerous, and it was clear that the deceased came to his death by the blow inflicted by the prisoner, as before stated. The deceased spoke a very few words only, after he was stricken by the prisoner. The deceased was an inoffensive man, and would not take his own part when imposed upon. The deceased and prisoner had always been friendly, and the prisoner had invited the deceased to help him roll logs on the next day. Another witness for the State testified that about ten or eleven o'clock the next day, he saw the prisoner passing by his field, six or seven miles from the place where the murder was committed, and saw him run into the woods. This witness was a constable, and called to two other persons to assist him in arresting the prisoner. They pursued and overtook him. When he had arrested him, witness told him that he had killed Moore; prisoner said he supposed he had "died damned suddenly," as he had given him "a few pretty good taps;" that the deceased deserved them, as he had treated him "damned badly" about a twenty dollar note that Joel Blackwell had at the log-rolling; the prisoner said that he pronounced the note to be a counterfeit, and that the deceased jerked or snatched the note out of his hands, saying he was "a damned fool and no judge of money." The prisoner, also, when arrested, stated that he was hunting his cow. "The question," said the learned judge who gave the opinion of the court, "which first presents itself upon the record is, whether the facts sufficiently establish that the homicide is of that kind of wilful, deliberate, malicious and premeditated killing which, by the provisions of the second section of the act of 1829, c. 23, will constitute the crime committed to be murder in the first degree? The characteristic quality of this offence, and that which distinguishes it from murder in the second degree, or any other homicide, is the existence of a settled purpose and fixed design, on the part of the assailant that the act of the assault should result in the death of the party assailed;" and it appearing that death was the object sought for and wished, the judgment was affirmed, the case according to the evidence

coming within the definition of murder in the first degree as given in the statute.[n]

1106. A verdict of murder in the first degree in Pennsylvania, was supported by the court where it appeared that on the evening of the fatal occurrence, Sutcliffe, the deceased, was sitting with his infant in his arms, while his wife was preparing supper, when a knock was heard at the door (at the back part of the room which opened upon the commons), and Felix Murray, the defendant, entering, asked if the painter was in? Having been affirmatively answered, he sat down with a wheelbarrow strap in his hand. Sutcliffe handed his infant to his wife; a third person entered with a club, immediately struck Sutcliffe over the head with the club, and Murray beat him with the buckle end of the strap. The wife of the deceased, with her infant in her arms, fled, and falling through the window into the cellar brought assistance. When she came back the assailants had disappeared, but Sutcliffe was found in a state of great danger, and shortly afterwards died in consequence of the wounds thus received.[o]

§ 1107. Murder in the second degree includes all cases of deliberate homicide where the intention is not to take life, of which, homicide by a workman, throwing timber from a house into the street of a populous city, without warning, or a person shooting at a fowl, *animo furandi*, and killing a man, are instances frequently given.[p] There may, also, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree. Thus, where it appeared that the deceased, during the Kensington riots, was killed while a desultory fire was going on, the object of which was to prevent either of two contending parties from taking possession of a position which both of them were desirous of obtaining, it was said that a homicide, committed under such circumstances, though murder at common law, deliberation being shown, might not be murder in the first degree, and a verdict of murder in the second degree was consequently rendered. The learned judge who tried the case, however, charged the jury, "that if one or more of the parties so engaged in an unlawful combat, deliberately fire at and kill an innocent third person, taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder in the first degree. It would present the case of a wilful, deliberate, and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code. If the testimony in your judgment," he said, "brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position, or if the proofs adduced by the defendant have rebutted this allegation, or thrown

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[n] Swan *v.* State, 3 Humph. 137.

[o] Com. *v.* Murray, 2 Ashmead, 41.

[p] Whiteford *v.* Com. 6 Randolph, 721; Com. *v.* Dougherty, 7 Smith's Laws, 696.

a fair doubt upon its certainty, then you ought not and cannot justly convict him of that part of the charge involving capital punishment."[q]

§ 1108. To the same effect, Judge Rodgers charged a jury in the same course of trials: What, then, is the law in such a case? I say, unhesitatingly, the law is, that if, in such a conflict, death ensues, all parties are guilty of murder at common law. They are engaged in an unlawful design, which is the first ingredient of murder, and it is only necessary to consummate the offence, that death should be the consequence. It is not necessary, in order to charge a particular offender, that he should be proved to have fired the particular gun, or discharged the particular missile, that caused the fatal wound. In the contemplation of the common law, where a mob of ten thousand is engaged in an unlawful design, and one of them, not out of special malice, but a general design to do harm, fires a gun, they are all to be considered as having pulled the trigger. But while such is the common law, the Pennsylvania act of 1794, by creating a distinction between murder with a specific intent to take life, and murder without such intent, has established a test, which it becomes your duty in the next place to consider. The reason of the establishment of the new grade, undoubtedly was the inhumanity of attaching capital punishment to anything under an actual and specific intention to take life. Was there such an intent here? It is for you to say whether the parties who formed the mob, or either of them, were actuated by so incredibly malignant a temper. It will be well for you to consider, whether the object of such outbreak and of such intent, was not rather to humble than to slay an adversary; rather to chastise than to annihilate. But be this as it may, I charge you that no special malignity on the part of an individual or individuals, against a specific object, can affect his associates with the grade of the guilt incurred by himself. They are answerable for the common design of those with whom they associate; not for the private design of individuals. Should you find that the object of the conflicting parties in the riot in which the deceased found his death, was merely to humble and repulse each other—should you reject the theory that their object was death and annihilation—then your finding will be for murder in the second degree.[r]

§ 1109. Where the defendant was in such a state of drunkenness, as to be incapable of forming a design, the verdict, it is said, should be for the second degree.[s]

§ 1110. If a pregnant woman be killed in an attempt to produce abortion in her, and it appears that the design of the operator was not to take the life of the mother, it is murder in the second degree.[t]

§ 1111. In Virginia and Ohio, it is said that where a homicide is proved, the presumption is that it is murder in the second degree. If the prosecutor

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[q] Com. *v.* Hare, 4 Penn. Law Jour. 401.

[r] Com. *v.* Sherry, Whar. on Hom. App. 482.

[s] Com. *v.* Haggarty, cited Lewis, C. L. 403; Pirtle *v.* State, 9 Humph. 664; Hale *v.* State, 11 Humph. 154.

[t] Ex parte Chauncy, 2 Ashmead, 227.

would make it murder in the first degree, he must establish the characteristic of that crime, and if the prisoner would reduce it to manslaughter, the burden of proof is on him.[u]

In fine, wherever the deliberate intention is to take life, and death ensues, it is murder in the first degree; wherever it is to do bodily harm or other mischief, and death ensues, it is murder in the second degree; while the common law definition of manslaughter remains unaltered.

Where the killing with a deadly weapon is admitted, and there is no pretence that the wound was not designedly given, it is not error to charge, that if the offence is not manslaughter, it is murder in the first degree, as the jury might find that it was committed deliberately and premeditately, or in hot blood.[v]

§ 1112. But however clear may be the distinction between the two degrees, juries not unfrequently make use of murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect. Thus, where S. having conceived and declared a design to kill P., the parties met afterwards in front of S.'s own house, and a quarrel ensued, in which S. gave the first offence; P. proposed a fight; upon which S. retired for a very brief time into his house, armed himself with a loaded pistol, which he concealed in his pocket, and instantly returned so armed to the scene of quarrel; then P. threw a brickbat at S., which did not hit him, but falling short of him, broke, and a small fragment struck S.'s child, standing within his own door, who cried out, and S. hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "He has killed my child and I will kill him," advanced towards P., deliberately aimed and fired the pistol at him, then retreating with his face towards S., and the shot took effect and killed P. A verdict of murder in the second degree being rendered, the court refused to set it aside.[vv]

§ 1113. There are, however, certain features which, in cases of deliberate homicide, draw forth, generally, from the courts instructions to the jury that by them a deliberate intent to take life is shown.[w] Where a man makes use of a weapon likely to take life;[x] where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harbored design against the life of another;—such evidence goes a great way to fix the grade of homicide at murder in the first degree. Thus, where the defendant struck

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[u] Hill's case, 2 Gratt. 594; State v. Turner, Wright 20; ante, § 710.

[v] Kilpatrick v. Com. 7 Casey, 198.

[vv] Slaughters v. Com. 11 Leigh, 682; post, § 3148.

[w] See, generally, Whar. on Hom. 358–387.

[x] Kilpatrick v. Com. 7 Casey, 198.

the deceased violently on the head with a sharp and heavy axe, it was held murder in the first degree, deliberation being shown; and it was said by M'Kean, C. J., "Let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge human actions, be deemed a premeditated violence."[xx] Where a man loaded a pistol, took aim at, and shot another, it was held murder in the first degree.[y] If one man shoot another through the head with a musket or pistol ball—if he stab him in a vital part with a sword or dagger—if he cleave his skull with an axe, or the like—it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrator of such acts of deadly violence intended to kill.[z] Where the defendant deliberately procured a butcher's knife, and sharpened it for the avowed purpose of killing the deceased;[a] where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;[b] where he thrust a handspike deeply into the forehead of the deceased;[c] the presumption was held to exist, that the killing was wilful.[d] But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death. Thus, where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life.[e] The same presumption of intention is drawn with still greater strength from the declared purpose of the defendant.[f] Thus, where the prisoner, a negro, said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;[g] where it was said, "I am determined to kill the man who injured me;"[h] where the prisoner had declared, the day before the murder, that he certainly would shoot the deceased;[i] where, in another case, the language was, "I will split down any fellow that is saucy;"[j] where the prisoner rushed rapidly to the deceased, and aimed at a vital part;[k] where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed;[l] in each of these cases it was held murder in the first degree.

It must be noticed that premeditation, in the eye of the law, has no defined limits; and if a design be but the conception of the moment, it is as deliberate, so far as judicial examination is concerned, as if it were the plan of years. If the party killing had time to think, and did intend to kill, for a

[xx] Resp. *v.* Mulatto Bob, 4 Dallas, 145.
[y] Com. *v.* Smith, 7 Smith's Laws, 696; Whar. on Hom. 388.
[z] 4 Penn. Law Journ. 157.
[a] Com. *v.* Burgess, 2 Va. Cases, 484.
[b] Bennett's case, 11 Leigh, 749.
[c] Swan *v.* State, 4 Humph. 139.
[d] See U. S. *v.* Cornell, 2 Mason, 94; Woodside *v.* State, 2 Howard, 656; State *v.* Toohey, 3 Rice's Digest, 104; Com. *v.* Webb, 6 Randolph, 721.
[e] Com. *v.* Murray, 2 Ashmead, 57.
[f] Stewart *v.* Ohio, 1 Ohio St. R. 66.
[g] Jim *v.* State, 5 Humph. 174.
[h] Com. *v.* Burgess, 2 Va. Cases, 484.
[i] Com. *v.* Smith, 7 Smith's Laws, 697.
[j] Com. *v.* Mulatto Bob, 4 Dallas, 146.
[k] Com. *v.* O'Hara, 7 Smith's Laws, 694.
[l] Com. *v.* Zephon, Oyer and Term., Phila., July, 1844, MSS.

minute, as well as an hour or a day, it is a deliberate, wilful, and premeditated killing, constituting murder in the first degree.[m]

The evidence by which intent can be proved or inferred has already been fully considered.[n]

§ 1114. In an early case in Tennessee, it is true, it was said that a *previous* intent to take life must be positively shown;[o] but such is not the opinion which now obtains even in that State.[p] If the accused, as he approached the deceased, and first came within view of him at a short distance, then formed the design to kill, and walked up with a quick pace, and killed him, without any provocation then, or recently received, it is murder in the first degree.[q] "It is true," as was said in a late case, "the act says the killing must be wilful, deliberate, and premeditated. But every intentional act is, of course, a wilful one, and deliberation and premeditation simply mean that the act was done with reflection, and conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances. The law, reason, and common sense unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of predetermination."[r] Much difference of opinion exists on the question whether murder by "poisoning" or "lying in wait" must necessarily be murder in the first degree. In Virginia, the affirmative seems to be held;[s] but the contrary view is taken in Connecticut,[t] and in Pennsylvania.[u] Where there is an intention to commit a deliberate homicide, and an unintended person is killed, there has been some conflict of opinion, it being held in Pennsylvania to be murder in the first,[v] and in Tennessee to be murder in the second degree.[w]

§ 1115. It is not necessary, nor is it the practice to designate the grade of homicide in the indictment, nor that the killing should be charged to be wilful, deliberate, and premeditated.[x] So if murder be committed in the

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[m] Com. *v.* Smith, 7 Smith's Laws, 647; State *v.* Dunn, 18 Mo. (3 Bennett), 419; State *v.* Jennings, 18 Mo. (Ibid.) 435; People *v.* Clark, 3 Selden, 385; Kilpatrick *v.* Com. 7 Casey, 198; Donnelly *v.* State, 2 Dutch. (N. J.) 463, 601.

[n] See ante, § 631–5, 647–51 et seq.; see, particularly, Whar. on Hom. 358–387.

[o] Mitchell *v.* State, 5 Yerger, 340.

[p] State *v.* Anderson, 2 Tenn. 6; Dale *v.* State, 10 Yerger, 551.

[q] Whiteford *v.* Com. Randolph, 721; Anthony *v.* State, 1 Meigs, 265; Resp. *v.* Mulatto Bob, 4 Dallas, 146.

[r] Com. *v.* Daley, 4 Penn. Law Jour. 156; Davis *v.* State, 2 Humph. 439.

[s] Com. *v.* Jones, 1 Leigh, 610; Souther *v.* Com. 7 Grat. 678.

[t] State *v.* Dowd, 19 Conn. 391.

[u] Com. *v.* Keeper of Prison, 19 Connect. 391; see Whar. on Hom. 359, 360, &c. where the cases are fully given.

[v] Com. *v.* Dougherty, 7 Smith's Laws, 695.

[w] Bratton *v.* State, 10 Humph. 103; see Whar. on Hom. 363–366, where this question is fully discussed.

[x] Com. *v.* Wicks, 2 Va. cases, 387; Mitchell *v.* State, 5 Yerger, 340; Com *v.* Flannagan, 8 Watts & Serg. 415; Com. *v.* White, 6 Binney, 183; Com. *v.* Miller, 1 Va. cases, 310; Com. *v.* Gilbert, 2 Va. cases, 70; Hines *v.* State, 8 Humph. 597; Livingston's case, 14 Grattan, 592; Gehrke *v.* State, 13 Texas, 568; People *v.* Lloyd, 9 Cal. 54. In Missouri, however, it is held necessary to specify the murder to have been

perpetration of arson, rape, burglary, or robbery, it is not necessary that it should be so set out in the indictment.[y]

In Pennsylvania, it is not necessary that the indictment should conclnde, contrary to the form of the act of assembly, &c.[z] On an indictment for murder, perpetrated by means of poison, a verdict finding the prisoner "guilty in manner and form as stated in the indictment," was held in Pennsylvania to be as correct as of murder in the first degree, and sufficient to authorize the judgment of death.[a] A different and perhaps a better view, however, as will presently be seen, is held in Alabama,[b] Ohio,[c] Missouri,[d] where it is necessary for the jury to specify in their verdict the degree.[e]

1116. In Maine, but one case has so far been tried since the alteration of the common law, and in that case the same line of distinction seems to have been taken as appears in the foregoing cases. The learned judge who presided (Shepley, J.), charged the jury that they could find one of four verdicts, not guilty, guilty of manslaugher, guilty of murder in the second degree, or murder in the first degree. "If it was proved that the prisoner killed Otis, the burden was upon him to reduce the offence from murder. The distinction between murder in the first and second degree was, that it must be proved that the deed was done with express malice, and with an intent to take life. Murder in the second degree might be found where there was no intention to take life, but it was taken not upon a mutual combat or sudden provocation, but in an assault made in consequence of preconceived anger or resentment, although not amounting to an intention to kill. That, in this case, to reduce the offence to manslaugher, the prisoner must be satisfied from the facts proved by the government, that the assault was not the result of preconceived anger, but upon some new and sudden provocation given at the time, or in the mutual combat. If the prisoner went there for the purpose of flogging the deceased, and did make the assault accordingly, and there was no sufficient provocation to excite him anew, and no mutual combat, then, although he did not intend to kill, he would be guilty of murder in the second degre."[f]

The Ohio statute, with the decisions under it, have been already given.[ff]

§ 1117. In Indiana, the distinguishing feature of murder in the first degree, under the Rev. Stat. of 1843, is "deliberate and premeditated malice." This must be specially averred to constitute the offence, as the ordinary

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wilful and deliberate, and to state the circumstances making it such. Bower. *v.* State, 5 Mo. 364; State *v.* Jones, 20 Mo. 58. As to Ohio, see § 925, note. As to California, see People *v.* Wallace, 9 Cal. 30; People *v.* Lloyd, Ibid. 54; People *v.* Steventon, Ibid. 273; People *v.* Dolan, Ibid. 576; People *v.* Murray, 10 Cal. 309; People *v.* Choisier, Ibid. 310; People *v.* Urias, 12 Cal. 325.

[y] Com. *v.* Flannagan, 8 Watts & Serg. 415.

[z] Com. *v.* White, 6 Binney, 183.

[a] Com. *v.* Earle, 1 Wharton, 525; see State *v.* Town, Wright, 75, contra.

[b] Johnson *v.* State, 17 Ala. 618.

[c] State *v.* Town, Wright, 75; Dick *v.* State, 3 Ohio St. Rep. 88; Parks *v.* State, Ibid. 101.

[d] M'Gee *v.* State, 8 Mo. 495; State *v.* Upton, 20 Mo. 397.

[e] See Whar. on Hom. 284, 387.

[f] Com *v.* Varney, 8 Boston Law R. 542.

[ff] Ante, § 924-5.

common law indictment designates only murder in the second degree in that State.[g]

In Missouri, by the act of assembly defining murder in its different degrees, the distinction between murder, in the first and second degree, lies in the intention; where a homicide is committed, and an intent to do the act, and no circumstance of excuse, justification, or extenuation, recognized by law, exist, it is murder in the first degree.[gg]

§ 1118. In Kentucky, a statute was passed in 1801,[h] by which a similar distinction was supposed to have been created, but at the next session of the legislature it was enacted that the former statute should not be so construed as "in any way to alter or change the idea of murder, as it stands at common law."[i]

VII. Verdict.

§ 1119. The practice in this respect may be briefly stated as follows:—

1st. Under an indictment for murder, if there be a conviction for manslaughter, the more correct course is to find "not guilty of murder, but guilty of manslaughter." In Maryland this has been held essential.[j] But such a degree of particularity is inconsistent with the practice which has been generally sustained.[k]

§ 1120. 2d. Under an indictment for murder at common law, the defendant may be convicted of manslaughter,[l] though in Pennsylvania, not for the misdemeanor of involuntary manslaughter.[m]

§ 1121. 3d. Under an indictment for murder at common law, it has been ruled in Pennsylvania, that a general verdict of guilty will be sustained as a verdict for the higher grade; and the defendant sentenced on such verdict for murder in the first degree.[n] In a later case, however, when an indictment alleging that the defendant feloniously, wilfully, and of malice aforethought, cast a certain person into a dam, &c., and held her in and under the water, whereby she was drowned, a verdict of "guilty in manner and form as indicted," was held to be a verdict of murder in the second degree, and not in the first degree.[nn] The opinion elsewhere, is, that the verdict should designate the degree.[o]

Where the verdict is "guilty of murder in the second degree," it is not necessary to find "not guilty of murder in the first degree."[p]

In Ohio, the degree is required by statute to be specially found.[q]

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[g] Statutes, p. 229.

[gg] State v. Phillips, 24 Mis. (3 Jones) 475.

[h] 2 Morehead & Brown, 1267.

[i] Ibid. 1281.

[j] State v. Flannigan, 6 Md. 166; Weighurst v. State, 7 Md. 445.

[k] See cases cited ante, § 561, 2, 3.

[l] Ante, § 400, § 561, 2, 3, 627.

[m] Com. v. Gable, 7 S. & R. 423.

[n] Com. v. Earle, 1 Wharton, 525.

[nn] Johnson v. Com. 24 Penn. State R. (12 Harris) 386.

[o] Johnson v. State, 17 Alab. 688; Kennedy v. State, 6 Indiana, 485; State v. Town, Wright, 75; McGee v. State, 8 Mo. 495; State v. Upton, 20 Mo. 397; Ford v. State, 12 Md. 514; State v. Moran, 7 Clarks (Iowa), 236; Tulley v. People, 6 Mich. (2 Cooley) 273.

[p] Weighurst v. State, 7 Md. 445.

[q] Crimes Act, § 39, ante, § 928.

In California, on a trial under an indictment for murder, a verdict of "guilty" imports a conviction on every material allegation in the indictment, and is therefor a conviction for murder.[qq]

§ 1122. 4th. As a general rule, at common law, there can be no conviction for an assault, under an indictment for murder. In what respects this rule has been varied by statute or otherwise, has been discussed elsewhere.[r]

§ 1123. 5th. When the jury find the homicide is excusable, the practice in this country is not to find so specially, but to acquit.[s]

Finding a person indicted for murder guilty of manslaughter, is an acquittal of the charge of murder; and however contrary to the law and the evidence it may appear to the court, it cannot order a new trial.[t]

A person may be legally convicted as accessory before the fact of murder in the second degree.[u]

A verdict in the following words, "We the jury find from the evidence produced that the prisoner is guilty of the murder of B," is a general verdict.[v]

CHAPTER II.

RAPE.

A. STATUTES.

United States.
- Rape on the high seas, § 1124.
- Entering vessel with intent to commit rape, § 1125.

Massachusetts.
- Rape on female of ten or more, and carnal knowledge of child under ten, § 1126.

New York.
- Rape on female of ten years or more, or carnal knowledge of child under ten, § 1127.
- Rape through stupefaction, § 1128.

Pennsylvania.
- Rape and its punishment, § 1129.
- Proof of carnal knowledge, § 1129 (*a*).
- Assault, &c., § 1129 (*b*).

Virginia.
- Rape by white person on female of ten years or more, § 1130.

Ohio.
- Rape upon daughter or sister, § 1131.
- Rape on woman of ten or more, or carnal knowledge of female under ten, § 1132.
- Carnal knowledge of insane woman, § 1133.

B. RAPE AT COMMON LAW.

I. DEFENDANT'S COMPETENCY TO COMMIT OFFENCE, § 1134.
- 1st. Infancy, § 1134.
- 2d. Impotency, § 1135.
- 3d. Relationship, § 1136.

[qq] People *v.* March. 6 Cal. 543.

[r] See Wharton on Homioide, 284, ante, § 400, 627.

[s] Wharton on Homicide, 284.

[t] Ante, § 550.

[u] Jones *v.* The State, 13 Texas, 168.

[v] McGuffie *v.* State, 17 Geo. 194.

II. IN WHAT CARNAL KNOWLEDGE CONSISTS, § 1137.

III. IN WHAT WANT OF WILL CONSISTS, § 1141.
1st. Acquiescence obtained by fear, § 1142.
2d. Acquiescence obtained by ignorance of nature of act, § 1143.
3d. Acquiescence obtained by mistake or imposition as to the person, § 1144.
4th. Acquiescence obtained by artificial stupefaction, § 1146.

IV. PARTY AGGRIEVED AS A WITNESS, § 1149.
1st. Her admissibility and weight, § 1149.
2d. How far she may be corroborated by her own statements, § 1150.
3d. How she may be impeached, § 1151.
4th. Presumption of acquiescence from prior unchastity, § 1148.

V. PLEADING, § 1153.

VI. ASSAULTS WITH INTENT TO RAVISH, § 1155.

A.—Statutes.

United States.

§ 1124. *Rape on High Seas.*—If any person upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder, or rape, or shall, wilfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting, such person shall afterwards die upon land, within the United States, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death. (Act 3d March, 1825, sect. 4.)

§ 1125. *Entering Vessel with intent to commit Rape.*—If any person, upon the high seas, or in any of the other places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any vessel, boat, or raft; or if any person shall, wilfully and maliciously, cut, spoil, or destroy any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to any anchor or moorings, belonging to any vessel, boat, or raft; every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years, according to the aggravation of the offence. (Ibid. sect. 7.)

Massachusetts.

§ 1126. *Rape on Female of ten or more, and Carnal Knowledge of Child under ten.*—If any person shall ravish and carnally know any female, of the age of ten years or more, by force and against her will, or shall, unlawfully and carnally, know and abuse any female child, under the age of ten years, he shall suffer the punishment of death for the same. (R. S. chap. 125, sect. 18.)[a]

[a] Punishment changed to imprisonment for life; see Sup. Rev. Stat. p. 884. Under Stat. 1784, c. 66, s. 11, and Stat. 1805, c. 97, one indicted for rape might be found guilty of an assault with intent to commit a rape. (Com. *v.* Cooper, 15 Mass. 197.) Under the Rev. Stat. ch. 137, sect. 11, he may be found guilty of an assault and battery. (Com. *v.* Drum, 19 Pick. 497.) Under the same provision, where one was indicted for rape upon his own daughter, and the jury found the criminal connection, but negatived the force and violence, he was sentenced for incest. (Com. *v.* Goodhue, 2 Metcalf, 193.) An indictment for the abuse of a female child, which avers that the defendant, at a certain time and place, did assault "one B. C., a female child under the age of ten years," and "her, the said B. C., then and there" did abuse, is not

[Altered to imprisonment for life by Stat. 1852, chap. 2, sect. 259.)[aa]

NEW YORK.

§ 1127. *Rape on Female of ten years or more, or Carnal Knowledge of Child under ten.*—Every person who shall be convicted of rape, either, 1. By carnally and unlawfully knowing any female child under the age of ten years; or, 2. By forcibly ravishing any woman of the age of ten years or upwards, shall be punished by imprisonment in a State prison, not less than ten years. (2 R. S. 663, sect. 22.)

§ 1128. *Rape through Stupefaction.*—Every person who shall have carnal knowledge of any woman above the age of ten years, without her consent, by administering to her any substance or liquid, which shall produce such stupor, or such imbecility of mind, or weakness of body, as to prevent effectual resistance, shall, upon conviction, be punished by imprisonment in a State prison, not exceeding five years. (Ibid. sect. 23. See post, § 1180–1–2, 1191.)

PENNSYLVANIA.

§ 1129. *Rape and Carnal Knowledge of Female Children.*—If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will, or who, being of the age of fourteen years and upwards, shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent, such person shall be adjudged guilty of felonious rape, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding fifteen years. (Rev. Act, Bill I. sect. 91.)

§ 1129(*a*). *Proof of Carnal Knowledge.*—It shall not be necessary, in any case of rape, sodomy, or carnal abuse of a female child, under the age of ten years, to prove the actual emission of seed, in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only. (Ibid. sect. 92.)

§ 1129(*b*). *Assault with Intent to Commit Rape.*—If any person shall be guilty of committing an assault and battery upon a female, with intent, forcibly and against her will, to have unlawful carnal knowledge of such female, every such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. (Ibid. sect. 93.)[b]

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fatally defective, by reason of omitting the words "she then and there being," or other like words, after the first mention of the name of the child; nor by omitting to repeat her age after the second mention of her name. (Commonwealth *v.* Sullivan, 6 Gray, Mass. 477.

[aa] Under the Stat. of 1852, c. 250, § 2, by which rape of any female of the age of ten years or more, or abuse of any woman child under the age of ten years, is punished with imprisonment for life, an indictment which duly charges a rape is sufficient without stating the age of the female. (Commonwealth *v.* Sugland, 4 Gray (Mass.), 7.

[b] "The only act of assembly now in force in reference to this crime (rape), is the fourth section of the act of the 23d April, 1829, entitled 'A further supplement to an act to reform the penal laws of this Commonwealth,' Pamphlet Laws, 341. Brightly's Digest, 698, No. 1, which provides for its punishment, which previously had been inflicted under the fourth section of the act of 1794. The amendment contemplated by this section, makes the unlawful carnal knowledge of a woman child under the age of ten years, with or without her consent, a felonious rape. The ninety-fourth section punishes assaults, with intent to commit rape; and the ninety-third section settles a question which is sometimes agitated in courts, as to the evidence necessary to establish the consummation of the crime."—*Reviser's note.*

VIRGINIA.

§ 1130. *Rape by White Person of Female of twelve or more.*—If any white person carnally know a female of the age of twelve years or more, against her will, by force, or carnally know a female child under that age, he shall be confined in the penitentiary not less than ten nor more than twenty years.[c] (Code, 1849, ch. 191, s. 15. See Ibid. ch. 200, for similar offences by negroes.)

OHIO.

§ 1131. *Rape upon Daughter or Sister.*—If any person shall have carnal knowledge of his daughter or sister, forcibly and against her will, every such person so offending shall be deemed guilty of a rape, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor during life. (Act of March 7, 1835, sect. 4. Swan's Stat. 269.)

§ 1132. *Rape on Woman of ten or more, or Carnal Knowledge of Female under ten.*—If any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will,[d] or if any male person, of the age of seventeen years and upwards, shall carnally know and abuse any female child, under the age of ten years, with her consent; every such person so offending shall be deemed guilty of a rape, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty nor less than three years. (Ibid. sect. 5.)

§ 1133. *Carnal Knowledge of Insane Woman.*—If any male person, seventeen years old and upwards, shall have carnal knowledge of any woman, other than his wife, such woman being insane, he knowing her to be such; 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 ten, nor less than three years. (Ibid. sect. 6.)

I. DEFENDANT'S COMPETENCY TO COMMIT OFFENCE.

1st. INFANCY.

§ 1134. At common law, as has been seen, a child under fourteen years is presumed incapable of committing a rape,[e] though in Ohio this presumption may be rebutted by the prosecution.[f] The contrary, however, is the better approved opinion.[g] In New York, it is ruled[gg] that it is necessary that the evidence to overcome the presumption should be very strong. In

[c] Under a former statute, similar to the last, it was decided to be essential, to constitute an attempt to ravish, that some force should be exerted in order to overcome actual resistance. (4 Leigh, 648.)

[d] The law presumes that an infant under the age of fourteen years is incapable of committing or attempting to commit the crime of rape; but this presumption may be rebutted by proof that such person has arrived at the age of puberty. (Williams *v.* State, 14 Ohio, 222.) In a prosecution for rape, the declarations made by the injured female as to the transaction, immediately after the offence was committed, may be given in evidence to sustain her testimony given in court, but not as substantive testimony to prove the commission of the offence. (Johnson *v.* State, 17 Ohio, 593. See also, Laughlin *v.* State, 18 Ohio, 99.)

[e] 1 Hale, 631; R. *v.* Eldershaw, 3 C. & P. 11; R. *v.* Groombridge, 7 C. & P. 582; Stephen *v.* State, 11 Georgia, 227.

[f] Williams *v.* State, 14 Ohio R. 222; see ante, § 58 et seq.

[g] R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 C. & P. 118; Lewis, C. L. 558.

[gg] People *v.* Randolph, 2 Parker, C. R. 213.

Massachusetts, it has been held, Parker, C. J., dissenting, that a boy under twelve could be rightfully convicted of an assault with intent to commit a rape.[h] But whatever may be the limits of his capacity as a direct agent, it is clear that when concerned with others, he may be convicted as principal in the second degree,[i] or of an assault with intent to commit the offence.[j] In Ohio, as has been observed, the period of capacity, so far as the abuse of children and insane persons is concerned, is limited by statute at seventeen years.[k]

2d. Impotency.

§ 1135. Impotency is undoubtedly a sufficient defence to an indictment for the consummated offence, though not for an assault with intent.

The subject of impotency is fully considered in another work.[l]

3d. Relationship.

§ 1136. Though a husband cannot be convicted of the offence, he may be tried as the accessary of another therein, and the wife is a competent witness against both to prove the violence.[m]

II. In what carnal knowledge consists.

§ 1137. "A very considerable doubt," remarks Mr. East, "having arisen as to what shall be considered sufficient evidence of the actual commission of this offence, it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further inquiry were unnecessary after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace." The doubts, however, that existed in England, have been put to rest by the 9 Geo. IV. c. 31, making the least penetration enough; and in this country the proof of emission seems never to have been required. In several instances, in fact, it has been held, that as the essence of the crime is the

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[h] Com. v. Green, 2 Pick. 380; see State v. Handy, 4 Harrington, 566.
[i] R. v. Phillips, 8 C. & P. 736; 1 Russell & M. 675.
[j] Com. v. Green, 2 Pick. 380; R. v. Eldershaw, 3 C. & P. 396.
[k] Ante, § 1132-3.
[l] Wh. & St. Med. Jur. § 416, 419, 424.
[m] 1 Hale, 629; Lord Audley's case, 12 Mod. 340, 454; 1 St. Trials, 387; 1 Stra. 633.

violence done to the person and feelings of the woman, which is completed by penetration without emission, it will be sufficient to prove penetration. In New York, by statute, penetration alone is made sufficient to support conviction, without emission.

When, in an indictment for fornication and bastardy, the witness testified, "He forced me; he worked himself under me, and in that way forced me; I did not give my consent;" upon a demurrer to this evidence, it was held that it was not such as would merge the offence charged in the crime of rape, but that the defendant might be legally convicted of fornication.[n]

§ 1138. But while the slightest penetration is sufficient, the English practice is decisive that there must be specific proof of *some*.[o] It must be shown, to adopt the phraseology of Tindal, C. J., and afterwards of Williams, J., that the private parts of the male entered at least to some extent in those of the female.[p] At one time it was even thought that there must be proof that the hymen was ruptured,[q] though this is no longer considered necessary.[r] The law may now indeed be considered as settled that while the rupturing of the hymen is not now indispensable to a conviction, there must be proof, of some degree of entrance of the male organ, "within the labia of the pudendum,"[s] and the practice seems to be, to judge from the cases just cited, not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, whenever such proof was attainable. It seems but right, both in order to rectify mistakes and to supply the information necessary to convict, that the prosecutrix should be advised of this at the outset, so that she can take the necessary steps to secure such an examination in due time. If the principle be generally insisted upon, there is no danger of any conviction failing because of non-compliance with it; and on the other hand many mistaken prosecutions will be stopped at the outset.[t]

§ 1139. In this country it is in like manner unnecessary to prove either emission or rupture of the hymen, though proof of some degree of penetration is essential.[u] It has been said, however, that penetration may be presumed from circumstances without specific and positive proof of the organ by which it was effected. This method of proof, however, ought never to be resorted to except in extreme cases, where from the nature of the case no other evidence can be had.[v]

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[n] Com. *v.* Parr, 5 Watts & Serg. 345.

[o] R. *v.* Russen, 1 East, P. C. 438; R. *v.* Allen, 9 C. & P. 31; R. *v.* Jordan, 9 C. & P. 118.

[p] Ibid.

[q] R. *v.* Gammon, 5 C. & P. 321; see W. & S. Med. Jur. § 432.

[r] R. *v.* Hughes, 8 C. & P. 752; see R. *v.* McRue, 8 C. & P. 641.

[s] R. *v.* Lines, 1 C. & K. 393; see W. & S. Med. Jur. § 432.

[t] See W. & S. Med. Jur. § 432.

[u] State *v.* Leblanc, 3 Brevard, 339; Penns. *v.* Sullivan, Add. 143; Stroud *v.* Com. 11 S. & R. 177; Com. *v.* Thomas, 1 Virg. Cases, 307; see W. & S. Med. Jur. § 432.

[v] Com. *v.* Beale, Phila. Q. S., Nov. 1854. In this case, the court said on this point, on discharging a motion for a new trial: "The only remaining question is, whether the evidence given by the prosecutrix was sufficient, if believed, to sustain the verdict. It is true that the commonwealth failed to produce the corroboratory evidence, which

§ 1140. It was formerly thought that if the female conceived, this was evidence of consent which negatived rape. This notion, however, has long since been exploded.[w] In this country, it has been expressly held that the introduction of an averment that the prosecutrix was gotten with child, does not vitiate the indictment.[x]

III. IN WHAT WANT OF WILL CONSISTS.

§ 1141. The original doctrine, that it was necessary that the act should be *against the woman's will*, may now be considered as so far modified as to make it sufficient to constitute the offence that it should have been committed without her consent. The original position, it is true, remains unshaken, that carnal knowledge of the woman against her will is rape.[y]

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an inspection of the person of the witness and of her garments might possibly have afforded, and it is equally true, that we should have been more fully satisfied had such evidence been produced. There is no rule of law, however, which imperatively demands that the witness shall be corroborated by such evidence. The want of such corroboration is a circumstance to be considered by the jury; and, after being carefully advised on this point by the court, if they regard the evidence produced as satisfactory, the court should not interfere, unless satisfied that their decision was clearly unjust. This we are not prepared to say. The witness, it is admitted, was an innocent, pure-minded girl; she told her sad story with apparent candor, detailed all that occurred from the time that the ether was administered—the feeling of her pulse, her arm, her bosom, her person, the fixing of her feet, the drawing down of her body to the edge of the chair, and finally the pain she suffered. It is not strange that the jury believed her; for the question might well be asked—How could an innocent girl detail such occurrences, and with such precision, if it had not really occurred? There is nothing that appears so inconsistent in her story, or so apparently devoid of probability, that a jury should be instructed to disregard it, or that the court should interfere with their decision upon it. But it is said that, even if her statement be believed, it shows no legal evidence of penetration.

"It is impossible to lay down any general rules regulating the nature and amount of proof required to establish the commission of such an offence. Each case must be viewed under its own circumstances, and legitimate inference drawn from all the facts proved. Here the witness states the preparation made by the defendant: her feet, which had been crossed, were spread apart, one on each end of the stool; her body was drawn down to the edge of the chair, the defendant was before her, she felt his breath upon her face, which shows that the position of his body must have been leaning over her; and at that time she felt the pain which enabled her to say that she had no doubt that the defendant entered her person. If this evidence as to sensation and position is believed, upon such an issue as here presented, of the condition and knowledge of the witness, may not the jury determine from it whether the penetration sworn to was such as the law requires to constitute a rape?

"It is true, that she can only state, from the pain and from the defendant's breath, what part of his person he applied to hers; but if the jury understood her to mean that she believed her person was actually penetrated in the manner necessary to constitute a rape, and if, judging from her position upon the chair and the position which the defendant, being before her, must have occupied so as to bring his breath upon her face, they were convinced that her belief was well founded, we cannot say that the jury were not authorized to draw the inference which they have drawn from all the evidence. Upon this subject great care was taken by the court to warn the jury against making a strained or hasty inference, and the requirements of the law were so fully explained, that the jury could not have mistaken the fact which they are required to determine." See this case fully examined, W. & S. Med. Jur. § 443–458.

[w] 1 Hale, 631; 1 Hawkins, ch. 41, sec. 8.

[x] U. S. *v.* Dickinson, 1 Hempstead, C. C. 1. This case was tried before the territorial court of Arkansas, in 1820. A very extraordinary feature about the case is that this defendant was sentenced to be castrated. He was pardoned, however, and the sentence consequently was never executed.

[y] 1 Hawk. c. 41, s. 6.

But there are cases where the will may remain passive, or may even concur in the ultimate act, in which nevertheless rape is held to be complete. These cases will now be considered as follows:—

1st. Acquiescence obtained by fear.

§ 1142. Where the woman is insensible, through fright, or even where she consents when under fear of death or duress, the consummated act is rape.[z]

2d. Acquiescence obtained by ignorance of nature of act.

§ 1143. The consent of a female of very tender years, or even her aiding the prisoner in the attempt, is no defence.[a]

An infant under ten years of age cannot consent to sexual intercourse so as to rebut the presumption of force. And it would seem that where sexual intercourse is had with one over ten, who is still a child in stature, constitution, and physical and mental development, the court may be justified in saying that the party was in like manner incapable of giving consent.[b]

Under this head, also, may fall the cases presently to be noticed, where a married woman consents under the belief that it is her husband.[c] As to how far acquiescence produced by surprise or fraud will be a defence, has been the subject of much vacillation in the English courts. Thus in one case it was ruled that it was not an assault with an intent to commit a rape, for a medical man, under the pretence of administering an injection, to induce a woman to kneel down with her face on the bed, and then to attempt sexual connection with her by surprise.[d] On the other hand it was afterwards much doubted whether connection with a girl obtained by inducing her to believe she was at the time submitting to medical treatment was not rape,[e] the judges being unanimous that consent obtained by such process was no defence.[f] The effect of artificial stupefaction will be considered under another head. That of an unconscious submission during sleep has been discussed elsewhere.[g]

3d. Acquiescence obtained by mistake or imposition as to the person.

§ 1144. In England, having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband, was held by a majority of the judges not to amount to a rape; but several of the majority intimated, that should the point again occur, they would direct the jury to find a special

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[z] Dalt. c. 105, 607; 1 Hawk. P. C. Ca. 41; see W. & S. Med. Jur. § 438; Pleasant v. State, 8 Eng. (3 Ark.) 360; Wyatt v. State, 2 Swan (Tenn.) 394.

[a] Hays v. People, 1 Hill, N. Y. R., 351; Stephen v. State, 11 Ging. 225; Contra R. v. Dead, 1 Den. C. C. 377; 2 Car. & Kir. 957.

[b] Stephen v. State, 11 Georg. 225.

[c] See post, § 1144.

[d] R. v. Stanton, 1 Car. & Kir. 415.

[e] R. v. Case, 1 Eng. L. & Eq. 544.

[f] Ibid.

[g] W. & S. Med. Jur. § 440.

verdict.[h] In two subsequent cases, where the defendants were indicted for rapes under similar circumstances, Gurney and Alderson, Bs., directed an acquittal for the rape, but held that the defendants might be convicted of the assault, under the Stat. 7 W. IV. & 1 Vict. c. 85, s. 11, and the judges afterwards held, that upon such conviction, hard labor might be added to the sentence of imprisonment.[i]

In 1854, in a case where the finding was that the defendant got into bed with a married woman and had criminal connection, she believing him to be her husband, but where at the same time it was found that the intention on his part was not to consummate the act by force in case of discovery, but if detected, to desist, it was held by Jervis, C. J., Coleridge, J., Alderson, J., Martin, B., and Crowder, J., in a case reserved, that this was not rape.[j]

In Virginia, upon an indictment on statute of 1822, ch. 34, p. 3, the evidence was that the defendant, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force, and it was held that this was not attempt to ravish within the meaning of the statute.[k] But in New York a contrary rule has been held; and it was determined that when the offence was consummated before the prosecutrix, a married woman, found that the defendant was not her husband, the rape was complete.[l] And so it is said to have been determined in an anonymous case before Thompson, C. J., in Albany, at a Court of Oyer and Terminer.[m] So in an early case it seemed to be assumed in Connecticut that stealthy connection with a woman, under the impression on her part that it was her husband, was rape.[n] A contrary view, however, was taken by the Supreme Courts of Tennessee[o] and Alabama.[p]

§ 1145. Whether rape existed when a medical man had sexual connection with a young girl, who made no resistance, solely from a bona fide belief that the defendant was (as he represented) treating her medically, was a subject of much discussion in a very recent case in England in which, under the recent statute, the defendant had been convicted upon such evidence of an assault. "I entertain no doubt whatever in this case," said Wilde, C. J.; "to my mind, it is perfectly clear that the prisoner has been properly convicted. The learned recorder told the jury that the girl was of age to consent, and if they thought she had consented to what the prisoner had done, they ought to acquit the prisoner; but if they were of the opinion that she was ignorant of the nature of the prisoner's act, and made no resistance, solely from the belief that she was submitting to medical treatment, they ought to find him guilty. That was a most proper direction; and the jury have found that the prisoner was guilty, and that the girl made no resistance because she supposed

[h] R. v. Jackson, R. & R. 487.
[i] R. v. Saunders, 3 C. & P. 265, and R. v. Williams, Id. 286.
[j] R. v. Clark, 29 Eng. Law & Eq. 542.
[k] Com. v. Fields, 4 Leigh, 648.
[l] People v. Metcalf, 1 Wheel. C. C. 378.
[m] Ibid. 381.
[n] State v. Shephard, 7 Conn. 54.
[o] Wyatt v. State, 2 Swan, 394.
[p] Lewis v. State, 30 Alab. 54.

he was, as he represented to her, treating her medically. She was, according to the evidence, but fourteen years old, and it is quite reasonable to suppose that in this case this young person might have been totally ignorant of the nature of the act of the prisoner, and how it would affect her character, her station, and her happiness for the rest of her life. She consented to be medically treated by the medical man under whose care she had been placed by her parents. Was the defilement of her person medical treatment? Did the prisoner commit no legal, nor moral, and no ecclesiastical offence? To contend that a medical man could be justified in such conduct, under any conceivable circumstance, is not to be tolerated in a court of justice. Here the young woman did not resist in consequence of the representation of the prisoner. It was a most wicked act on the part of the defendant, and I am of opinion that the verdict of the jury was perfectly right."[q] "I am of the same opinion," said Alderson, B.; "in the case where a man obtains possession of a woman's person by fraud, the man is clearly guilty of an assault—perhaps of a rape—but certainly of an assault, which is included in a rape." "The young woman," said Coleridge, J., "consented only to medical treatment, from the confidence which she reposed in the prisoner—which confidence he so much abused—she made no resistance; but as the prisoner obtained his purpose by fraud, he was guilty of an assault." But the weight of authority in England now seems to be that consent negatives the assault.[r] In this last case, it should be observed, the only question was whether consent obtained under such circumstances as these was a defence, and it was agreed by all the judges that it was not.[s]

In a late case in Arkansas, it was said that where the defendant in such cases accomplished his purpose by fraud or surprise without intending to use force, it is not rape, though it is otherwise when the intent was to use force if the fraud failed.[t]

4th Acquiescence obtained by artificial stupefaction.

§ 1146. On the trial of an indictment for rape, it was proved that the prisoner made the prosecutrix drunk, and that when she was in a state of insensibility took advantage of it, and violated her. The jury convicted the prisoner, and found that the prisoner gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her. The fifteen judges held that the prisoner was properly convicted of rape.[u]

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[q] R. *v.* Case, 1 Eng. L. & Eq. 544; See R. *v.* Stanton, 1 Car. & Kir. 415.

[r] Post, § 1155. [s] R. *v.* Case, supra. [t] Pleasant *v.* State, 8 Eng. (3 Ark.) 360.

[u] Reg. *v.* Camplin, 1 Car. & K. 746; S. C. 1 Denis. C. C. 90. In a letter to Mr. Denison, by Mr. Baron Parke (1 Denis. C. C. Add. p. 1), that learned judge in commenting on Camplin's case, says: "Of the judges who were in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether that state is caused by the man or not—the accused knowing at that time she was in that state." And Tindal, C. J., and Parke, B., remarked, that in Stat. West. 2, c. 34, the offence of rape is described to be ravishing a woman "when she did not consent, and not ravish-

A conviction was sustained in Philadelphia, in 1854, when it appeared that the rape was committed by a dentist on his patient, when she was under the influence of ether; and this, although she was the only witness to the fact.[v]

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ing *against her will.*" But all the ten judges agreed, that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that by an unlawful act, and where also the prisoner must have known that the act was against her consent at the last moment she was capable of exercising her will, because he had attempted to procure her consent, and failed, the offence of rape was committed.

[v] Com. *v.* Beale, Phila. Q. S. 1854. The court said: "The last and most important reason relates to the weight of evidence, and the alleged want of evidence of penetration. The examination of the whole case, which this reason obliged us to make, certainly convinced us that it was not free from difficulty. In considering it, we must regard first the means of proof; 2d. The evidence given. The witness, whose evidence was relied on for the proof of the perpetration of the offence by the defendant was Miss Mudge, the prosecutrix. Her competency to testify was not questioned, and her evidence was given to the jury. It appeared that she had been placed under the influence of ether at the time when the alleged offence was perpetrated, and whether what she testified to was an actual occurrence or a delusion arising from the effect of the ether, was a prominent question made by the defence. A large portion of the evidence was designed to show to the jury the effect produced by ether upon the human system, and that its tendency was to excite mental action and produce fancies, which took their color from recent impressions. Upon the evidence thus submitted, the jury were called to decide. This issue was strongly presented, and the proof of the existence of such a delusion was confidently assumed by the defence. What might have been our opinion upon the propriety of relying solely upon the evidence produced by the commonwealth, where the chief witness stated the fact that she was under the influence of ether at the time to which her testimony referred, and in the absence of accompanying corroboration, need not now be considered, inasmuch as the defendant assumed to show the actual condition of the witness at the time, and presented the question of her ability to know the facts to which she testified, fairly and fully to the jury. Had this not been so, we are free to say that our opinion might have been different, but after the most anxious consideration, we have been unable to rest upon any principle which would authorize the court to interfere with the decision of the jury upon an issue submitted to them by the defendant; that issue was exclusively one of the fact, and by the decision of it we are bound. The reliance to be placed on the statements of the prosecutrix was thus submitted entirely to their consideration. They were to decide upon the credibility of the witness, and of her opportunity and capability of knowing the facts to which she testified. As to her general credibility no question was made by any one; her character for veracity stood entirely unimpeached. As to her opportunity and capability of knowing the facts to which she testified, much evidence was submitted to the jury. The effect of ether upon the system was explained by many witnesses. Some of these persons exhibited a mental and physical condition very analogous to that described by Miss Mudge as existing in her case, and upon the whole evidence the jury were left to determine whether she was in a state of consciousness which enabled her to know what was going on around her, or whether, influenced by a delusion, she had detailed the particulars of a dream. The jury found in favor of her consciousness, and believed that the facts detailed by her were realities and not delusions. Is it for the court to decide that in this the jury have erred? Why was the evidence of men of science, and of persons who had themselves been under the influence of ether, submitted to the jury, unless to enable them to judge to what extent the administration of ether produced delusion, and whether the witness was so influenced by it? This was the peculiar province of the jury. In every case where the mental or moral condition either of a party or of a witness is put in issue, the decision of such condition is for the jury. Where insanity or intoxication is relied on as defence, it is for the jury to ascertain from the evidence the extent to which the party is influenced. So the testimony of a witness may be impeached by proof of insanity or intoxication existing at the time of the transaction in relation to which he testifies; but certainly the jury upon the whole evidence must decide the question of credibility. The fact that a person has taken spirituous liquors does not render his testimony inadmissible unless the effect is shown to be such as to deprive him of the capacity of knowing that to which he testifies. Nor, it is presumed, will the use of ether disqualify, unless the quantity taken has produced certain effects, of which the jury are the judge. If the mere fact of having taken ether rendered a witness unworthy of belief, upon what principles could those witnesses, called by the

In 1860, a similar conviction was sustained in the Court of Common Pleas of Mercer County, Ohio.[vv]

§ 1147. In New York, as has already been observed, carnal knowledge effected by stupefaction is made rape by statute.[w]

5th. PRESUMPTION OF ACQUIESCENCE FROM PRIOR UNCHASTITY.

§ 1148. The fact of the woman being a common strumpet, or the mistress of the defendant, is no bar, though such fact undoubtedly would prejudice her testimony.[x]

To what extent evidence impeaching the prosecutrix's character may be received, will be presently considered.

IV. PARTY AGGRIEVED AS A WITNESS.

1st. HER ADMISSIBILITY AND WEIGHT.

§ 1149. The party aggrieved is so much considered as a witness of necessity in this as in other personal injuries,[y] that in Lord Audley's case, who assisted another man in ravishing his own wife, she was admitted as a witness against him.[z] If the witness be of good character; if she presently discovered the offence, and made search for the offender; if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry, these and the like circumstances carry a strong, but not a conclusive presumption, that her testimony is false or feigned.[a]

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defendant to prove the existence of delusion as one of the effects of that drug, be offered? They all testified to their condition while under its influence; and if they are worthy of belief, why may not the prosecutrix be equally credible? The existence of delusion in the mind of the witness was, therefore, regarded as exclusively a question for the jury, and they were strongly charged by the court to consider the evidence bearing upon this part of the defence cautiously, and to hesitate to convict, unless fully convinced that the witness could be properly relied on. We see no reason to doubt the correctness of the decision of the jury upon the evidence submitted to them upon this question. Whether the evidence was all that was proper or that could have been produced, it is not for us to determine. The defendant called such witnesses as he deemed sufficient for his case, and that he has been unable to satisfy the jury, is not sufficient reason for the interference of the court." See this case fully discussed. W. & S. Med. Jur. § 458, &c. The rightness of the verdict in this case was much doubted at the time, and shortly afterwards, after a careful re-examination, and on the express ground of the doubts entertained, a pardon was granted by Governor Pollock.

[vv] State *v.* Green, reported in full in Wh. & St. Med. Jur. 2d ed. § 459.

[w] Ante, § 1128.

[x] 1 Hale, 629; Arch. by Jerv. 453; see Pleasant *v.* State, 8 Eng. (3 Ark.) 360.

[y] Ante, § 769.

[z] Lord Audley's case, Hutt. 116; 1 State Tr. 387; 1 Stra. 633; 1 Hale, 629; 12 Mod. 340, 354.

[a] 4 Black. Com. 213.

While no unreasonable suspicion should be indulged against her on trial, courts and juries should be cautious in scrutinizing her testimony, and guarding themselves from the influence of sympathy on her behalf.[b] It is no excuse, as has been said, that the woman consented after the fact, nor that she was a common strumpet, for she is still under the protection of the law, and may not be forced; nor that she was first taken with her own consent, if she was afterwards forced against her will; nor that she was a concubine to the ravisher; for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these latter circumstances, however, are material to be left to the jury in favor of the party accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence.[c] And in California the court has gone so far as to say that no rape case should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances, without the court warning them of the danger of conviction on such testimony.[cc]

2d. How far she may be corroborated by her own statements.

§ 1150. In all cases, what she herself said so recently after the fact as to preclude the possibility of her being practised on, has been holden to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement,[d] except to corroborate her testimony when attacked.[e]

In Ohio, the rule is, that in a prosecution for rape, or for assault with intent, &c., "the substance of what the prosecutrix said," or the "declarations" made by her immediately after the offence was committed, may be given in evidence, in the first instance, to corroborate her testimony.[ee]

Where the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood, but neither the mistress nor the washerwoman was under recognizances to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner, the judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in their examination.[f]

Where, on an indictment for rape, the judge trying the case admitted

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[b] People *v.* Shelse, 3 Hill's N. Y. R. 309.
[c] 1 Hale, 628, 631; 1 Hawk. c. 41, s. 2; 4 Blac. Com. 213; Cro. Car. 485.
[cc] People *v.* Benson, 6 Cal. 221.
[d] R. *v.* Brazier, 1 East, P. C. 444; R. *v.* Clarke, 2 Stark. 241; People *v.* Crouch, 2 Whe. C. C. 42; Stephen *v.* State, 11 Georg. 225; Johnson *v.* State, 17 Ohio, 593; R. *v.* Walker, 2 M. & R. 212; People *v.* M'Gee, 1 Denio, 19; Laughlin *v.* State, 18 Ohio, 99; see ante, § 665.
[e] Pleasant *v.* State, 15 Arkans. 624; *contra*, Phillips *v.* State, 9 Humph. 246, where greater latitude is allowed.
[ee] McCombs *v.* The State, 8 Ohio State R. (N. S.) 643.
[f] R. *v.* Stroner, 1 Car. & Kir. 650.

evidence of the declarations of the injured party immediately after the event, though she herself had not been brought as a witness, being at the time incapable of testifying, such admission was held error by the Supreme Court of New York,[g] and such is the general rule.[h]

Such evidence is admissible merely as corroboration, not to patch out the case of the prosecution by supplying new facts.

On a trial for rape, which ultimately came before the Virginia Court of Appeals, the main question was as to the identity of the prisoner. The female was examined, and although she swore positively that the prisoner was the person who committed the outrage upon her, she declined to give a description of him as at the time of the outrage. The commonwealth then introduced a witness to prove the particulars of the description of the person who committed the outrage, given by the female to the witness on the morning after the rape was committed, and before she had seen the prisoner, in corroboration of the female witness. It was held that though it was competent to prove the fact of a recent complaint by the female for the purpose of sustaining her credit, it was not competent to prove the particulars of her complaint; nor to prove the particulars of the description given by her. And it was further held that the female having declined to give a description of the person who committed the outrage when upon oath, it is not competent to prove the description given by her when not upon oath.[i]

3d. How she may be impeached.

§ 1151. In England, it was formerly held that the defendant might impeach the character of the prosecutrix for general chastity by general evidence, but not by particular acts.[j] So far was this view pushed that it was held that the witness was not bound to say whether she had had connection with other men, or with a particular person named; and that evidence of her having had such connection was inadmissible.[k] Since then, however, the witness was required to answer whether she had not had voluntary connection with the prisoner on a previous occasion;[l] and in another case, upon her denying that she had had previous connection with third persons, evidence was received to contradict her.[m] So independent evidence is admissible to show that the prosecutrix had had a prior voluntary connection with the defendant.[n] It has even been held admissible to ask the prosecutrix whether, *after* the alleged rape, she had not been on the town.[o]

§ 1152. In this country, there has been some conflict of authority. In New York, it has been held admissible to compel an answer from the prose-

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[g] People *v.* M'Gee, 1 Denio, 21; see Com. *v.* Gallagher, 4 Penn. Law Jour. 511.

[h] R. *v.* Nicholas, 2 C. & K. 246; 2 Cox C. C. 139; R. *v.* Guttridge, 9 C. & P. 471.

[i] Brogy *v.* Com. 10 Grattan, 722.

[j] R. *v.* Clarke, 2 Starkie, R. 241.

[k] R. *v.* Hodgson, R. & R. 211.

[l] R. *v.* Master, 6 C. & P. 562; Pleasant *v.* State, 15 Ark. 624.

[m] R. *v.* Robins, 2 Moody & R. 512; but see, contra, People *v.* Jackson, 3 Parker Cr. R. 391.

[n] R. *v.* Aspinwall, 2 Starkie, Ev. 700.

[o] R. *v.* Barker, 3 C. & P. 589; see R. *v.* Clay, 5 Cox C. C. 146.

cutrix as to whether she had had previous criminal connection with other men,[p] though if she denies such acts it is said that she cannot be contradicted by other witnesses.[pp]

In Vermont, the question was held competent, though it was not decided whether she could be compelled to answer.[q]

In North Carolina and Ohio, it is held that the evidence should be confined to general character,[qq] and that the prosecutrix cannot be interrogated as to previous criminal intercourse with persons other than the accused himself; nor is such evidence of other instances admissible.

In California, it is said that where the prosecutrix is the only witness, evidence that she had committed acts of lewdness with other men is admissible, as tending to disprove the allegation of force and total want of assent on her part. It is immaterial by whom particular instances of lewdness with other men are proved, and it is unnecessary to question the prosecutrix in regard to them.[a]

On a trial for rape, or for assault with intent to commit a rape, the acts and declarations of the husband of the woman on whom the offence is allegd to have been committed, are not admissible to discredit the wife examined as a witness.[b]

A., being indicted for committing a rape on B., it was held that evidence showing bad character on the part of B.'s parents is inadmissible.[c]

V. Pleading.[r]

§ 1153. It is the practice to join a count for an assault with an intent to commit the rape with a count for rape itself,[s] and a general verdict of guilty carries the greater offence.[ss]

Whether there is a merger of the assault, when the felony is proved, has been already considered.[t]

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[p] People *v.* Abbott, 19 Wend. 192; though see Pleasants *v.* State, 15 Arkan. 624; Love *v.* Murphy, 6 Shepl. 372; Camp. *v.* State 3 Kelly, 407.

[pp] People *v.* Jackson, 3 Parker, C. R. 391.

[q] State *v.* Johnson, 2 Wms. (28 Vt.) 512.

[qq] State *v.* Jefferson, 6 Iredell, 305; McCombs *v.* State, 8 Ohio St. R. (N. S.) 643. As to impeaching of witnesses generally, see ante, § 814–821.

[a] People *v.* Benson, 6 Cal. 221.

[b] McCombs *v.* The State, 8 Ohio St. R. (N. S.) 643.

[c] State *v.* Anderson, 19 Missouri (4 Bennett), 241.

[r] See Wh. Prec. for Forms, as follows:—

(186) General forms.

(187) For carnally knowing and abusing a woman child under the age of ten years. Mass. Stat. 1852, ch. 259, § 2.

(188) Rape. Upon a female other than a daughter or a sister of the defendant, under Ohio stat. p. 48, sec. 2.

(189) Rape. Upon a daughter or sister of the defendant, under Ohio stat. p. 48, sec. 1.

(190) Rape. Abusing female child with her consent, under Ohio stat. p. 48, sec. 2.

[For assaults with intent to ravish, see 253, &c.]

[s] Harman *v.* Com. 12 Serg. & Rawle, 69: Buck *v.* State 2 Har. & John. 426; State *v.* Coleman, 5 Porter, 52; State *v.* Montagué, 2 M'Cord, 287; State *v.* Gaffney, Rice, 431; Stevens *v.* State, 11 Georgia, 227; see ante, § 419.

[ss] Cook *v.* State, 4 Zabr. (N. J.) 845; ante, § 418.

[t] See ante, § 564.

§ 1154. A count in an indictment, charging that the prisoner, a slave, "with force and arms, in the county aforesaid, in and upon one A. (then and there being a free white woman), feloniously did make an assault, and her, the said A., then and there feloniously did attempt to ravish and carnally know, by force and against her will, and in said attempt did forcibly choke and throw down the said A.," is not bad for duplicity or uncertainty. The last allegation is but a minute description of the manner of the assault, and may be rejected as surplusage.[u]

The words "ravish,"[uu] and "forcibly and against the will," are necessary in the indictment,[v] though in Pennsylvania it was held that the omission of the latter word was not fatal when it was charged that the defendant "feloniously did ravish and carnally know her."[w]

Where an indictment for a rape charged that the defendant, "with force and arms, &c., in and upon one Mary Ann Taylor, in the peace of the State, &c., violently and feloniously did make an assault, and her, the said Mary Ann Taylor, then and there violently and against her will, feloniously did ravish and carnally know," the court can and must see with certainty that Mary Ann Taylor was a female.[x]

An indictment for rape need not allege that the defendant was over fourteen years of age, nor that the female was not the wife of the defendant.[xx]

If the description of rape in an indictment leave out the word "unlawfully," but be in accordance with the common law definition of the offence, it is sufficient.[y]

How far the defendant may be convicted of the assault on a count for the rape has been already considered.[z]

VI. Assault with intent to ravish.

[*For statutes in reference to assaults with intent to ravish, see post, § 1264, &c.*]

§ 1155. Where the prisoner decoyed a female child into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held, that though there was no evidence of his having actually touched her, he was properly convicted of an assault with intent to ravish.[a]

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[u] Green *v.* State, 23 Miss. (1 Cush.) 509.

[uu] Gongleman *v.* People, 3 Parker, C. R. (N. Y.) 15.

[v] State *v.* Jim, 1 Devereux, 142; ante, § 401. Under the laws of Maine, the acts necessary to constitute the crime of rape must be done "by force," and these words or something equally significant, cannot be dispensed with in an indictment. The word "violently" does not fulfil the demands of the statute. State *v.* Blake, 39 Maine (4 Heath), 322.

[w] Harman *v.* Com. 12 Serg. & R. 65; Com. *v.* Bennett, 2 Virg. Cases, 235; see ante, § 197.

[x] State *v.* Farmer, 4 Iredell, 224; S. P. State *v.* Hussey, 7 Iowa, 409.

[xx] Commonwealth *v.* Scannel, 11 Cush. (Mass.), 547.

[y] Weinzorplin *v.* State, 7 Blackf. 186; see ante, § 401.

[z] Ante, § 627.

[a] Hayes *v.* People, 1 Hill, 351.

§ 1156. On an indictment for an assault with intent to commit a rape, the prosecutrix stated that the defendant, her medical man, being in her bedroom, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the defendant was proceeding to have a criminal connection with her, upon which she instantly raised herself up, and ran out of the room. She stated that the defendant had penetrated her person a little; it was held, that if it had appeared that the defendant had intended to have had a criminal connection with the prosecutrix, by force, the complete offence of rape would, upon this evidence, have been proved, but that the thus getting possession of the person of the woman by surprise, was not an assault with intent to commit a rape, but was an assault.[b] Assent, it was held in a subsequent case, even when given by a child, negatives the assault.[c] These cases, however, are in conflict with the cases already cited in this country,[d] where it was held that fraudulent connection with a married woman is rape.

It should be observed, however, that there is a distinction between *an assault to commit a rape*, and an *assault with an intent to have an improper connection*. There may be cases in which the jury may not be satisfied that it was intended to consummate the offence by force, but merely to tempt the prosecutrix to consent. In this case it is proper to indict for the assault with intent to have an improper connection.[e] An indictment charging an assault and an "attempt to ravish, &c.," is insufficient to support a charge of an assault with intent to commit rape.[f] A prisoner may be convicted of an assault with intent to commit a rape, without the testimony of the party injured.[g]

CHAPTER III.

SODOMY.

A. STATUTES.
- MASSACHUSETTS, § 1157.
- NEW YORK, § 1158.
- PENNSYLVANIA, § 1159.
- VIRGINIA, § 1160.

B. AT COMMON LAW.

A.—STATUTES.

MASSACHUSETTS.

§ 1157. Every person who shall commit the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State prison, not more than twenty years.—(Rev. Stat. chap. 130, sect. 14.)

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[b] R. *v.* Stanton, 1 Car. & Kir. 415.
[c] R. *v.* Dead, 1 Den. C. C. 377; 2 Car. & Kir. 957.
[d] See ante, § 1144.
[e] R. *v.* Stanton, 1 C. & K. 415; R. *v.* Saunders, 8 C. & P. 265; R. *v.* Williams, 8 C. & P. 286; R. *v.* Case, 1 Den. C. C. 580; 1 Eng. Law & Eq. 544.
[f] State *v.* Ross, 25 Mis. (4 Jones) 426.
[g] People *v.* Bates & Parker, C. R. (N. Y.) 27.

NEW YORK.

§ 1158. Every person convicted of the detestable and abominable crime against nature, committed with mankind or a beast, shall be punished by imprisonment in a State prison, for a term not more than ten years.—(2 Rev. S. 689.)

PENNSYLVANIA.

§ 1159. *Sodomy.*—If any person shall commit sodomy or buggery, he shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.—(Rev. Code, Bill I. § 32.)

Solicitation, &c.—If any person shall unlawfully and maliciously assault another, with the intent to commit sodomy or buggery, or if any person shall wickedly and unlawfully solicit and incite, and endeavor to persuade another, to permit and suffer such person to commit sodomy or buggery with him, such person shall be guilty of a misdemeanor, and being convicted of an assault with the intent aforesaid, or if so inciting another to suffer the act of sodomy or buggery to be committed with him, shall be sentenced to pay a fine not exceeding three hundred dollars, and undergo an imprisoument, by separate or solitary confinement at labor, not exceeding three years.—(Rev. Code, § 33.)[a]

VIRGINIA.

§ 1160. If any free person shall commit the crime of buggery, either with mankind or with any brute animal, he shall be confined in the penitentiary, not less than one, nor more than five years.—(Code, 1849, ch. 191, sect. 15.)

B.—AT COMMON LAW.

§ 1161. The evidence required in the case of sodomy is the same as in rape, with a few exceptions;[b] it being held that to constitute the offence, the act must be in the part where sodomy is usually committed.[c] The act committed in a child's mouth is not enough.[d] A party consenting to the act is not sufficient to procure a conviction without confirmation; it being held that such party is an accomplice, upon whose unsupported testimony a conviction would not be sustained.[e]

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[a] "Attempts to commit, and solicitations to commit this crime, are not embraced within the provisions of the act of 1829. Punishment in such cases must now be inflicted under the fourth section of the act of 1790, entitled 'An act to reform the penal laws of this State.' 2 Smith's Laws, 530. Brightly's Digest, 644; and the first section of the act 4th April, 1807, entitled, 'A further supplement to the penal laws of this State.' 4 Smith, 393. Brightly's Digest, 644, Nos. 21 and 22. These sections of the acts of 1790 and 1807 are general provisions, which prescribe imprisonment at hard labor not exceeding seven years, in all cases where previously burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping, or imprisonment for life might have been inflicted. As these sections are proposed to be repealed, it is necessary to provide against these offences, as well as all others supposed to be so circumstanced."—*Reviser's note.*

[b] 2 Russ. on Crimes, 698.

[c] R. *v.* Jacobs, R. & R. 331.

[d] Ibid.; see, generally, 1 Hale, 669; 3 Inst. 58, 59; 1 Hawk. P. C. C. 4.

[e] 2 Russ. on Cr., 6th Am. ed. 698.

CHAPTER IV.

MAYHEM.

A. STATUTES.
UNITED STATES.
Cutting ear, tongue, nose, etc., or limb, on the high seas, or abetting in same, § 1162.
MASSACHUSETTS.
Cutting tongue, eye, ear, lip, limb, etc., or aiding in same, § 1163.
NEW YORK.
Cutting tongue, eye, lip, or limb, etc., § 1164.
PENNSYLVANIA.
Cutting tongue, eye, nose, or limb, or pulling out eye, § 1165.
Punishment for the same, § 1166.
VIRGINIA.
Shoot, stab, cut, or wound, or causing bodily injury, with intent to maim, disfigure, disable, or kill, § 1167.
An attempt to commit felony unlawfully, shoot, stab, cut, or wound another person, § 1168.
Unlawfully shooting at another person, § 1169.
OHIO.
Maiming or disfiguring another with intent, etc., § 1170.
B. MAYHEM AT COMMON LAW, § 1171.

A.—STATUTES.

UNITED STATES.

§ 1162. *Cutting Ear, Tongue, Nose, or Limb, &c., on the high seas, or abetting in same.*—If any person or persons within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure[a] such person in any of the manners before mentioned, then and in every such case the person or persons so offending, their counsellors, aiders, and abettors (knowing of and privy to the offence aforesaid), shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.—(Act 30th April, 1790, sect. 3.)

MASSACHUSETTS.

§ 1163. *Cutting Tongue, Eye, Ear, Lips, Limb, &c., or aiding in same.*—If any person, with malicious intent to maim or to disfigure, shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit, or mutilate the nose or lip, or cut off or disable a limb or member of any other person, every such offender, and every person privy to such intent, who shall be present aiding in the commission of such offence, shall be punished by imprisonment in the State prison, not more

[a] This includes disabling the arm of a man by shooting at it with intent to maim. U. S. *v.* Scroggins, 1 Hempstead, 478.

than twenty years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than three years.—(Rev. Stat. ch. 125, sect. 10.)

NEW YORK.

§ 1164. *Cutting Tongue, Eye, Lip, or Limb, &c.*—Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony; shall, 1. Cut out or disable the tongue; or, 2. Put out an eye; or, 3. Slit the lip, or slit or destroy the nose; or, 4. Cut off or disable any limb or member of another, on purpose, upon conviction thereof, shall be imprisoned in a State prison, for such term as the court shall prescribe, not less than seven years.—(R. S. 664, sect. 27.)

PENNSYLVANIA.

§ 1165. *Cutting Tongue, Eye, Nose, or Limb, or putting out Eye.*—If any person on purpose, and of malice aforethought, by lying in wait,[b] shall unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose, ear,[c] or lip, or cut off or disable any limb or member of another, or brand another with intention in so doing to maim or disfigure such person, or shall voluntarily, maliciously, and of purpose,[d] pull or put out an eye, or bite off the nose, ear, lip, limb, or member, or any part of the nose, ear, lip, limb, or member of his opponent while fighting, or otherwise, every such offender shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, three-fourths parts whereof shall be for the use of the party grieved, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years: *Provided also*, That the party grieved shall, in such prosecution, be received as a competent witness, his credibility to be judged of the jury as in other cases.—(Rev. Acts, 1860, Bill I. § 80.)

§ 1166. Attempts at mayhem, &c.[e]

VIRGINIA.

§ 1167. *Shoot, stab, cut, or wound, or causing Bodily Injury with intent to maim, disfigure, disable, or kill.*—If any person maliciously shoot, stab, cut, or wound any

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[b] The first clause of this act, as was remarked by the Supreme Court in an early case, is borrowed from the words of the British statute of 22d and 23d of Charles II. c. 1, s. 7. It pursues the same language, except that the Pennsylvania act particularly enumerates the cutting off "the ear," and mildly varies the mode of punishment. Under the English statute, commonly called the *Coventry Act*, it has been adjudged not necessary that either the malice aforethought, or lying in wait, should be expressly proved to be on purpose to maim or disfigure. Leach's Cases, 193, Tickner's case. He who intends to do this kind of mischief to another, and by *deliberately watching an opportunity*, carries that intention into execution, may be said to *lie in wait on purpose.* Ib. 194, Mill's case.

Under the first clause of the act of Assembly, no intent to maim or disfigure in a *particular* manner is necessary; and, therefore, if the general intent be established, to the satisfaction of the jury, the next material inquiries will be, as to the malice and lying in wait, whether the same have been proved, or can fairly be inferred from all the circumstances which have been disclosed in evidence.

The second clause of the 6th section of the act goes further than the *Coventry Act*, and was evidently introduced to prevent the infamous practice of gouging. The words are very comprehensive, and extend to pulling out or putting out the eye, while fighting, or otherwise. But it was held to be necessary, in order to convict on this clause, that a specific intent to pull out, or put out the eye, must be shown to the satisfaction of the jury. Com. *v.* Langcake and Hook, 1 Yeates, 417.

[c] Cutting or biting off the ear is not mayhem at common law. 6 S. & R. 226.

[d] Under this clause a particular intent must be shown. 1 Y. 415.

[e] See post, § 1275, &c.

person, or by any means cause him bodily injury, with intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one, nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, at the discretion of the jury, if the accused be white, or of the court, if he be a negro, either be confined in the penitentiary not less than one, nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars.—(Code, 1849, chap. 191, sect. 9.)

§ 1168. *In attempt to commit Felony, unlawfully shoot, stab, cut, or wound another Person.*—If any free person, in the commission of, or attempt to commit a felony, unlawfully shoot, stab, cut, or wound another person, he shall, at the discretion of the jury, if the accused be white, or of the court, if he be a negro, either be confined in the penitentiary not less than one, nor more than five years, or be confined in jail not exceeding one year, and fined not exceeding five hundred dollars.—(Ibid. sect. 10.)

§ 1169. *Unlawfully shooting at another Person.*—If a free person unlawfully shoot at another person, in any street in a town, or in any place of public resort, whether in a town or elsewhere, he shall be confined in jail not less than six months, nor more than three years, and be fined not less than one hundred, nor exceeding one thousand dollars.—(Ibid. sect. 11.)

OHIO.

§ 1170. *Maiming or disfiguring another with intent, &c.*—If any person voluntarily, unlawfully, and on purpose, cut or bite the nose, lip or lips, ear or ears; or cut out or disable the tongue; put out an eye; slit the nose, ear, or lip; cut or disable any limb or member of any person, with intent to murder, kill, maim, or disfigure such person; 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 twenty years, nor less than one year.—(Act of March 17, 1835, Swan's Stat. sect. 23, 272.)

B.—MAYHEM AT COMMON LAW.[c]

§ 1171. Mayhem, at common law, says Mr. East, is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening the man's hand, or finger, or striking out an eye, or fore tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or

[c] For indictments in mayhem, see Wh. Prec. as follows:—
(192) Indictment on Coventry Act, 22 and 23 Car. 2, c. 1, for felony, by slitting a nose, and against the aider and abettor.
(193) Mayhem by slitting the nose, under the Rev. Stat. Massachusetts, ch. 125, § 10.
(194) Mayhem by cutting out one of the testicles, under the Pennsylvania statute.
(195) Against principal in first and second degree for mayhem in biting off an ear, under the statute of Alabama.
(196) Biting off an ear, under Rev. Stat. N. C. 34, c. 34.
(197) Maliciously breaking prosecutor's arm with intent to maim him, under the Alabama statute.

nose are not such at common law. But in order to found an indictment or appeal of mayhem, the act must be done maliciously, though it matters not how sudden the occasion.[d]

§ 1172. Where maiming is proved to have been done, the law will presume it to have been done on purpose, and with an intent to maim, until the contrary appears from evidence; and no sudden rencontre shall be deemed sufficient to excuse the party maiming, unless it be done in necessary self-defence against some great bodily harm attempted by the person maimed, and where there are no other means of preventing it; or under circumstances of like kind.[e] All mayhems are said to be felony, because anciently the offender had judgment of the loss of the same member, &c., which he had occasioned to the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been considered more in the nature of an aggravated trespass. Lord Coke accordingly classes it as an offence "under felonies deserving death, and above all other inferior offences."[f]

§ 1173. To constitute a maim, under the North Carolina statute, by biting off an ear, it is not necessary that the whole ear should be bitten off. It is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely.[g] In an indictment for cutting off an ear under the Rev. Sts., c. 34, sec. 48, of North Carolina, it need not be alleged whether it was the right or the left ear.[h] In an indictment under the same statute, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute.[i] It is not necessary in such case to prove malice aforethought, or a preconceived intention to commit the maim.[j]

§ 1174. The putting out an eye is a mayhem at common law,[k] and an indictment under the 55th section of the Tennessee penal code for putting out an eye, must aver that the party was thereby "maimed."[l]

The biting off a small portion of the ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention is directed to it, is not mayhem under the statute of Alabama.[m]

§ 1175. An intentional and unnecessary mutilation by a slave, of any of the members of a white person, enumerated in the statute of Alabama, as constituting mayhem, will be wilfully committed within the meaning of the

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[d] State *v.* Danforth, 3 Conn. 112; 1 East, P. C. 393; Co. Litt. 126, 288; 3 Inst. 62, 118; Staundf. 38 b; 1 Hawk. c. 44, sec. 1, 2; 2 Hawk. c. 23, s. 16; 3 Blac. Com. 121; 4 Blac. Com. 205.

[e] State *v.* Evans, 1 Hayw. 281.

[f] Co. Litt. 127; 1 Hawk. c. 44, s. 3; 2 Hawk. c. 23, s. 18; 4 Blac. Com. 205, 206.

[g] State *v.* Girkin, 1 Iredell, 121.

[h] State *v.* Green, 7 Iredell, 39.

[i] State *v.* Girkin, 1 Iredell, 121.

[j] Ibid.

[k] Chick *v.* State, 7 Humph. 161; Com. *v.* Reed, 3 Amer. Law Jour. 140.

[l] Chick *v.* State, 7 Humph. 161.

[m] State *v.* Abram, 9 Ala. 928.

act. But, if the slave be engaged in mortal strife, his adversary armed with a deadly weapon, and he defenceless, such a mutilation will not be considered as wilfully done, unless from the circumstances of the case, it can be considered as having been wantonly done.[n]

The technical offence of mayhem has never, in Massachusetts, been considered a felony, either by statute or at common law.[o] The words "felonious assaulter," in the statute, do not make it felony.[p] In Georgia, mayhem is said not to be felony at common law, except when by castration.[q]

In Pennsylvania, the practice is to charge it as a felony.[r]

CHAPTER V.

ABDUCTION AND KIDNAPPING.

A. STATUTES.

MASSACHUSETTS.

Secretly confining or imprisoning any other person, or forcibly carrying or sending such person out of State, § 1176.
Offences mentioned in preceding section—where they may be tried, § 1177.
Fraudulently enticing or taking away an unmarried woman of chaste life, § 1178.
Time of commencing prosecution, § 1179.

NEW YORK.

Compelling a woman to marry a man by force, menace or duress, § 1180.
Taking any woman unlawfully with intent to compel her by force, etc., to marry him or other person, § 1181.
Taking away any female child under fourteen years, from her father, mother, guardian, &c., § 1182.
Forcibly seizing or confining any person, § 1183.
Trial of offence in last section, § 1184.
Consent of person kidnapped or confined no defence, § 1185.
Necessary after fact, to kidnapping or confining, § 1186.
Selling or transferring the services of any black, who has been forcibly taken away, § 1187.
Where offence prohibited in last section may be tried, § 1188.
Forcibly or fraudulently leading, taking or carrying away, any child under twelve years, § 1189.
Exposing child with intent to abandon it, § 1190.
Abduction of female under twenty-five years, of previously chaste character, § 1191.

PENNSYLVANIA.

Taking or enticing a child away from its parents, § 1192.
Kidnapping, § 1193.
Sale of fugitive slaves to be void, § 1194.

VIRGINIA.

Taking or detaining a white female against her will, with intention of marrying or defiling her, § 1197.
Free person selling a free person as a slave, § 1198.

OHIO.

Kidnapping a white person, § 1199.
Kidnapping, &c., negroes; prohibited, § 1200.
Punishment, &c., § 1201.

B. OFFENCE AT COMMON LAW, § 1202.

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[n] State *v.* Abram, 9 Ala. 928.
[o] Com. *v.* Newell, 7 Mass. 244.
[p] Ibid.; State *v.* Danforth, 3 Com. 112.
[q] Adams *v.* Barratt, 5 Georgia, 403.
[r] Com. *v.* Reed, 3 Amer. Law Jour. 140; Whar. Prec. 162.

A.—STATUTES.

MASSACHUSETTS.

§ 1176. *Secretly confining or imprisoning any other Person, or forcibly carrying or sending such Person out of State, &c.*—Every person who, without lawful authority, shall forcibly or secretly confine or imprison any other person, within this State, against his will, or shall forcibly carry or send such persons out of this State, or shall forcibly seize and confine, or shall inveigle or kidnap any other person, with intent either to cause such person to be secretly confined or imprisoned in this State, against his will, or to cause such person to be sent out of this State against his will, or to be sold as a slave, or in any way held to service against his will; and every person who shall sell, or in any manner transfer for any term, the service or labor of any negro, mulatto, or other person of color, who shall have been unlawfully seized, taken, inveigled, or kidnapped from this State, to any other State, place, or country, shall be punished by imprisonment in the State prison, not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than two years.—(Rev. Stat. ch. 125, sect. 20.)[a]

§ 1177. *Offences mentioned in preceding section, where they may be tried.*—Every offence mentioned in the preceding section may be tried either in the county in which the same may have been committed, or in any county, in or to which the person so seized, taken, inveigled, kidnapped, or sold, or whose services shall be sold or transferred, shall have been taken, confined, held, carried, or brought; and upon the trial of any such offence, the consent thereto, of the person so taken, inveigled, kidnapped, or confined, shall not be a defence, unless it shall be made satisfactorily to appear to the jury that such consent was not obtained by fraud, nor extorted by duress or by threats.—(Ibid. sect. 21.)

§ 1178. *Fraudulently enticing or taking away any Unmarried Woman of chaste life.*—SECT. 1. Any person who shall fraudulently and deceitfully entice, or take away any unmarried woman, of a chaste life and conversation, from her father's house, or wheresoever else she may be found, for the purpose of prostitution, at a house of ill-fame, assignation, or elsewhere, and every person who shall aid and assist in such abduction, for such purpose, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by confinement to hard labor, in the State prison, for a term not exceeding three years, or by imprisonment in the common jail for a term not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment in the common jail, in the discretion of the court.—(Gen. Laws Mass. Sess. 1845, chap. 216.)[b]

§ 1179. *Time of commencing Prosecutions.*—SECT. 2. All prosecutions under the provisions of this act shall be commenced within two years from the commission of the offence and not afterwards.—(Ibid.)[c]

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[a] The Massachusetts Rev. Stat. c. 125, s. 20, providing for the punishment of those who, without lawful authority, forcibly confine any person in this State, or carry any person out of the State against his will, apply to soldiers of another State, acting under martial law, and under the military authorities of that State, in time of civil war and insurrection, who come into this State and seize and carry away the insurgent citizens of that State, who are found here. (Com. *v.* Blodgett, 12 Metc. 56.)

[b] The carrying away of a free black child, five years of age, against her will, from the family of the person by whom she had formerly been owned as a slave, and secreting her, is an offence within this statute. (Com. *v.* Robinson, Thacher's C. C. 488.)

[c] The Massachusetts statute of 1845, c. 226, prescribing the punishment for fraudulently and deceitfully enticing, or taking away an unmarried woman, for the purpose

NEW YORK.

§ 1180. *Compelling a Woman to marry a Man, by force, menace, or duress.*—Every person who shall take any woman unlawfully, against her will, and by force, menace, or duress, compel her to marry him, or to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in a State prison not less than ten years.—(2 Rev. Stat. p. 663, sect. 24.)

§ 1181. *Taking any Woman unlawfully with intent to compel her by force, &c., to marry him or other person.*—Every person who shall take any woman unlawfully, against her will, with the intent to compel her by force, menace, or duress, to marry him, or to marry any other person, or to be defiled, upon conviction thereof, shall be punished by imprisonment in a State prison for such time as the court shall prescribe, not less than ten years.—(Ibid. sect. 25.)

§ 1182. *Taking away any Female Child under fourteen years from her father, mother, guardian, &c.*—Every person who shall take away any female child, under the age of fourteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of prostitution, concubinage, or marriage, shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.—(Ibid. sect. 26.)

§ 1183. *Forcibly seizing or confining any Person.*—Every person who shall, without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other, with intent either—1st, to cause such other person to be secretly confined or imprisoned in this State against his will; or, 2d, to cause such other person to be sent out of this State against his will; or, 3d, to cause such person to be sold as a slave, or in any way held to service against his will, shall, upon conviction, be punished by imprisonment in a State prison, not exceeding ten years.—(Ibid. sect. 28.)

§ 1184. *Trial of Offence in last section.*—Every offence prohibited in the last section may be tried either in the county in which the same may have been committed, or in any county through which any person so kidnapped or confined shall have been taken while under such confinement.—(Ib. sect. 29.)

§ 1185. *Consent of Person kidnapped or confined no Defence.*—Upon the trial of any such offence, the consent of the person so kidnapped or confined thereto, shall not be a defence, unless it appear satisfactorily to the jury, that such consent was not extorted by threats or by duress.—(Ibid. sect. 30.)

§ 1186. *Accessary after fact to Kidnapping or Confining.*—Every person who shall be convicted of having been an accessary after the fact, to any kidnapping or confinement, hereinbefore prohibited, shall be punished by imprisonment in a State prison, not exceeding six years, or in a county jail, not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. sect. 31.)

§ 1187. *Selling or transferring the Services of any Black, who has been forcibly taken away.*—Every person who shall sell or in any manner transfer, for any term, the services or labor of any black, mulatto, or other person of color, who shall have been forcibly taken, inveigled, or kidnapped from this State to any other State,

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of prostitution, does not apply to the case of a man's enticing such woman to leave her place of abode, for the sole purpose of illicit sexual intercourse with him. (Com. *v.* Cook, 12 Metc. 93.)

place, or country, shall, upon conviction, be punished by imprisonment in a State prison, not exceeding ten years, or in a county jail, not exceeding one year, or by a fine, not exceeding one thousand dollars, or by both such fine and imprisonment.—(Ibid. sect. 32.)[cc]

§ 1188. *Where Offence prohibited in last section may be tried.*—Every offence prohibited in the last section may be tried in any county in which the person of color so sold, or whose services shall be so transferred, shall have been taken, kidnapped, or inveigled, or through which he shall have been carried or brought.—(Ibid. sect. 33.)

§ 1189. *Forcibly, fraudulently, leading, taking, or carrying away, any Child under twelve years.*—Every person who shall maliciously, forcibly, or fraudulently, lead, take, or carry away, or decoy or entice away any child under the age of twelve years, with intent to detain and conceal such child, from its parent, guardian, or other person having the lawful charge of such child, shall, upon conviction, be punished by imprisonment in a State prison not exceeding ten years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. sect. 34.)

§ 1190. *Exposing Child, with intent to abandon it.*—If the father or mother of any child under the age of six years, or any other person to whom any such child shall have been confided, shall expose such child in any highway, street, field, house, or out-house, with intent wholly to abandon it, he or she shall, upon conviction, be punished by imprisonment in a State prison not exceeding seven years, or in a county jail not more than one year.—(Ib. sect. 35.)

§ 1191. *Abduction of Female under twenty-five years, of previously chaste character.*—Any person who shall inveigle, entice, or take away any unmarried female of previously chaste character, under the age of twenty-five years, from her father's house, or wherever else she may be, for the purpose of prostitution at a house of ill-fame, assignation, or elsewhere, and every person who shall aid or assist in such abduction for such purpose, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding two years, or by imprisonment in a county jail not exceeding one year: provided, that no conviction shall be had under the provisions of this act on the testimony of the female so inveigled or enticed away, unsupported by other evidence, nor unless an indictment shall be found within two years after the commission of the offence.[d]—(Laws 1848, chap. 105.)

[cc] This does not apply to the sale in another State of a black, kidnapped here: otherwise it would be repugnant to amendment 6 and to art. 4, § 2, of the Constitution of the United States. The crime provided for by § 30, is kidnapping with intent to kill. (People *v.* Merrill, 2 Parker, C. R. (N. Y.) 590.)

[d] The words, "previous chaste character," as used in the New York act of March 20th, 1848, to punish abduction as a crime, mean actual personal virtue in the female; and to sustain an indictment, it is necessary that she should have been chaste and pure in conduct and principle up to the time of the commission of the offence, or the commencement of the act on the part of the accused, which resulted in the abduction of the female.

The word "previous," in this connection, must be understood to mean immediately previous, or to refer to a period terminating immediately previous, to the commencement of the guilty conduct of the defendant.

Although the female has previously fallen from virtue, yet if she subsequently reformed and became chaste, she may be a subject of the offence declared in the statute.

The prostitution intended by the statute was that of the female to the lustful appetites of men at any place where prostitution of the character common at houses of ill-fame or assignation is practised.

In order to constitute the offence created by the act of March 20th, 1848, the abduc-

PENNSYLVANIA.

§ 1192.—*Enticing a Child from its Parents.*—If any person shall maliciously, either by force or fraud, lead, take, or carry away, or decoy or entice away, any child, under the age of ten years, with the intent to deprive its parent or parents, or any other person having the lawful charge or care of such child, of the possession of such child, by concealing and detaining such child from such parent or parents, or other person or persons having the lawful charge or care of it, or with intent to steal any article of apparel or ornament, or other thing of value or use, upon or about the person of such child, or to whomsoever such article may belong, or shall receive and harbor, with any such intent as aforesaid, any such child, knowing the same to have been so by force or fraud led, taken, or carried, or decoyed, or enticed away as aforesaid, every such person shall be guilty of a misdemeanor, and upon conviction thereof, be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years: *Provided always,* That no person who shall have claimed to be the father of any illegitimate child, or to have any legal right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of getting possession of such child, out of the possession of the mother or other person having lawful charge thereof.—(Rev. Act, Bill I. § 94.)

§ 1193. *Kidnapping Negro, &c.*—If any person or persons shall, by force or violence,[e] take and carry away, or cause to be taken or carried away, or shall, by

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tion of the female must be for the purpose of her indiscriminate meretricious commerce with men. Such must be the case to make her a prostitute, or her conduct prostitution, within the act. Accordingly, where it was proved that the female, when she left her home, went voluntarily, and not at the instance of the defendant, and that she had since lived and cohabited with him, and with no one else, it was held that an indictment would not lie for her abduction.

On the trial of an indictment for abduction, it is erroneous to charge the jury that they are to judge in regard to the meaning of the word "prostitution." (Carpenter *v.* People, 8 Barbour, 603.)

[e] In a late case, involving the constitutionality of the acts, on which this is based, Edward Prigg, a citizen of the State of Maryland, was indicted in the Court of Oyer and Terminer of York County, Pennsylvania, for having forcibly taken and carried away, from that county to the State of Maryland, a negro woman, named Margaret Morgan, with the design and intention of her being held, sold and disposed of as a slave for life. Edward Prigg pleaded not guilty, and the jury found a special verdict, on which judgment was rendered for the Commonwealth of Pennsylvania. The case was removed to the Supreme Court of the State, and the judgment of the Court of Oyer and Terminer was, *pro forma,* affirmed; and the case was carried to the Supreme Court of the United States; the constitutionality of the law under which the indictment was found being denied by the counsel of the State of Maryland, which State had undertaken the defence for Edward Prigg, and prosecuted the writ of error. The cause was brought to the Supreme Court with the sanction of both the States of Maryland and Pennsylvania, with a view to have the question in the case settled. Margaret Morgan was the slave for life, under the laws of Maryland, of Margaret Ashmore, a citizen of that State. In 1832, she escaped and fled from the State, into Pennsylvania. Edward Prigg, having been duly appointed the agent and attorney of Margaret Ashmore, and having obtained a warrant from a justice of the peace of York County, caused Margaret Morgan to be taken as a fugitive from labor, by a constable of the State of Pennsylvania, before the magistrate, who refused to take cognizance of the case; and thereupon Edward Prigg carried her and her children into Maryland, and delivered them to Margaret Ashmore. The children were born in Pennsylvania, one of them more than a year after Margaret Morgan had fled and escaped from Maryland.

"It will probably be found," it was said by Story, J., in delivering the opinion of the court, "when we look to the character of the Constitution of the United States itself, the objects which it seeks to attain, the powers which it confers, the duties which

fraud or false pretence, entice or cause to be enticed, or shall attempt so to take, carry away, or entice, any free negro or mulatto from any part of this common-

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it enjoins, and the rights which it secures, as well as to the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied which may not allow, even if it does not positively demand, many modifications in its actual applications to particular clauses. Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. By the general law of nations, no nation is bound to recognize the state of slavery as to foreign slaves within its territorial dominions, when it is opposed to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon, and limited to, the range of the territorial laws."

"The clause in the Constitution of the United States," it was said, "relating to fugitives from labor, manifestly contemplates the existence of a positive, unqualified right, on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control, or restrain. Any State law or regulation which interrupts, limits, delays or postpones the rights of the owner to the immediate control of his services or labor, operates *pro tanto*, a discharge of the slave therefrom. The question can never be, how much he is discharged from, but whether he is discharged from any, by the natural or necessary operation of the State laws or State regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive right."

"The owner of a fugitive has the same right to seize and take him in a State to which he has escaped or fled, that he had in the State from which he escaped; and it is well known that this right to seizure or recapture is universally acknowledged in all the slaveholding States. The court have not the slightest hesitation in holding, that under and in virtue of the Constitution, the owner of the slave is clothed with the authority in every State of the Union, to seize and recapture his slave, wherever he can do it without any breach of the peace, or illegal violence. In this sense, and to this extent, this clause in the Constitution may properly be said to execute itself, and to require no aid from legislation, State or national."

"The Constitution," it was declared, "does not stop at a mere annunciation of the right of the owner to seize his absconding or fugitive slave, in the State to which he may have fled. If it had done so, it would have left the owner of the slave, in many cases, utterly without any adequate redress. It declares that the fugitive slave shall be delivered up on claim of the party to whom service or labor may be due. It is exceedingly difficult, if not impracticable, to read this language, and not to feel that it contemplated some further remedial redress than that which might be administered at the hand of the owner himself. 'A claim' is to be made. 'A claim,' in a just judicial sense, is a demand of some matters as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty. It cannot well be doubted that the Constitution requires the delivery of the fugitive on the claim of the master; and the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required the means are given; and where the duty is enjoined, the ability to perform is contemplated to exist on the part of the functionaries to whom it is intrusted."

"The right to seize and retake fugitive slaves," it was ruled, "and the duty to deliver them up, in whatever State of the Union they may be found, is, under the Constitution, recognized as an absolute, positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State sovereignty, or State legislation. The right and duty are co-extensive and uniform in remedy and operation throughout the whole Union. The owner has the same security, and the same remedial justice, and the same exemption from State regulations and control, through however many States he may pass with the fugitive slave in his possession, *in transitu*, to his domicil." "No doubt," it was said, "was entertained that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and to remove them from their borders, and otherwise to secure themselves against their depredation and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owner of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases

wealth, to any other place whatsoever out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such free negro or mulatto, as a slave or servant for life, or for any term whatsoever, every such person or persons shall be guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding two thousand dollars, one-half whereof shall be paid to the person or persons who shall prosecute for the same, and the other half to this commonwealth, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding twelve years; if any person or persons shall hereafter knowingly sell, transfer, or assign, or shall knowingly purchase, take a transfer or assignment of any free negro or mulatto, for the purpose of fraudulently removing, exporting or carrying such free negro or mulatto out of this State, with the design or intent, by fraud or false pretences, of making him or her a slave or servant for life, or for any term whatsoever, every person so offending shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding two thousand dollars, one-half whereof shall be paid to the person or persons who shall prosecute for the same, and the other half to this commonwealth, and at the discretion of the court, to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding twelve years; no judge of any of the courts of this commonwealth, nor any alderman or justice of the peace of said commonwealth, shall have jurisdiction or take cognizance of the case of any fugitive from labor, from any of the United States or territories, under any act of Congress, nor shall any such judge, alderman, or justice of the peace of this commonwealth, issue or grant any certificate or warrant of removal of any such fugitive from labor, under any act of Congress; and if any alderman or justice of the peace of this commonwealth shall take cognizance or jurisdiction of the case of any such fugitive, or shall grant or issue any certificate or warrant of removal as aforesaid, then, and in either case, he shall be deemed guilty of a misdemeanor in office, and shall, on conviction thereof, be sentenced to pay, at the discretion of the court, any sum not exceeding one thousand dollars, the one-half to the party prosecuting for the same, and the other half to the use of this commonwealth. If any person or persons claiming any negro or mulatto, as a fugitive from servitude or labor, shall, under any pretence of authority whatsoever, violently and tumultuously seize upon any carry away to any place, or attempt to seize and carry away in a riotous, violent, tumultuous, and unreasonable manner, and so as to disturb or endanger the public peace, any negro or mulatto, within this commonwealth, either with or without the intention of taking such negro or mulatto before any district or circuit judge, the person or persons so offending against the peace of this commonwealth shall be guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and further, to be imprisoned in the county jail, for any period, at the discretion of the court, not exceeding three months.—(Ibid. sect. 95.)

§ 1194. *Sale of Fugitive Slaves to be void.*—All sales that shall hereafter be

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they may be promoted by the exercise of the police power. But such regulations," it was determined, "can never be permitted to interfere with or obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same." The Pennsylvania act was adjudged unconstitutional and void, and the judgment upon the indictment was set aside. (Prigg *v.* Com. 16 Peters, 538.)

"Where it was alleged that the mother was a slave in Maryland, and she was not pregnant when she came into this State, and afterwards had a child, and on being removed as a slave, the child was taken with her, it was held that the taking of the child was kidnapping under this act." (Com. *v.* Alberti, 2 Par. 495.)

made within this State, of any fugitive from service or labor, who at the time of such sale shall be within the limits of this State, shall be utterly null and void; and if any person, under color or pretence of any such sale or sales, shall seize, arrest, or by intimidation, seduction, or fraud, shall remove or cause to be removed from this State, any such fugitive thus sold, or attempted to be sold, the person so offending shall forfeit and pay the sum of five hundred dollars, one-half thereof to the use of this commonwealth, and the other half to the use of the party suing for the same.[ee]—(Ibid. sect. 96.)

VIRGINIA.

§ 1197. *Taking or detaining a White Female against her will, with intention of marrying or defiling her.*—If any white person take away or detain against her will, a white female, with intent to marry or defile her, or cause her to be married or defiled by another person, or take from any person, having lawful charge of her, a female child under twelve years of age, for the purpose of prostitution or concubinage, he shall be confined in the penitentiary not less than three nor more than ten years.—(Code, 1849, ch. 191, sect. 16.)

§ 1198. *Free person selling a free person as a slave.*—If any free person sell a free person as a slave, or kidnap a free person with intent to use or sell him as a slave, knowing him free, he shall be confined in the penitentiary not less than three nor more than ten years.—(Ibid. sect. 17.)

OHIO.

§ 1199. *Kidnapping a White Person.*—That any person or persons who shall kidnap, or forcibly or fraudulently carry off, or decoy out of this State, any white person or persons, or shall arrest and imprison any white person or persons, with an intention of having such person or persons carried out of the State, unless it be in pursuance of the laws thereof, and shall be thereof duly convicted, by indictment, in the Court of Common Pleas, in any county in this State, shall be deemed guilty of a misdemeanor, and shall be confined in the penitentiary, at hard labor, for any space of time not less than three, nor more than seven years, at the discretion of the court; and shall, moreover, be liable for the costs of prosecution.—(Act of June 19, 1835, Swan's Stat. sect. 1, 276.)

§ 1200. *Kidnapping, &c., Negroes prohibited.*—That no person or persons, under any pretence whatever, shall, by violence, fraud, or deception, seize upon any free black or mulatto person within this State, and keep such free black or mulatto person in any kind of restraint or confinement, with intent to transport such black or mulatto person out of the State.—(Act of Feb. 15, 1831, Swan's Stat. sect. 1, 276.)

[ee] "These sections are consolidations of the act of the 17th April, 1827, entitled 'An act to prevent certain abuses of the law relative to fugitives from labor,' 9 Smith's Laws, 442. Brightly's Digest, 612, title Negroes, No. 20; and first, second, third, fourth, and sixth sections of the act of the 3d March, 1847, entitled 'An act to prevent kidnapping, preserve the public peace, prohibit the exercise of certain powers heretofore exercised by judges, justices of the peace, aldermen, and jailers in this commonwealth, and to repeal certain slave laws,' Pamphlet Laws, 206; Brightly's Digest, 612. The sixth section of this act, which forbids the use of any jail of this commonwealth for the detention of any person claimed as a fugitive from labor, has been repealed by the act of the 8th April, 1852, entitled 'An act to repeal the sixth section of an act, entitled 'An act to prevent kidnapping,'' Pamphlet Laws, 295. The seventh and eighth sections of this act have not been interfered with, and will remain in force. These sections take away the right which formerly was possessed by masters, or owners of slaves, to bring and retain such slaves within this commonwealth, for a period of six months, in involuntary servitude, and restores the competency of slaves as witnesses against any person whatever."—*Reviser's note.*

§ 1201. *Punishment, &c.*—That any person or persons offending against the provisions of this act, shall, on conviction thereof, by indictment in the Court of Common Pleas, in any county in this State, be deemed guilty of a misdemeanor, and shall be confined in the penitentiary, at hard labor, for any space of time not less than three, nor more than seven years, at the discretion of the court.—(Ibid. sect. 3.)

B.—Offence at Common Law.

§ 1202. Under the English statute,[g] from which most of the American statutes of abduction are taken, the indictment must allege that the taking was for lucre, in order to show which, it must be proved that the woman had substance either real or personal, or is heir apparent; and it must be further alleged and proved that she was taken against her will, and afterwards married to the misdoer or to some other by his assent, or that she was defiled, that is carnally known; because no other case is within the preamble of the statute, to which the enacting clause clearly refers, for it does not say, that "whatsoever person or persons shall take any woman against her will," but, "whatsoever person or persons shall take any woman *so* against her will."[h]

§ 1203. A woman thus taken against her will and married, may without doubt be a witness against the offender, if the force were continued upon her till the marriage; because then he is no husband *de jure*, or of right, and she may herself prove such continuing force. It has been doubted whether, in cases in which the actual marriage is good by the consent of the inveigled woman, obtained after her forcible abduction, her evidence should be allowed. But the opinion appears to have prevailed, that it should even then be admitted; because otherwise the offender would be permitted to take advantage of his own wrong, and the very act of marriage, which is a principal ingredient of his crime, would, by a forced construction of the law, be made use of to stop the mouth of the most material witness against him.[i] There can be no doubt of her competency, where the marriage was against her will at the time, notwithstanding her subsequent assent. For if she were a competent witness at any time after the crime committed, no subsequent assent can incapacitate her, much less can any mere lapse of time; however, these circumstances may and ought to weigh with the jury who are to decide upon the credit of her testimony.[j]

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[g] "That whereas women, as well maidens as widows and wives, having substances, some in goods movable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre, of such substances, have been oftentimes taken by misdoers contrary to their will, and afterwards married to such misdoers, or to others by their consent, or defiled:" "That whatsoever person or persons shall take any woman so against her will, unlawfully, that is to say maid, widow, or wife, such taking and the procuring and abetting to the same, and also, receiving wittingly the same woman, so taken against her will, shall be felony; and that such misdoers, takers and procurers to the same, and receivers knowing the said offence in form aforesaid, shall be reputed and judged as principal felons; and upon conviction thereof shall be sentenced to undergo a confinement in the penitentiary not less than two nor more than ten years; provided always, that this act shall not extend to any person taking any woman, only claiming her as his ward or bondwoman." 3 H. 7, cap. 2; 1 Hale, 660.

[h] Davis's Criminal Law, 137; 1 Hale, 660.

[i] 4 Bl. Com. 209; 1 East, P. C. 454; see ante, § 767.

[j] East, P. C. 454.

§ 1204. If a woman be forcibly taken in one country, and afterwards go voluntarily into another country, and be there married or defiled with her own consent, it appears that the fact is not indictable in either, for the offence, which consists in the forcible taking and subsequent marriage or defilement, is not complete in either. But if the force is continued upon her at all in the other country, into which she was so taken, the offender may be indicted there, although the actual marriage or defilement afterwards took place with her own consent.[k]

§ 1205. Though not only the misdoers themselves, but the procurers and any who wittingly receive the woman so taken against her will, are made principals by this statute, yet he who only receives the offender himself is but an accessary after the fact, according to the rules of the common law. And those who are only privy to the marriage, and not to the forcible taking or consenting thereto (which must be inferred, where the woman is under no constraint at the time of the marriage), are not within the statute.[l]

§ 1206. It is no excuse that the man who marries her was not the author of the original force, or that the woman was first taken away with her own consent, if she afterwards refused to continue with the offender, and was forced against her will, for from that time she may properly be said to be taken against her will. As little material is it, that a woman taken against her will was at last married or defiled with her own consent, for such case is equally within the words and meaning of the statute, which was made to protect the weaker sex against force and fraud.[m]

§ 1207. But it need not be alleged or shown, that the taking was with an intention to marry or defile her, for the words of the statute do not require such an intent, nor does the want of it in any way lessen the injury.[n]

§ 1208. Kidnapping is an offence at common law.[o] It is the most aggravated kind of abduction, and is punished by fine and imprisonment.[p]

§ 1209. In order to constitute the offence of kidnapping a child under ten years of age, it is not necessary that actual force and violence should be used; nor is a transportation to a foreign country necessary to the completion of the offence.[q] It is enough to show fraud or undue influence, amounting to a coercion of the will.[qq]

§ 1210. Where a person had in his custody a mulatto boy, six years of age, who had been placed with him by the overseers of the poor of a town, sold him to a person residing in another State, with the intention that he should be carried into that State, and held in servitude until he arrived at the age of twenty-one years, and he carried the boy into another town and delivered him there, it was held, that he was guilty of kidnapping.[r]

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[k] 1 Hawk. c. 16, sect. 11; 1 East, P. C. 453; 1 Russ. on Cr. 716.
[l] 1 Hawk. c. 16, sect. 9, 10; 1 East, P. C. 452, 3.
[m] Hawk. c. 16, sect. 7, 8; 1 East, P. C. 454.
[n] 1 Hawk. c. 16, sect. 4, 5, 6; 1 East, P. C. 453.
[o] State *v.* Rollins, 8 N. Hamp. 550; 1 East, P. C. 430.
[p] 4 Bl. Com. 219.
[q] State *v.* Rollins, 8 N. Hamp. 550.
[qq] Moody *v.* People, 20 Ill. 315.
[r] Ibid.

§ 1211. At common law, the offence of kidnapping is treated as an aggravated species of false imprisonment, and all the ingredients in the definition of the latter are necessarily comprehended in the former. The requisites in an indictment would seem to be, an averment of an assault, and the carrying away, or transporting the party injured, from his own country into another, unlawfully and against his will.[s] It is not sufficient to charge the defendant with kidnapping, generally; the indictment should state specifically the facts and circumstances which constitute the offence.

§ 1212. The statute 4th and 5th P. and M., ch. 8, against taking away maidens, or marrying them without the consent of their parents, is of force in South Carolina.[t] In an indictment under the third section of the above act, for taking away a young woman under the age of sixteen years, against the consent of her parents, it is necessary to state that the defendant was above the age of fourteen years, and that the person taken away was a maid or woman child under the age of sixteen years. It is not sufficient to describe the latter by her name.[u]

§ 1213. 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.[v]

CHAPTER VI.

ABORTION.

A. STATUTES.

MASSACHUSETTS.

Procuring the miscarriage of a woman, § 1214.

Advertising, &c., for purpose of informing where medicine, &c., may be obtained for the causing of miscarriage, § 1215.

NEW YORK.

Administering to woman pregnant with quick child, any medicine, &c., for the destroying of child, § 1216.

Administering medicine, &c., for purpose of procuring miscarriage, § 1216.

Solicitation of woman for purpose of procuring miscarriage, § 1217.

PENNSYLVANIA.

Attempt to produce abortion, § 1217(*a*).

VIRGINIA, see ante, § 923.

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[s] Click *v.* State, 3 Texas, 282. [t] State *v.* O'Bannon, 1 Bail. 144. [u] Ibid.

[v] Resp. *v.* Hevic et al. 2 Yeates, 114; see R. *v.* Barrett, 3 Boston Law R. 281. See forms of indictments in Wh. Prec., as follows:—

(198) Misdemeanor in Massachusetts in kidnapping a slave.
(199) Misdemeanor in Pennsylvania in seducing away a negro from the State, &c.
(200) Abduction under New York Rev. Stat. vol. 2, p. 553, s. 25.
(201) Abduction of a white person under Ohio Stat. p. 51, sec. 14.
(202) Attempt to carry a white person out of the State, under Ohio Stat. p. 51, sec. 14.
(203) Kidnapping. Attempt to carry off a black person, under Ohio Stat. p. 51, sec. 15.

OHIO.
Administering medicine, &c., to produce abortion, § 1218.
Of taking of life of pregnant woman or an unborn child—shall be guilty of misdemeanor, § 1219.
B. OFFENCE AT COMMON LAW, § 1220.

A.—STATUTES.

MASSACHUSETTS.

§ 1214. *Procuring the Miscarriage of a Woman.*—Whoever maliciously, or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, or medicine, or noxious thing; and whoever maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned, not more than twenty years, nor less than five years, in the State prison; and if the woman doth not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the State prison or house of correction, or common jail, and by fine not exceeding two thousand dollars. (Gen. Laws of Mass. Sess. 1845, c. 27.)

§ 1215. *Advertising, &c., for purpose of informing where Medicine may be obtained for the causing of Miscarriage.*—Every person who shall, knowingly, advertise, print, publish, distribute, or circulate, or knowingly cause to be advertised, printed, published, distributed, or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words or language giving or conveying any notice, hint, or reference, to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop, or office, where any poison, drug, mixture, preparation, medicine, or noxious thing, or any instrument or means whatever, or any advice, direction, information, or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished by imprisonment in the State prison, house of correction, or common jail, not more than three years, or by fine not exceeding one thousand dollars. (Gen. Laws of Mass. Sess. 1847, ch. 83.)

NEW YORK.

§ 1216. *Administering to Woman Pregnant with Quick Child, any Medicine, &c., for the destroying of Child.*—Every person who shall administer to any woman pregnant with a quick child, or prescribe for any such woman, or advise, or procure any such woman to take any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree. (Sec. 1 of chap. 22, of 1846, 2 Rev. 3d ed. 750.)

Administering Medicine, &c., for purpose of procuring Miscarriage.—Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance, or thing whatever, or shall use or employ any instruments or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon con-

viction, be punished by imprisonment in a county jail, not less than three months, nor more than one year. (Sec. 2 of chap. 260, of 1845, 2 Rev. 3d ed. 779.)[a]

§ 1217. *Solicitation of Woman for purpose of procuring Miscarriage.*—Every woman who shall solicit of any person any medicine, drug, or substance, or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Ibid. sec. 3.)

PENNSYLVANIA.

§ 1217 (*a*). *Attempt to commit Abortion.*—If any person shall unlawfully administer to any woman pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years. (Rev. Act Bill, I. sect. 87.)

§ 1217(*b*). If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug, or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. (Ibid. sect. 88.)

VIRGINIA.—[See *antea*, § 923.]

OHIO.

§ 1218. *Administering Medicine, &c., to produce Abortion.*—That any physician or other person, who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (Act of Feb. 2, 1834, Swan's Stat. Sect. 1, 296–97.)[b]

§ 1219. *Of taking Life of Pregnant Woman or an Unborn Child, shall be deemed guilty of misdemeanor.*—That any physician, or other person, who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance what-

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[a] See People *v.* Lohman, 2 Barbour, S. C. 216; 1 Comst. 379; People *v.* Stockham, 1 Harris, C. C. 424, as to construction of these acts; and see post, § 1228.

[b] The offence defined by the first section of the act of February 27, 1834, is complete, if the medicine, drug, substance, or thing be administered, or instrument used, with the intent prescribed, at any time during the period of gestation. Wilson *v.* State, 22 O. R. 319.

ever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother in consequence thereof, be deemed guilty of a high misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year. (Ibid. sect. 2.)[c]

B.—At Common Law.[d]

§ 1220. There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder.[e] If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide,[f] even though the child is still attached to the mother by the umbilical cord.[g] It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is *quick* with child,[h] though such a distinction, it is submitted, is neither in accordance with the result of medical experience,[i] nor with the principles of the common law.[j] The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that no matter at how early a stage he may be appointed executor,[k] is capable of taking as legatee,[l] or under a marriage settlement,[m] may take specifically under a general devise, as a "child;"[n] and may obtain an injunction to stay waste.[o] Such, also, was the effect of a decision on the direct point in Pennsylvania in 1845.[p]

§ 1221. Since the publication of the first edition of this work, the position taken in the text has been the subject of much discussion. In Massachusetts, the Supreme Court has again held, that at common law, unless there is quickness, there is no offence;[q] and the result was the enactment by the legislature of a statute to cover the supposed deficiency. In New Jersey, the same view was taken by the Supreme Court, in a very able opinion.[r] "In a recent

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[c] The crime specified in the second section differs from the offence in the first section in several particulars. Under the second section, to make the crime complete, the means must be employed after, and not before, the period of quickening; and the child must be destroyed, or the mother lose her life thereby. Wilson *v.* State, 22 O. R. 319. This was the operation of the "act providing for the punishment of crimes," passed March 7, 1835; Robbins *v.* State, 8 Ohio State R. (N. S.) 132.

[d] See W. & S. Med. Jur. tit. Abortion; and see Elwell's Med. Jur. § 243, &c.

[e] 1 Russ. on Cr. 671; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale, 434; 1 East, P. C. 90; 3 Chitty C. L. 798.

[f] R. *v.* Senior, 1 Mood. C. C. 36; 3 Inst. 50; see ante, § 942.

[g] R. *v.* Trilloe, 2 Moody, C. C. 13.

[h] Com. *v.* Bangs, 9 Mass. 387.

[i] W. & S. Med. Jur. § 344–5. Guy's Med. Juris. tit. Abortion; 1 Beck. 172, 192; Lewis, C. L. 10.

[j] 1 Russ. on Crim. 661; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; Bracton, l. 3, c. 21.

[k] Bac. Ab. tit. Infants.

[l] 2 Vernon, 710.

[m] Swift *v.* Duffield, 6 Serg. & Rawle, 38; Doe *v.* Clark, 2 H. Bl. 399; 2 Ves. jr. 673; Thelluson *v.* Woodford, 4 Vesey, 340.

[n] Fearne, 429.

[o] 2 Vernon, 710.

[p] Com. *v.* Demain, &c., 6 Penn. Law Jour. 29; Brightly, 441.

[q] Com. *v.* Parker, 9 Metc. 263.

[r] State *v.* Cooper, 2 Zabriskie, 57.

American treatise upon criminal law," says Green, C. J., "in the latter cases the proposition that the procuring of an abortion was indictable at common law, has been stated and advocated with much learning. (Wharton's Amer. Crim. Law, 308; Whar. Prec. 108.) The only direct authority in support of the doctrine, is the case of the Commonwealth *v.* Demain, decided by the Supreme Court of Pennsylvania, at January term, 1846, and reported in 6 Penn. Law Journal, 29. Although in this case the point appears to have been elaborately argued by counsel, it does not appear to have been decided by the court. We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at common law, and, consequently, that the mere attempt to procure the act is not indictable." It must be admitted that the criticism thus made on the precise effect of Com. *v.* Demain has great force; and perhaps on the record it may be doubted whether in sustaining the indictment the Supreme Court of Pennsylvania can be said to have decided the direct point.[s] The fact that it was regarded as so doing may be attributed to the oral expression of opinion by the learned judge (Sergeant, J.), who subsequently tried the case at Nisi Prius, and who certainly entertained no doubt as to the law being such as is stated. But in Pennsylvania the question has been put to rest in a more recent case,[t] where the position in the text was broadly sustained, and in which the court held that to produce an abortion on a woman, pregnant, but not quick, was indictable at common law.

§ 1222. In Maine, also, it has been held that, to procure an abortion, as to a female, pregnant but not quick with child, was not at the common law an offence, if done with her consent,[u] though by the Maine statute, the procuring of abortion is an offence, whether the child had quickened or not, and whether with or without the consent of the mother. "The third count in the indictment," said the court, "alleges the act to have been done with the intent to cause and procure the deceased to miscarry and bring forth the child of which she was then pregnant and quick; and that by means of that act, she brought forth the child, dead. But there is no allegation that the act was done, with the intention that she should bring forth her child dead, or with an intent to destroy it, unless the words, miscarry, and bring forth the child necessarily include its destruction. The expulsion of the ovum or embryo, within the first six weeks after conception, is technically miscarriage; between that time and the expiration of the sixth month, when the child may by possibility live, it is termed abortion; if the delivery be soon after the sixth month, it is termed premature labor. But the criminal attempt to destroy the fœtus, at any time before birth, is termed in law a miscarriage, varying as we have seen in degree of offence and punishment, whether the attempt was before or after the child had quickeded.[v] Other

[s] Such also is the view of a very accomplished jurist, afterward of the Supreme Court of Pennsylvania, Lewis, J.; Lewis, C. L. 13.

[t] Mills *v.* Com. 1 Harris, 631.

[u] Smith *v.* State, 33 Maine (3 Red.), 48.

[v] Chitty's Med. Juris. 410.

writers on the subject give a similar definition of the term 'miscarriage.'[w] The converse of this last proposition cannot be true, as there are undoubtedly many miscarriages involving no moral wrong. If the term miscarriage were to be understood in the indictment in its most limited sense, it cannot be denied that, in effect, it must be identical with the destruction of the fœtus. But this indictment itself has given to the word 'miscarriage' the more general signification. It charges that the miscarriage was of the woman who was pregnant, and quick with child. The term 'quick with child' is a term known to the law, and courts are presumed to understand its meaning; a woman cannot be quick with child until a period much later than six weeks from the commencement of the term of gestation. The more general meaning of the word miscarriage must therefore be applied. The indictment charges no time after the quickening, when the miscarriage took place. It may have been at any period when the birth would have been premature. The language of the indictment, when taken together, construed in its ordinary, or in its technical and legal signification, does not forbid this. And labor is premature, if it take place at any period before the completion of the natural time. It is admitted by Dr. Paris, a writer of high repute on medical jurisprudence, from the number of established cases, it is possible that the fœtus may survive and be reared to maturity, though born at very early periods; many ancient instances are stated of births even at four months and a half with continued life, even to the age of twenty-four years, and the Parliament of Paris decreed, that an infant at five months possessed the capability of living to the ordinary period of human existence; and it has been asserted that a child delivered at the age only of five months and eight days may live; or, according to Beck and others if born at six months after conception.[x] Many of the facts upon which the opinions of writers upon medical jurisprudence are founded may be erroneous, and the opinions incorrect. We cannot take judicial notice of either. But it is not too much to say, that a child may be born living, when its birth may be soon after conception, that is premature. The fœtus may be expelled by unlawful means, so soon after conception, that extra-uterine life cannot continue for any considerable length of time, and yet after birth it may once exercise all the functions of a living child. We have found no authority, that this may not be termed a miscarriage, if the word is not confined to its most limited meaning. And if it be so, it is not perceived that it ceases to be correct if the life of the child prematurely born is further prolonged. It is quite clear, therefore, that the word miscarriage, in its legal acceptation, and as used in this indictment, does not necessarily include the destruction of the child before its birth; and a design to cause its miscarriage is not the same thing as a design to destroy the child. The other term used in the indictment, to bring forth the said child, does not imply even a premature birth. Consequently, it gives no additional strength to the charge."

[w] Hoblyn's Dictionary of Terms, used in medicine and other collateral sciences.
[x] Chitty's Med. Juris. 410, 411.

Perhaps, however, as the point may be considered as still unsettled, a recapitulation of the reasons formerly given may not be out of place.

§ 1223. The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction," as it is called by Dr. Guy,[y] is now exploded in medicine, the fact being considered indisputable, that "quickening" is the incident, not the inception of vitality. This view is clearly expounded by Dr. Beck.[z] "The motion of the fœtus," he says, "when felt by the mother, is called QUICKENING. It is important to understand the sense attached to this word formerly, and at the present day. The ancient opinion, and on which indeed the laws of some countries have been founded, was, that the fœtus became animated at this period—that it acquired a new mode of existence. This is altogether abandoned. The fœtus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received. The next theory attached to the term, and which is yet to be found in many standard works, is, that from the increase of the fœtus, its motions, which hitherto had been feeble and imperfect, now are of sufficient strength to communicate a sensible impulse to the adjacent parts of the mother. In this sense, then, quickening implies the first sensation which the mother has of the motion of the child which she has conceived.

§ 1224. "A far more rational, and undoubtedly more correct opinion, is that which considers quickening to be produced by the *impregnated uterus starting suddenly out of the pelvis into the abdominal cavity.* This explains several peculiarities attendant upon the phenomenon in question—the variety in the period of its occurrence—the faintness which usually accompanies it, owing to the pressure being removed from the iliac vessels, and the blood suddenly rushing to them; and the distinctness of its character, differing, as all mothers assert, from any subsequent motions of the fœtus. Its occasional absence in some females is readily accounted for, from the ascent being gradual and unobserved."

§ 1225. The true meaning of quickening, and the absurdity of the doctrine that it is the inception of life, is pointedly shown by Orfila, in the recent edition of his very authoritative treatise.[a]

"Chez la plupart des femmes le fœtus exerce des mouvemens que l'on a appelé *actifs;* c'est particulièrement vers la fin du quatrième mois, lorsque les organes de la locomotion jouissent dejà d'une certaine energie, que ces mouvemens sont sensibles; ils deviennent quelquefois si forts par la suite, qu'on les aperçoit même à travers les vetemens, et que la femme en est réveillée pendant la nuit; l'homme de l'art parvient souvent à les provoquer en appliquant sur les parois du ventre, la main préalablement trempée

[y] Med. Juris. 133; see, also, W. & S. Med. Jur. § 344–5.
[z] Med. Juris. vol. i. p. 173.
[a] Traité de Médecine Légale—Paris, 1848, vol. i. p. 226.

dans l'eau froide. Ce signe qui paraitrait au premier abord devoir permettre d'affirmer que la femme est ou n'est pas enceinte, presente pourtant beaucoup d'incertitude; non seulement il y a des femmes qui n'ont senti de pareils mouvemens à aucune époque de la grossesse, mais il en est beaucoup d'autres chez lesquelles des contractions spasmodiques de l'uterus et des intestins simulaient tellement les mouvemens du fœtus qu'elles se disaient enceintes."

These views are fully sustained by the result of a very curious investigation before a jury of matrons in England in 1838.[b]

§ 1226. It appears, then, that quickening is a mere circumstance in the physiological history of the fœtus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another—that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all—and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. There is as much vitality, in a physical point of view, on one side of quickening as on the other, and in a social and moral point of view, the infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law in making fœticide penal, had in view the great mischief which would result from even its qualified toleration, *e. g.*, the removal of the chief restraint upon illicit intercourse, and the shock which would thereby be sustained by the institution of marriage and its incidents—we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed—the inducements to marriage are equally diminished—the delicacy of the woman is as effectually destroyed—no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New Jersey, in order to fill up the supposed gap, passed acts making ante-quickening-fœticide individually penal. If, however, as has been argued, no such gap exists, it will be worth while for the courts of those States which have not legislated on the subject, to consider how far an exploded notion in physics is to be allowed to suspend the operation of a settled doctrine of the common law.

§ 1227. It is remarkable that both in Massachusetts and New Jersey, a leading English case on this point was not referred to, where in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel, "Quick with child, is having conceived; with *quick* child is when the child is quickened."[c] This view disposes of all the common law authorities against the indictability of the offence.

§ 1228. In New York, where one statute makes it a misdemeanor to administer drugs, &c., to a pregnant female, with intent to produce a miscarriage; and another statute declares it manslaughter to use the same means with intent to destroy the child, in case the death of such child should be

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[b] R. *v.* Wycherly, 8 C. & P. 265.

[c] R. *v.* Wycherly, 8 C. & P. 265.

thereby produced; an indictment charging all the facts necessary to constitute manslaughter under the latter statute, except the intent to destroy the child, and alleging only an intent to produce miscarriage, is fatally defective as an indictment for manslaughter, but is good as an indictment for a misdemeanor.[d] A conviction for a misdemeanor, for administering drugs to a pregnant woman with intent to produce miscarriage, would, it seems, be a bar to a subsequent indictment for manslaughter, for administering the same drugs to the same female, with intent to destroy the child, by which means the death of the child was produced.[e]

§ 1229. In an indictment for administering medicine to procure abortion, the name of the medicine need not be stated, nor need the medicine be described as noxious.[f] It is admissible to prove in such a case that ergot, a drug shown to have been administered to the deceased, was popularly supposed to produce abortion, the object being to prove intent.[g]

§ 1230. By the Pennsylvania act of May 31, 1781, any person who counsels, advises, or directs a woman "to kill the child she goes with, and after she is delivered of such a child she kills it," is to be deemed accessary to such murder.[h]

Under 1 Vict. c. 85, it is immaterial whether or not the woman was pregnant at the time.[i] The prisoner was convicted, on an indictment, under § 6 of 7 Will. IV. and 1 Vict. c. 85, for administering and causing to be taken by E. C. certain poison with intent to procure her miscarriage. It appeared that E. C., being pregnant, applied to the prisoner to get her something to procure miscarriage, and that the prisoner did procure a drug, which drug was given by the prisoner to E. C., and taken by her with intent to procure, and did in fact procure miscarriage; but the taking by E. C. was not in the presence of the prisoner. It was held, that the conviction was right, inasmuch as there was a "causing to be taken," within the meaning of the statute[j]

The woman on whom the abortion has been performed, is a competent witness against the defendant, though she were an accomplice.[k]

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[d] Lohman *v.* People, 1 Comst. 379; People *v.* Lohman, 2 Barb. Sup. Ct. R. 216. See People *v.* Stockham, 1 Parker C. C. 285; ante, § 1216.

[e] Ibid.

[f] State *v.* Vawter, 7 Blackf. 922.

[g] Carter *v.* State, 2 Carter, 617.

[h] Purdon, 9th ed. 531.

[i] R. *v.* Goodhall, 1 Den. C. C. 187. For forms of indictments in abortion see Whar. Prec. as follows:—

(204) Production of abortion at common law. First count. By assault and thrusting an instrument in the prosecutor's womb, she being "big, quick, and pregnant."
(205) Second count, averring prosecutrix to be "big and pregnant."
(206) Third count, merely averring pregnancy in same.
(207) Assault on a woman with quick child, so that the child was brought forth dead. (At common law.)
(208) Against A., the principal, for producing an abortion by using an instrument on the person of a third party, and B. an accessary before the fact, under the English statute.
(209) Administering a potion at common law with intent to produce abortion.
(210) Producing abortion in New York, 2 R. S., 550, 551, s. 9, 2d ed.
(211) Administering medicine under the Indiana statute, with intent to produce abortion.
(212) Attempt to procure abortion by administering a drug, under Ohio stat.

[j] R. *v.* Wilson, 37 Eng. Law and Eq. 605; S. P. R. *v.* Farrow, 40 Eng. Law and Eq.

[k] Ante, § 778.

CHAPTER VII.

CONCEALING DEATH OF BASTARD CHILD.

A. STATUTES.

MASSACHUSETTS.

Concealing death of an infant, which would otherwise have been a bastard, § 1531.

Indictment for the murder of an infant bastard child, § 1232.

NEW YORK.

Concealing the death of a child whether born alive or not, § 1232(*a*).

PENNSYLVANIA.

Concealing death of an infant bastard child, whether it was born alive or not, § 1233.

Concealment of death of child, not conclusive evidence to convict party of murder, § 1234.

B. DECISIONS UNDER ENGLISH AND AMERICAN STATUTES, § 1235.

A.—STATUTES.

MASSACHUSETTS.

§ 1231. *Concealing Death of any Infant, which would otherwise have been a Bastard.*—If any woman shall conceal the death of any issue of her body, which, if born alive, would be a bastard, so that it may not be known whether such issue was born alive or not, or whether it was not murdered, she shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail, not more than one year.—(Rev. Stat. chap. 130, sect. 6.)

§ 1232. *Indictment for the Murder of an Infant Bastard Child.*—Any woman who shall be indicted for the murder of her infant bastard child, may also be charged in the same indictment, with the offence described in the preceding section, and if, on the trial, the jury shall acquit her on the charge, and find her guilty of the other offence, judgment and sentence may be awarded against her for the same.—(Ibid. sect. 7.)

NEW YORK.

§ 1232(*a*). *Concealing the Death of a Child whether born alive or not.*—Any woman who shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which, if born alive, would by law be a bastard, whether it was born dead or alive, or whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in a county jail, not exceeding one year.—(3 Rev. St. chap. 50, sec. 22.)

PENNSYLVANIA.

§ 1233. *Concealing Death of an Infant Bastard Child, whether it was born alive or not.*—If any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it was born dead or alive, or whether it was murdered or not, every such

mother, being convicted thereof, shall suffer an imprisonment, by separate or solitary confinement at labor, not exceeding three years; and if the grand jury shall, in the same indictment, charge any woman with the murder of her bastard child, as well as with the offence aforesaid, the jury by whom such woman shall be tried, may either acquit or convict her of both offences, or find her guilty of one and acquit her of the other, as the case may be.—(Rev. Act, Bill I. § 89.)

§ 1234. *Concealment of Death of Child not conclusive evidence to convict party of Murder.*—The concealment of the death of any such child shall not be conclusive evidence to convict the party indicted of the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such child.—(Act of 22 Apr. 1794, sect. 18.)[a]

B.—Decisions under English and American statutes.

§ 1235. Under the statute 43 Geo. III. c. 58, and 9 Geo. IV. c. 31, s. 14, from which the American acts differ but little, where a woman, delivered of a seven months' child, threw it down the privy, and it appeared that another woman, charged as an accomplice, knew of the birth: upon an indictment for murder against the two, the jury found the mother guilty of the

[a] Under this act, whether the child be born dead or alive, would seem to be immaterial. Douglass *v.* Com. 8 Watts, 535, Rogers, J.; see R. *v.* Coxhead, 1 Car. & K. 623. The concealment is not conclusive evidence of the fact, unless the circumstances attending it are sufficient to satisfy the jury that the mother did wilfully and maliciously destroy the child. Penna. *v.* M'Kee, Add. 2.

In the indictment it is not necessary to set forth in what manner, or by what arts the mother endeavored to conceal the death. Boyles *v.* Com. 2 Ser. & R. 50; Penna. *v.* McKee, Addison, 2.

Where an indictment charged that the defendant afterwards, &c., "the said infant having on the day and year aforesaid, died, did endeavor privately to conceal the death of the said infant," it was held that this was a sufficient averment of the death of the child. Boyles *v.* Com. 2 Serg. & Raw. 50.

It is a fatal objection that an indictment for concealing the death of a bastard child does not directly aver that the defendant "did endeavor privately to conceal the death of the said female bastard child." Douglas *v.* Com. 8 Watts, 535; Com. *v.* Clark, 2 Ashmead, 105.

"The eighth section of the act of 1718, subjected the concealment, by the mother, of the death of a bastard child, to the penalty of death, except such mother could make proof, by one witness at least, that the child, whose death was by her so concealed, was born dead. This provision was copied from the English statutes of 21 James I., chapter 27. The rigorous nature of this statute suggested the passage of the sixth section of the act of 5th April, 1790, which declares that 'the constrained presumption that the child whose death is concealed, was therefore murdered by the mother, shall not be sufficient evidence to convict the party indicted, without probable presumptive proof is given that the child was born alive.' And that of the eighteenth section of the act of 1794, which declares 'that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted of the murder of her child, unless the circumstances attesting it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such child.'

"In this state of the law, it seemed better to the commissioners to repeal all the existing statutes on the subject, and to substitute a plain provision, making the concealment of the death of an illegitimate child a substantive offence. The destruction of the life of such child by its mother is thus left subject to the same punishment, and susceptible of the same proof as ordinary cases of murder. They have, however, preserved that feature of the act of 1794, which authorizes counts for the murder of a bastard child, and for concealment of its death, to be united in the same indictment."—*Reviser's note.*

concealment; and the point, being saved upon a doubt whether it was a case within the statute 43 G. III. c. 58, as a second person knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavor to conceal the birth, and that the conviction was right.[b] Where a woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavoring to conceal the birth.[c] But where the mother caused the body of her child to be buried privately, her object being to conceal its birth, it was determined that the fact of her having previously acknowledged the birth to several persons, did not prevent her conviction of the concealment.[d]

§ 1236. An indictment on stat. 9 Geo. IV. c. 31, s. 14, for endeavoring to conceal the birth of a dead child, need not state whether the child died before, at, or after its birth.[e]

§ 1237. An indictment for the same offence, which charges that the defendant "did cast and throw the dead body of the child into soil in a certain privy, and did thereby, then and there, unlawfully dispose of the dead body of the said child, and endeavor to conceal the birth thereof," sufficiently charges the endeavor to conceal the birth, as the word "thereby" applies to the endeavor, as well as to the disposing of the dead body.[f] If on the trial of such indictment, it appears that the body of the child was found lying on the soil, immediately under the seat of the privy, it is a question for the jury whether it was thrown there for the purpose of concealment, or whether it came from the mother unawares, when she was there for another purpose, but the judge on such evidence will not stop the case.[g]

§ 1238. Upon the construction of the North Carolina act against the mother, for concealing the birth of her bastard child, it was held that the *corpus delicti* is concealing the death of a being upon whom the crime of murder would have been committed; and, therefore, if the child be born dead, concealment is not an offence against the statute.[h] In the same State it is said that it is not incumbent on the prosecution to show that the child was born alive, but the burden of the showing the contrary is on the accused.[i]

§ 1239. Where a mother had concealed her bastard child after its death, and there was some evidence given which induced the jury to be of opinion that the child was stillborn, it was held a proper case in South Carolina for an acquittal.[j]

A person other than the mother of a bastard child, cannot be convicted of the offence "of concealing the birth of such child, so that it may not be known whether it was born alive or not," "unless upon an indictment which

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[b] R. v. Cornwall, R. & R. 366.
[c] R. v. Higley, 4 C. & P. 336.
[d] R. v. Douglass, 7 Moody's C. C. 480.
[e] R. v. Coxhead, 1 Car. & K. 623.
[f] Ibid.
[g] Ibid.
[h] State v. Joiner, 4 Hawks, 350.
[i] Ibid.
[j] State v. Love, 1 Bay, 167.

charges the mother of the bastard also with the offence. Such a person, may, however, upon proper proof, be convicted of aiding, assisting, abetting, counselling, commanding, or procuring the commission of such an offence, upon an indictment which charges the mother with the offence, and such other person as an aider, abettor, &c., although the indictment does not charge such person with being present," aiding, abetting, &c.[k]

CHAPTER VIII.

ASSAULTS.

I. ASSAULTS GENERALLY.
II. ASSAULTS WITH FELONIOUS INTENT.
III. ASSAULTS ON OFFICERS WHEN IN EXECUTION OF THEIR DUTIES.
A. STATUTE.
PENNSYLVANIA, § 1239(*a*).
OHIO, § 1240.
B. OFFENCE GENERALLY.
1st. WHAT CONSTITUTES AN ASSAULT, OR AN ASSAULT AND BATTERY, § 1241.
2d. DEFENCE, § 1252.
(*a*) Pendency of civil proceedings, § 1252.
(*b*) Words of provocation, § 1253.
(*c*) Misadventure, &c., § 1254.
(*d*) Retaking or defence of property, § 1255.
(*e*) Prior assault, § 1258.
(*f*) Correction by persons in authority, § 1259.
(*g*) Guilt of major offence, § 1261.
(*h*) Assent of prosecutor, § 1262.
3d. INDICTMENT AND VERDICT, § 1263.

I. ASSAULTS GENERALLY, § 1239.(*a*)

A.—STATUTES.

PENNSYLVANIA.

§ 1239(*a*). *Assault and Battery.*—Any person who shall be convicted of an assault and battery, or of an assault, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court. (Rev. Act, Bill 1, § 97.)

OHIO.

§ 1240. *Assault and Battery.*—That if any person shall unlawfully assault or threaten another, in a menacing manner, or shall unlawfully strike or wound another, the person so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred and fifty dollars, or imprisonment 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; and shall, moreover, be liable to the suit of the party injured. (Act of March 8, 1831, Swan's Stat. sect. 10, 285.)

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[k] State *v.* Sprague, 4 R. I. 257.

I. ASSAULTS GENERALLY.

1st. WHAT CONSTITUTES AN ASSAULT, OR AN ASSAULT AND BATTERY.

§ 1241. An assault is an intentional attempt, by violence, to do an injury to another.[b] The attempt must be intentional; for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do injury, there is no assault. Thus, where a man laid his hand on his sword, and said: "If it were not assize time, I would not take such language from you," the court agreed that it was not an assault: for the declaration was that he would not assault him, the judges being in town, and the intention as well as the act makes an assault.[c] When the defendant, at the time he raised his whip, and shook it at plaintiff, though within striking distance, made use of the words, "Were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault.[d] So, if a man raise his hand against another, within striking distance, and at the same time say: "If it were not for your gray hairs, I would tear your heart out," it is no assault, because the words explain the action, and take away the idea of an intention to strike.[e]

§ 1242. "It must also," to adopt the language of the late Judge Gaston,[f] "amount to an attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Therefore it is, that notwithstanding many ancient opinions to the contrary, it is now settled that no words can, of themselves, amount to an assault.[g] It is difficult, in practice, to draw the precise line which separates violence menaced, from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted." Thus, riding after a person so as to compel him to run into a garden for shelter, to avoid being beaten, has been adjudged to be an assault.[h] Where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held an assault was committed.[i]

§ 1243. An offer to strike by one person rushing upon another, will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the

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[b] State v. Davis, 1 Iredell, 128; Richels v. State, 1 Sneed, 605; People v. Hays, 1 Hill, N. Y. R. 361; 1 Hawk. ch. 62, s. 1, 2; 1 East's P. C. 406.

[c] Tuberville v. Savage, 1 Mod. 3

[d] State v. Crow, 1 Iredell, 375.

[e] Com. v. Eyre, 1 Serg. & Raw. 346.

[f] State v. Davis, 1 Iredell, 128.

[g] 1 Hawk. c. 61, s. 1, p. 110; 2 Comyn, Bat. C.

[h] Morton v. Shopple, 3 Car. & Payne, 373; 14 Eng. Com. Law R. 355.

[i] Stephens v. Myers, 4 Car. & Payne, 349; 19 Eng. Com. Law R. 414.

accompanying circumstances, to believe that he will instantly receive a blow, unless he strike in self-defence.[j]

§ 1244. It is an assault to point a loaded pistol at any one, but not an assault to point a pistol at another which is proved not to be so loaded as to be able to be discharged.[k]

Drawing of a gun or pistol on another with threat to use it, is an assault, although the weapon is not pointed.[a]

The appellant drew his pistol, cocked it, pointed it towards the breast of F., and said, "If you do not pay me my money, I will have your life," the parties being close together. It was held, that this was an assault.[b]

When A., being within striking distance, raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault in A.[l]

§ 1245. Striking at another with a cane, stick, or fist, although the party striking misses his aim;[m] drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry;[n] pointing a pitchfork at him, when within reach of it; or any other act indicating an intention to use violence against the person of another, completes the offence, unless such intention be disproved.[o]

Evidence of false imprisonment and of unlawful intention will sustain an indictment for assault and battery.[p]

§ 1246. In Vermont, threats of great bodily harm, accompanied by acts showing a formed intention of putting them into execution, if intended to put the person threatened in fear of their execution, and if they have that effect and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the public peace, which is punishable by indictment.[q]

§ 1247. When a medical man unnecessarily stripped, with his own hands, a female naked, under the pretence of examining her;[r] where a parish officer, against the will of a pauper, cut off her hair;[s] where the prosecutor had possession of a negro, chained to his bed-post, and confined to his person by a rope, and the defendants broke the chain, cut the rope, and carried off the negro;[t] where the defendant attempted to run his cart against the wagon of another, on the public highway,[u] in each case an assault was held to be committed.

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[j] State v. Davis, 1 Iredell, 125.
[k] R. v. James, 1 Car. & Kir. 530.
[a] People v. McMakin, 8 Cal. 547; State v. Epperson, 6 Jones, Mo. 255.
[b] Keefe v. State, 19 Ark. 190.
[l] State v. Morgan, 3 Iredell, 186; U. S. v. Richardson, 5 Cranch, C. C. R. 348.
[m] Ro. Abr. 545, l. 45.
[n] Richels v. State, 1 Sneed, 606.
[o] 1 Hawk. c. 62, s. 1.
[p] Long v. Rogers, 17 Alab. 540.
[q] State v. Benedict, 11 Verm. 236.
[r] R. v. Rosinski, 1 Mood. C. C. 12; see ante, § 1155.
[s] Forde v. Skinner, 1 Moo[illegible] C. 12.
[t] State v. Davis, 1 Hill, S. C. R. 46.
[u] People v. Lee, 1 Whee[illegible] C. C. 364; see 1 Mod. 3, 6 Mod. 173, 10 Mod. 187, 1 Serg. & Rawle, 347.

§ 1248. One decoying a female under ten years of age, and detected standing before her in a state of indecent exposure, is properly convicted of an assault with an attempt to commit a rape, though there is no evidence of his actually touching her.[v]

§ 1249. Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him, it was held that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a bona fide belief that the defendant was (as he represented) treating her medically, with a view to her cure; and the intimation of the judges was, that he might have been indicted for rape.[w]

A schoolmaster, who takes indecent liberties with his pupil, without her consent, though without resistance, is indictable for an assault.[x]

Where A. put cantharides into rum, and gave it to B. to drink; B. drank it, not knowing that the cantharides was in the rum, and became ill; it was held, that A. was neither indictable for an assault, nor for a misdemeanor at common law.[y]

Where a parent exposes a young child to the inclemency of the weather, and no injury results, it seems this is not an assault,[z] and to constitute a neglect by the parent to supply food, &c., a misdemeanor at common law, there must be a positive injury to the health.[a]

§ 1250. It is not, however, sufficient to constitute the offence, that a man of ordinary firmness should believe he was about to be stricken; for, as has been said, if it can be collected from the circumstances, that notwithstanding appearances to the contrary, there was not a present purpose to do an injury, the result is not consummated. The jury must judge of these circumstances.[b]

No matter how private or secret the assault may be, it does not thereby cease to be an indictable offence.[c]

§ 1251. One who incites others to commit an assault and battery is guilty, and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it, as whatsoever will make a man an accessary before the fact, in felony, will make him a principal in treason, petit larceny and misdemeanors.[d]

If two parties go out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow.[e]

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[v] Hays *v.* People, 1 Hill, 351; see ante, § 1155.

[w] R. *v.* Case, 1 Eng. L. & Eq. R. 544; see ante, § 1155.

[x] R. *v.* Nichol, R. & R. 130; R. *v.* M'Gavaran, 6 Cox, C. C. 64; 1 Bennett & H. Lead. Cas. 515.

[y] R. *v.* Hanson, 2 Car. & Kir. 912; R. *v.* Dilworth, 2 Moo. & Rob. 831, though it was formerly thought differently; R. *v.* Batton, 8 C. & P. 660; and see People *v.* Blake, 1 Wheeler's C. C. 490, where putting cow-itch on a towel was held a misdemeanor; ante, § 5.

[z] R. *v.* Renshaw, 20 Eng. Law. & Eq. 593; 2 Cox, C. C. 285; see Wh. Prec. 916.

[a] R. *v.* Philpott, 20 Eng. Law & Eq. 591.

[b] State *v.* Crow, 1 Iredell, 375; Richels *v.* State, 1 Sneed, 605; see ante, § 1341, etc.

[c] Com. *v.* Simmons, 6 J. J. Marshall, 615.

[d] State *v.* Lymburn, 1 Brevard, 397; see ante, § 132–3.

[e] R. *v.* Lewis, 1 Car. & Kir. 419.

To spit at another,[f] to push or thrust him,[g] to push another against him,[h] to throw a squib at him,[i] and the like, constitute a battery.

Evidence admitted for a different purpose, went to show a second battery committed within a short interval on the same day. It was held, that the State, having elected to try the defendant for the first battery, cannot, without abandoning the first, convict him of the second, for which he has not been tried.[ii]

2d. Defence.

§ 1252 (*a.*) *Pendency of civil proceedings.*—A prosecutor in an indictment for an assault and battery, who has commenced a civil suit for the injury, will not be compelled to elect or abandon the civil suit, or the prosecution; both may be sustained, the first for damages to the injured individual, the second to avenge the public wrong.[j] The court, however, will not give a severe judgment upon the criminal conviction, unless the prosecutor will agree to relinquish his civil remedy.[k]

§ 1253. (*b.*) *Words of provocation.*—No words will justify an assault. Every assault will not justify an enormous battery; but every such beating must be in one's defence, and proportioned to the nature of the injury offered, otherwise the defendant himself becomes the aggressor.[l]

§ 1254. (*c.*) *Misadventure, &c.*—Whatever would be a defence on ground of misadventure to an indictment for homicide is equally a defence to a charge of battery. Thus, if a horse run away with his rider, and run against a man, it is no battery.[m] If a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it, it is no battery.[n] So also, it is a good defence to prove that the alleged battery was merely an amicable contest: as, that the defendant wrestled with the prosecutor for a wager.[o] So, that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous, is a good defence.[p]

§ 1255. (*d.*) *Retaking or defence of property.*—A tenant, who had left the premises, entered for the purpose of removing windows placed by him in the dwelling-house, and had obtained possession of the windows, and was leaving with them. It was held, that the owner of the property, or his agent, might retake the property by seizing upon the windows and forcing them from such person, using no unnecessary violence; and that a complaint for assault and battery for such retaking could not be sustained.[q]

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[f] 6 Mod. 142. [g] Ibid. [h] Bul. N. P. 16. [i] 2 W. Bl. 892.

[ii] Tompkins *v.* State, 17 Geo. 356.

[j] Ante, § 549; State *v.* Blennerhasset, 1 Walk. 7.

[k] Buckner *v.* Beek, Dudley, S. C. 168.

[l] State *v.* Wood, 1 Day, 351; ante, § 970–987.

[m] Gibbons *v.* Pepper, 2 Salk. 637; ante, § 934–1002, etc.

[n] Moor, 864; Hob. 134; and see R. *v.* Gill, 1 Stra. 490.

[o] Com. Dig. *Pleader*, 3 M. 18. [p] See ante, § 1012–14.

[q] State *v.* Elliott, 11 N. Hamp. 540; see Overdeer *v.* Lewis, 1 W. & S. 90; and post, § 2026, etc.

A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties. Where the entrance of innkeepers, or their servants, into such a depot, to solicit passengers to go to their inns, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse to do so, he and his assistants may forcibly remove them; using no more force than is necessary for that purpose. And if an innkeeper who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtain a ticket for a passage in the cars, with the *bona fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery.[qq]

While a passenger on a railway car, who complies with the rules of the company, cannot be ejected without subjecting the officer who attempts it to an indictment, this is otherwise when he refuses to comply with such rules. And hence it is a defence to an indictment for an assault and battery that the assault consisted in the removing from the cars, without unnecessary violence, of a passenger who had not bought his ticket before entering the cars, and who refused to submit to a regulation of the company which required him to pay in such cases a higher price for his ticket.[r]

§ 1256. Force was held excusable where a person, after request, had refused to leave another's premises;[rr] and where an officer attempted to seize the goods of the defendant, and in his possession, upon a writ of attachment against another.[s] Where there has been, however, a trespass in law, merely, without actual force, the owner of the close, &c., must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him.[t] But, if the trespasser use force, then the owner

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[qq] Com. *v.* Power, 7 Metcalf, 596.

[r] State *v.* Chovin, 7 Iowa (Clarke), 204.

[rr] Com. *v.* Clark, 2 Metcalf, 23; Harrington *v.* People, 6 Barbour, 608.

[s] 2 Ro. Abr. 549, l. 7; Com. *v.* Kennard, 8 Pick. 133. The owner of personal property, it is said, may assert his claim thereto, when about to be taken as the property of another, and may make use of all peaceable means to prevent its attachment, or keep or regain its possession. (State *v.* Miller, 12 Ver. R. 437.)

[t] Weaver *v.* Bush, 8 T. R. 299; see 2 Ro. Abr. 548, l. 35, 45; 2 Salk. 641.

may oppose force to force;[u] and in such a case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive;[v] or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close or the like. But though a man may in such case put another out of his house, who persists in remaining against the will of the occupant, yet he may not inflict a violent battery.[w]

§ 1257. The proprietor of a public inn has a right to request a person who visits it, not as a guest, or on business with a guest, to depart; and, if he refuses, the innkeeper has a right to lay his hands gently upon him, and lead him out, and if resistance be made, to employ sufficient force to put him out. And for so doing he can justify his conduct on a prosecution for assault and battery.[x]

§ 1258. (*e.*) *Prior assault.*—It is a good defence, in justification even of a wounding, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence;[y] though proof that the prosecutor struck the first blow will not justify an enormous battery.[z] While a teamster was standing by his wagon with a heavy whip in his hand, another person took hold of the horse and turned his horse's head; and, being told by the teamster to let go, did so, and struck the horse on the head with his hand, causing the horse to step back three or four feet, but not otherwise doing any damage. It was held, that these facts did not show a sufficient provocation to justify the teamster in severely beating the other, and knocking him down with the butt of his whip.[zz]

If the defendant prove an assault merely, as, for instance, that the prosecutor lifted up his staff, and offered to strike him, it is sufficient to justify the defendant's striking him; for he need not, in such a case, stay till the other has actually struck him.[a] On the same principle a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master.[b]

One tenant in common of a barn floor, has no right to use force and violence to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former, then standing on the floor.[c]

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[u] Salk. 641; 8 T. R. 78; 1 C. & P. 6. [v] Skin. 387; Lutw. 1436.

[w] State *v.* Lazarus, 1 Con. S. C. R. 34. A policeman prevented a member of a society from entering the society's room. Held, that if the policeman was wholly passive, and merely obstructed his entrance, as any inanimate object would, this was not an assault by the policeman. (Innes *v.* Wylie, 1 Car. & Kir. 257.

[x] Com. *v.* Mitchell, 2 Par. 431.

[y] 1 Sid. 246; 1 Ro. Rep. 19; 2 Salk. 642; 3 Salk. 46.

[z] State *v.* Quinn, 3 Brevard, 515; Colton *v.* State, 4 Texas, 260.

[zz] Com. *v.* Ford, 5 Gray (Mass.) 475.

[a] Bull. N. P. 18; 2 Ro. Abr. 547, l. 37.

[b] 2 Ro. Abr. 546 (D.); 1 Hawk. c. 60, s. 23, 24; ante, § 1024.

[c] Com. *v.* Lakeman, 4 Cush. 597.

A stranger has no right to chastise the slave of another person; and an assault and battery upon him is a breach of the peace.[d]

§ 1259. (*f.*) *Correction by persons in authority.*—It is admissible for the defendant to show that the alleged battery was merely the correcting of a child by its parent, the correcting of a servant or scholar by his master, or the punishment of the criminal by the proper officer;[e] but if the parent or master chastising the child exceed the bounds of moderation and inflict cruel and merciless punishment, he is a trespasser, and liable to be punished by indictment.[f] The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible criminally, unless the punishment be such as to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions.[g]

On the trial of an indictment of a schoolmaster for an assault on a pupil, the judge refused to instruct the jury that the defendant was criminally liable for punishing a pupil, only when he acted *malo animo*, from vindictive feeling, passion, or ill-will, or inflicted more punishment than was necessary to secure obedience, and not for error of opinion or judgment, provided he was governed by an honest purpose to promote the discipline and highest welfare of the school, and the best interests of the child; and instructed them that in inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed, as to the mode and severity of the punishment, by the nature of the offence, the age, size, and apparent powers of endurance of the pupil, and left it to the jury to decide whether the punishment was excessive. It was held, that the defendant had no ground of exception.[gg]

§ 1260. By the ancient common law, the husband possessed the power of chastising his wife, though the tendency of criminal courts in the present day is to regard the marital relation as no defence to a battery. "Perhaps, however," it was said in a late case by the Supreme Court of Mississippi, "the husband should still be permitted to exercise the right of moderate chastisement, in cases of great emergency, and to use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned."[h] And where a husband is indicted for an assault and battery on his wife, he may show in mitigation, that he was provoked thereto by her immediate bad behavior and misconduct.[i] In New York it is said that while a husband has no right to inflict corporal punishment on his wife, he may defend himself against her, and restrain her from acts of violence towards himself or others.[ii]

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[d] Nelson *v.* State, 10 Humph. 518.

[e] Com. Dig. Pleader, 3 M. 19; 1 Hawk. c. 60, s. 23, c. 62, s. 2; and see 2 B. & P. 224; Reeve's Dom. Rel. 288.

[f] Johnson *v.* State, 2 Humph. 283.

[g] State *v.* Pendergrass, 2 Dever. & Bat. 407; Com. *v.* Seed, 3 Am. Law Jour. 137; Reeve's Dom. Rel. 288; see State *v.* Williams (Vt.) 755.

[gg] Com. *v.* Randall, 4 Gray (Mass.), 36.

[h] State *v.* Chase, 1 Walker, 156.

[i] Robbins *v.* State, 20 Ala. 36.

[ii] People *v.* Winters, 2 Parker, C. R. (N. Y.) 10.

Where the defendant, as an officer of justice, is charged with assault and battery, it is a good defence to show that he was at the time engaged in the execution of his official duties, and that the offence was committed in their discharge.[j] No greater force, however, can be used than is necessary to effect the immediate object.[k] So a man may justify laying his hands upon another to prevent his fighting, or committing a breach of the peace;[l] or to prevent him from rescuing goods taken in execution;[m] or the like.[n] A coroner,[o] and a magistrate upon a preliminary inquiry,[p] may justify a forcible exclusion of a party from the justice room, even though he be the attorney of the party accused; but if the inquiry be final and of a judicial nature, all persons have a right to be present.[q]

§ 1261. (*g.*) *Guilt of major offence.*—How far a merger of the assault in a felony is a defence, has been already considered.[r]

Persons indicted for an assault and battery cannot be acquitted because the proof shows that they were guilty of a riot, as well as an assault and battery.[s]

§ 1262. (*h.*) *Assent of prosecutor.*—As a general proposition, if the prosecutor assented, this is a good defence.[t] Thus, if it be proved that the struggle was an amicable contest, voluntarily continued on both sides;[u] or that the blow was given at the prosecutor's request, to save him, as was supposed, from a prosecution of a felony;[v] the defence was held good. Where, however, the consent is obtained through fraud, by stupefaction, or through the ignorance or incapacity of the party assaulted, the question becomes one of great difficulty, about which the courts have been much divided, and which in its connection with the subject of sexual attempts, has been already fully considered.[w] In this country, at least, the weight of opinion is such that consent is no defence.[x] It is agreed on all sides that mere *acquiescence*, without *assent*, is no defence.[y]

3d. Indictment and verdict.

§ 1263. It is not necessary that the word "unlawfully" should be used in the indictment;[z] nor is it necessary to allege that the assault or battery was committed in public, or to the terror of the citizens of the commonwealth.[a]

A charge in an indictment, that the defendant did unlawfully "make an assault upon the body of I. M. and other wrongs and injuries to the said

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[j] 2 Ro. Abr. 546 a.
[k] Harrison *v.* Hodgson, 10 B. & C. 445.
[l] Com. Dig. Pleader, 3 M. 16.
[m] 3 Lev. 113.
[n] See 1 Mod. 168; 2 Ro. Abr. 546, 1. 40.
[o] Garnett *v.* Ferrand, 6 B. & C. 611.
[p] Cox *v.* Coleridge, 1 B. & C. 16.
[q] Daubney *v.* Cooper, 10 B. & C. 237.
[r] Ante, § 554–564.
[s] Calloway *v.* State, 1 Missouri, 150.
[t] R. *v.* Dead, 1 Den. C. C. 377; 2 Car. & Kir. 957.
[u] Com. Dig. Pleader, 3 M. 18.
[v] State *v.* Beck, 1 Hill, S. C. 363.
[w] Ante, § 1143–6, § 1155–6.
[x] Ibid.
[y] R. *v.* Case, 1 Eng. Law & Eq. 544; R. *v.* Nichol, R. & R. 130; R. *v.* McGavaran, 6 Cox, C. C. 64.
[z] State *v.* Bray, 1 Missouri R. 126.
[a] Com. *v.* Simmons, 6 J. J. Marshall, 615.

I. M. then and there did," is sufficient without setting out the particular acts of the defendant, which, in law, constituted the offence.[b]

Although the word "assault" may not be used, yet when the indictment charges the accused with shooting a gun at or against another, with intent to commit murder, it will sufficiently imply an assault.[c]

An indictment which avers that the defendant "in and upon the body of I. S., deceased, in the peace of the commonwealth then and there being, did make an assault, and him the said I. S. did strike divers grievous and dangerous blows upon the head of him the said I. S. whereby the said I. S. was cruelly and dangerously beaten and wounded and his life greatly endangered," sufficiently shows that the assault was upon a living person.[d]

An indictment for an assault with a "basket-knife," with intent to kill, is supported by evidence of a "basket-iron."[e]

The "battery" can be discharged as surplusage, and a conviction sustained for the assault.[f]

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[b] Bloomer *v.* State, 3 Sneed (Tenn.), 66.

[c] State *v.* Munce, 12 La. An. 625.

[d] Com. *v.* Ford, 5 Gray (Mass.), 475.

[e] State *v.* Dame, 11 N. Hamp. 271.

[f] Ante, § 385, 560, 565. For indictments for assaults, see Wh. Prec. as follows:—

(213) Indictment for a common assault.
(214) Assault without battery.
(215) Assault and battery. Massachusetts form.
(216) Information in Connecticut for assault and battery and breach of peace, with commencement and conclusion.
(217) Assault and battery in New York, with commencement and conclusion.
(218) Assault and battery in New Jersey, with commencement and conclusion.
(219) Assault and battery in Pennsylvania, with commencement and conclusion.
(220) Threatening in a menacing manner, under Ohio statute.
(221) Assault and encouraging a dog to bite.
(222) Assault and tearing prosecutor's hair.
(223) Assaulting the driver of a chaise, and overturning the chaise with the wheel of a cart.
(224) Assault and beating out an eye.
(225) Assault and riding over a person with a horse.
(226) [For assaults on a pregnant woman, 204, &c.]
(227) Assault by administering cantharides to prosecutor.
(228) Assault with intent to kill an infirm person, by throwing him on the ground and beating him.
(229) For throwing corrosive fluid with intent, &c.
(230) [See for "Assaults with intent," &c., post, No. 242, &c., and also 1046, &c.
(231) Assault with beating and wounding on the high seas.
(232) Assault on high seas, by binding the prosecutor and forcing an iron bolt down his throat.
(233) Stabbing with intent to wound, under Ohio statute, p. 49, sect. 6.
(234) Shooting with intent to wound, under Ohio statute, p. 49, sect. 6.
(235) Assault on high seas, with dangerous weapon.
(236) Another form for same.
(237) Same in a foreign port, the weapon being a Spanish knife.
(238) Second count, same as first, charging the instrument differently.
(239) Third count—Assault with intent to kill.
(240) Assault and false imprisonment at common law.
(241) Assault and false imprisonment, with the obtaining of five dollars.
(242) Assault with intent to murder at common law.
(243) Another form for same.
(244) Assault with intent to drown.
(245) Assault with intent to murder, under the New York revised statute.
(246) Second count—With intent to maim.
(247) Assault with intent to commit a felony generally.
(248) Felonious assault under the Massachusetts statute.

II. ASSAULTS WITH FELONIOUS INTENT.

A. STATUTES.

UNITED STATES.

Assault upon high seas, &c. § 1264.
Breaking or entering ship, vessel, or raft, § 1265.

MASSACHUSETTS.

Assault with intent to murder, maim, or disfigure, § 1266.
Assault by person not armed with dangerous weapon, § 1267.
Assault with intent to commit rape, § 1268.
Assault with intent to commit burglary, robbery, rape, &c., § 1269.

NEW YORK.

Shooting at another, or an assault and battery upon another, with intent to kill, &c., § 1270.
Conviction of a person of an assault with intent to commit robbery, burglary, &c., § 1271.
No person shall be convicted of an assault with intent, when such has been perpetrated, § 1272.
Administering poison to another, where death shall not ensue, § 1273.
Assault with knife, dirk, or dagger, § 1274.
Indictment of person for assault with intent to kill, § 1275.

PENNSYLVANIA.

Administering poison, stabbing, cutting, or wounding, § 1275(*a*).
Attempting to administer poison, shoot, drown, suffocate, or strangle, § 1275(*b*).
Cutting and maiming, with intent to disfigure, § 1275(*c*).
Injuring by any explosive substances, § 1275(*d*).
Causing to explode, or sending an explosive substance, § 1275(*e*).
Administering stupefying mixtures with criminal intent, § 1275(*f*).
Aggravated assault, § 1275(*g*).
Modified verdict in cases of aggravated assaults, § 1275(*h*).

OHIO.

Assault with intent to commit murder or robbery, § 1276.
Maliciously shoot at or stab a person with intent to kill, § 1277.
Administering poison to another with intent to take life, § 1278.

B. OFFENCE GENERALLY, § 1279.

A.—STATUTES.

UNITED STATES.

§ 1264. *Assault upon High Seas, &c.*—If any person or persons upon the high seas, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board of any vessel belonging in whole or in part to the United States, or any citizen or

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(249) Assault with intent to murder in South Carolina.
(250) Felonious assault with intent to rob, being armed. Rev. Stats. of Massachusetts, ch. 125, § 14.
(251) Assault with intent to rob, against two.
(252) Another form for same.
(253) Assault with intent to ravish.
(254) Same, under revised statutes of Massachusetts, ch. 125, § 19.
(255) Assault with intent to rape, under Ohio statute, p. 48, sect. 4.
(256) Another form for assault with intent to ravish.
(257) Same against two.
(258) Same against a person of color, in North Carolina, under the statute.
(259) Indecent assault.
(260) Indecent assault with intent to have an improper connection.
(261) Indecent assault by stripping.
(262) Assault with intent to rape. Attempting to abuse a female under ten years of age, under Ohio statute, p. 48, sect. 4.
(263) Assault with intent to steal.

citizens thereof, shall, with a dangerous weapon,[c] or with intent to kill, rob, steal, or to commit a mayhem or rape, or to perpetrate any other felony, commit an assault on another, such person shall, on conviction thereof, be punished by fine not exceeding three thousand dollars, and by imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.[d] (Act 3d March, 1825, sect. 22.)

§ 1265. *Breaking or entering Ship, Vessel, or Raft.*—If any person or persons, on the high seas, or in any of the places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any ship or vessel, or raft; every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence. (Ibid. sect. 7.)[e]

[*For attempts to kill without malice, wherefrom death occurs on land, and for attempts to kill without death ensuing, see post,* § 2692.]

MASSACHUSETTS.

§ 1266. *Assault with Intent to murder, maim, or disfigure.*—If any person shall assault another with intent to murder, or to maim or disfigure his person, in any of the ways mentioned in the preceding section, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the State prison, not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail, not more than three years. (R. S. c. 125, sect. 11.)

§ 1267. *Assault by Person not armed with Dangerous Weapon.*—If any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob or to steal, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the State prison not more than ten years. (Ib. sect. 16.)

§ 1268. *Assault with Intent to commit Rape.*—If any person shall assault any female, with intent to commit the crime of rape, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the State prison for any term of years, or for life, or by fine not exceeding one thousand dollars, and by imprisonment in the county jail not more than three years. (Ib. sect. 16.)

§ 1269. *Assault with Intent to commit Burglary, Robbery, Rape, &c.*—If any person shall assault another with intent to commit any burglary, robbery, rape, manslaughter, mayhem, or any felony, the punishment of which assault is not hereinbefore prescribed, he shall be punished by imprisonment in the State prison, not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than three years. (Ib. sect. 23.)[f]

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[c] Whether an assault was with a dangerous weapon or not, may depend upon matter of fact, or upon the manner of the assault, and in such case the court cannot declare, as matter of law, that the assault, if committed with a belaying pin, was with a dangerous weapon. The question must be left to the jury. United States *v.* Small, 2 Curtis C. C. 241.

[d] This act constitutes a misdemeanor, not a felony. U. S. *v.* Gallagher, 2 Paine C. C. R. 447.

[e] See post, § 2002.

[f] It has been held that the words, "felonious assaulter," in the above statute, do not constitute the offence of felony. Com. *v.* Barlow, 4 Mass. 439; Com. *v.* Newell, 7 Mass. 244; Com. *v.* Squire, 1 Metc. 258. Now, however, by statute, 1852, ch. 37, the offence is made a felony, and must be charged "feloniously." See Com. *v.* Chapman, 7 Month. Law Rep. N. S. 155. See Wh. Prec. 254.

NEW YORK.

§ 1270. *Shooting at another, or an Assault and Battery upon another with Intent to kill, &c.*—Every person who shall be convicted of shooting at another, or of attempting to discharge any kind of fire-arms, or any air-gun, at another, or of any assault and battery upon another, by means of any deadly weapon, or by such other means or force, as was likely to produce death; with the intent to kill,[g] maim, ravish, or rob such other person, or in the attempt to commit any burglary, larceny, or other felony, or in resisting the execution of any legal process, shall be punished by imprisonment in a State prison, for a term not more than ten years. (2 R. S. 665–6, sect. 36.)

§ 1271. *Conviction of a Person of an Assault with Intent to commit Robbery, Burglary, &c.*—Every person who shall be convicted of an assault, with intent to commit any robbery, burglary, rape, manslaughter, or any other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in a State prison for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. (Ib. sect. 39.)

§ 1272. *No Person shall be convicted of an Assault with Intent, when such has been perpetrated.*—No person shall be convicted of an assault with the intent to commit a crime, or of any other attempt to commit any offence, when it shall appear that the crime intended, or offence attempted, was perpetrated by such person at the time of such assault, or in pursuance of such attempt. (2 R. S. 702, sect. 26.)

§ 1273. *Administering Poison to another where Death shall not ensue.*—Every person who shall be convicted of having administered, or having caused and procured to be administered, any poison to any other human being, with intent to kill such being, whereof death shall not ensue, shall be punished by imprisonment in a State prison for a term not less than ten years. (2 R. S. 665, sect. 37.)

§ 1274. *Assault with Knife, Dirk, or Dagger.*—Any person who, with intent to do bodily harm, and without justifiable or excusable cause, shall hereafter commit any assault upon the person of another with any knife, dirk, dagger, or other sharp, dangerous weapon; or who, without such justifiable or excusable cause, shall shoot off or discharge at another, with the intent to injure such other person, any air-gun, pistol, or other fire-arms, although without intent to kill such other person or to commit any other felony, shall, upon conviction, be punished by imprisonment in a State prison for a term not more than five years, or by imprisonment in the county prison for a term not exceeding one year. (Laws of N. Y. 1854, chap. 74, p. 152.)

§ 1275. *Indictment of Person for Assault with Intent to kill.*—Upon any indictment against any person for an assault with intent to kill, it shall and may be lawful for the jury to find such accused person guilty of an assault, according to the provisions of this act. (Ibid. sect. 2.)

PENNSYLVANIA.

§ 1275(*a*). *Administering Poison, stabbing, or wounding.*—If any person shall

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A plea of a former acquittal before a justice of the peace is a bar to an indictment for an assault and battery, though it charges that the life of the person beaten was put in great danger. (Com. *v.* Cunningham, 13 Mass. 245); but it was otherwise, under the Stat. 1783, c. 15, if the indictment averred that the assault, &c., was of a *high and aggravated nature.* Com. *v.* Goddard, 13 Mass. 455.

[g] An attempt to commit any felonious homicide will support this. People *v.* Shaw, 1 Harris, C. C. 327. For form see Wh. Prec. 248.

administer, or cause to be administered or taken by another, any poison or other destructive thing, or shall stab, cut, or wound any person, or shall, by any means whatsoever, cause any person bodily injury, dangerous to life, with intention, in any of the cases aforesaid, to commit murder, such person shall be guilty of felony. and shall, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years. (Rev. Act, Bill I. sect. 81.)

§ 1275(*b*). *Attempting to administer Poison, shoot, or cut, &c.*—If any person shall attempt to administer any poison, or other destructive thing, or shall attempt to cut, or stab, or wound, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, he shall, although no bodily injury be effected, be guilty of felony, and be sentenced to pay a fine of one thousand dollars, and undergo an imprisonment, by separate or solitary confinement, not exceeding seven years. (Ibid. sect. 82.)

§ 1275(c). *Cutting and Maiming with Intent to disfigure.*—If any person, unlawfully and maliciously, shall shoot at any person, or shall, by drawing a trigger, or by any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, the person so offending shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. (Ibid. sect. 83.)

§ 1275(*d*). *Gunpowder, &c.*—If any person shall unlawfully, wilfully, and maliciously, by the explosion of gunpowder, or other explosive substance, burn, maim, disfigure, disable, or do grievous bodily harm to any person, he shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding three years. (Ibid. sect. 84.)

§ 1275(*e*). *Explosive Missile.*—If any person shall unlawfully and maliciously cause any gunpowder, or other explosive substance, to explode, or send or deliver to, or cause to be taken and received by, any person any explosive substance, or any other dangerous or noxious thing, or cast or throw at or upon, or otherwise apply to any person, any corrosive fluid, or other destructive or explosive substance, with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to such person, he shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. (Ibid. sect. 85.)

§ 1275(*f*). *Stupefying Drugs, &c.*—If any person shall unlawfully apply or administer to another any chloroform, laudanum, or other stupefying and overpowering drug, matter, or thing, with intent thereby to enable such offender, or any other person, to commit, or with the intent to assist such offender, or other person, in committing any felony, every such offender shall be guilty of a felony, and, being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate and solitary confinement at labor, not exceeding five years. (Ibid. sect. 86.)

§ 1275(*g*). *Aggravated Assault.*—If any person shall unlawfully and maliciously inflict upon another person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully cut, stab, or wound any other person, every

such person shall be guilty of a misdemeanor, and, being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years. (Ibid. sect. 98.)

§ 1275(*h*). *Modified Verdicts in cases of Felonious Assault.*—If upon the trial of any indictment for felony, except murder or manslaughter, the indictment shall allege that the defendant did cut, stab, or wound any person, and the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied of his guilt of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of a misdemeanor, in unlawful cutting, stabbing, and wounding; and thereupon such defendant shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years. (Ibid. sect. 99.)

OHIO.

§ 1276. *Assault with Intent to commit Murder or Robbery.*—That if any person shall assault another, with intent to commit a murder, rape, or robbery,[h] upon the

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[h] In a prosecution under this act, the counsel for defendant moved the court to instruct the jury, "that if they were of opinion that the facts of the case would not warrant them in finding the defendant guilty of an assault with intent to kill and murder, as charged in the indictment, yet that it was competent and lawful for the jury to find the defendant guilty of assault and battery alone." This charge the court refused to give.

The prosecuting attorney asked the court to instruct the jury, "that if they did not find the defendant guilty of the assault with intent to kill and murder, they must find him not guilty of the whole charge;" and this instruction the court gave to the jury; to all which the defendant excepted.

"We are all of opinion that the charge was erroneous. That a jury may find a verdict of guilty for part, and acquit for the residue; that where an accusation for a crime of a higher nature includes an offence of a lower degree, the jury may acquit him for the graver offence, and return him guilty of the less atrocious. * * * The judgment must be reversed." (Lane, J., Stewart *v.* State, 5 Ohio, 242.)

Discharging a gun, loaded with powder and wadding only, at a person so far distant that no injury would probably result from the act, is not a violation of the 24th section of the act for the punishment of crimes. (Henry et al. *v.* State, 18 Ohio, 32.)

In an indictment for an assault with intent to murder, it is sufficient to describe the intent in these words: "With intent in and upon him, the said John F. Walton, then and there feloniously, wilfully, and of his malice aforethought, to commit a murder."

Though in the indictment it be averred that the assault was committed with malice aforethought, yet the jury may convict, if the proof satisfy them the assault was committed with intent maliciously and purposely to kill, although they should find it was made without malice aforethought. For form, see Wh. Prec. 255.

If a father wantonly makes an assault upon a third person, and his son afterwards come into the affray, to aid his father in the assault, on an indictment against the son for an assault with intent to murder, the jury cannot consider his relation to his father, nor the circumstances of peril in which his father was placed. (Sharp *v.* State, 19 Ohio, 379.)

An indictment for assault with intent to commit a rape, need not set forth whether the person on whom the attempt was made was a daughter or sister of the defendant, or an infant, or other person. (Bowles *v.* State, 7 Ohio R. P. 2d, 243.) It is well to observe, however, remarks Mr. Warren, that although that case was prosecuted about a year after the present Crimes' act had gone into effect, yet the crime must have been committed while the act of 1831 was in force, for Hitchcock, J., in his decision, reads from that act, instead of from the one now in force; there being a slight difference in the last clause of the 5th section. (See Chase, 1724; Warren C. L. 63.)

A female idiot, or an insane female, may be the subject of an assault with intent to commit a rape. (State *v.* Crow, 10 Wes. L. J. 501.)

person so assaulted, every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and

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The offence of assault with intent to murder, defined in the 17th section, and that of shooting or stabbing with intent to kill, defined in the 24th section of the Crimes' act, are distinct offences; and if a count charging the commission of one of these offences, contain also a charge for the other, it will be bad for duplicity. (Wilson *v.* State, 18 Ohio, 145.) And it is probable that an indictment drawn under the 4th section of this chapter would not be supported by proof of shooting, shooting at, or stabbing with intent to kill. (See Smith *v.* Ohio, 22 Ohio R. 511.)

Where an indictment contains a count for an assault with intent to murder, and another for shooting with intent to kill, and the jury find the defendant guilty of the last charge, the court cannot, with the consent of the jury, enter a verdict of guilty, generally, on both counts of the indictment. (Wilson *v.* Ohio, 18 Ohio R. 145.)

In a late case under this section, Thurman, J., said: "It is agreed, upon both sides, that the indictment is framed upon the 17th section of the 'Crimes' Act,' and not upon the 24th. Mr. Attorney-General, in his brief, says: 'The indictment does not charge the crime of maliciously shooting at the prosecutor with intent to kill, &c., under the 24th section. It is true, the words 'shoot at' occur in it, but it does not allege that the shooting was malicious, the very gist of the offence; it does not aver the weapon discharged, nor that it was loaded; all of which are necessary to a count under this section. (See the form, Archbold, 428, old ed.) This may be correct. We do not say that it is not. But if it be granted that the indictment is upon the 17th section, a very grave question arises, namely, Was the prisoner properly indicted? The facts, which the testimony tended to prove, are set out in the bill of exceptions, by which it appears that the only assault made was by shooting with a pistol. There was no assault independent of the shot. Does such a case fall under the 17th section? That section is in these words: 'That if any person shall assault another, with intent to commit a murder, rape, or robbery, upon the person so assaulted, 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, nor less than three years.' There is no doubt that the case comes within the letter of this section, but we must, if possible, find the legislative intent, to do which other parts of the act must be considered. Turning, then, to the 24th section, we see it provided: 'That if any person shall maliciously shoot, stab, or shoot at any other person, with intent to kill, wound or maim such person, 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 twenty years nor less than one year.'

"It is very clear that this section, also, in its terms, embraces the case. It has, indeed, been suggested, that the 17th section was designed for cases in which, if death had resulted, the crime would have been murder in the first degree, and the 24th section for those cases in which the killing would be only murder in the second degree. I must say, that this seems a strange construction to me. It makes the legislature provide a punishment of twenty years' imprisonment for the lesser offence, and only seven years for the greater. And it is directly opposed to the case of Sharp *v.* The State, 19 O. R. 386, in which it was held, that there might be a conviction under the 17th section, though, had death resulted, the crime would have been but murder in the second degree. Malice is a necessary ingredient of the offence under either section; for there can be no conviction under either, save of an assault, or an assault and battery, if the crime would have been merely manslaughter in the event of death.

"As then, each section, in terms, embraces the case under consideration, the question is presented, Was it the intention of the law makers that the prisoner might be prosecuted under either section, at the option of the grand jury, or the attorney for the State? Or, was it meant that the indictment should be upon the 24th section, alone, when the shooting or stabbing was the only assault committed? It would, certainly, be somewhat strange if such a discretion was vested in a grand jury, or a prosecuting attorney, and would open a wide door to partiality, or persecution, and render the punishment of crime not a little uncertain.

"If the indictment may be under either section, then, by selecting the 17th, the accused, if found guilty, must be imprisoned for at least three years, however much his case may appeal to the clemency of the court; whereas, were he indicted under the 24th, he might be imprisoned for one year only. On the other hand, if prosecuted under the latter section, he might be confined for twenty years; but if under the

kept at hard labor, not more than seven, nor less than three years. (Act of March 7, 1835, Swan's Stat. sect. 17, 271.)

§ 1277. *Maliciously shoot at or stab a Person with Intent to kill, &c.*—That if any person shall, maliciously, shoot, stab, or shoot at any other person, with intent to kill, wound, or maim such person, 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 twenty years, nor less than one year.[1] (Ibid. sect. 24.)

§ 1278. *Administering Poison to another with Intent to take Life.*—That if any person or persons shall administer poison to another, with intent to destroy or take the life of the person or persons to whom the same shall be administered, or to do him, her, or them an injury; or if poison shall be prepared with the intent aforesaid, and the same shall be taken by any person or persons, whereby an injury to such person or persons may be done; the person or persons so offending, their aiders and abettors, 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 fifteen, nor less than three years. (Act of March 7, 1835, Swan's Stat. sect. 34, 274.)

B.—Offence generally.

§ 1279. In an indictment for an assault and battery with intent to murder, the intent with which the injury is inflicted constitutes the offence. The true

former, for not over seven, however heinous his crime might be. Now, is it probable that the legislature enacted two sections, with such different penalties, for the same offence, and left it to the discretion, partiality, or prejudice, of a grand jury, or prosecuting attorney, to decide under which section to indict? Is it not much more reasonable to suppose that, regarding the use of a fire-arm, a knife, or similar weapon, as a more dangerous offence than an assault with a bludgeon, or the like, and knowing it to be a crime of frequent occurrence, and therefore requiring severe repression, the 24th section, with its maximum penalty of twenty years' imprisonment, was enacted to repress it; while for assaults not so likely to prove fatal, the 17th section, with its maximum of seven years' imprisonment, was adopted? And that the minimum penalty is less in the former than in the latter, is owing to the fact that the former includes cases in which the intent is merely to wound or maim. Again, it was distinctly decided, in Wilson *v.* The State, 20 O. R. 26, that these two sections define 'distinct and independent offences.' For these reasons, and others that might be mentioned, it would, probably, be correct to hold that the case under consideration does not fall under the 17th section, or, in other words, that, as there was no assault independent of the shooting, the prisoner could properly be indicted under the 24th section alone. But this view of the case has not been argued. The counsel on neither side have presented it, and there is another ground, upon which the judgment must be reversed. We, therefore, think it best to leave it open for further consideration." (Smith *v.* State, 2 Ohio St. Rep. N. S. 512.)

[1] In England, it is necessary to prove that the gun or pistol was loaded as charged in the indictment; although it is sufficient to charge that it was loaded with gunpowder and other destructive materials; and then proof of any kind of a loading that endangered the life, body or limbs of the prosecutor, will support the indictment. (Archbold's C. P. 271.) See for form, Wh. Prec. 233–4.

To support a charge of *shooting at*, it must appear that the defendant actually did shoot at the person as charged in the indictment. Therefore, where the prisoner fired into a room in which he imagined the prosecutor was at the time, but in fact he was not there, nor within reach of the shot, it was holden that he could not be convicted, however evident his intention might be. So where a man at night fired towards that part of the fence over which he supposed the prosecutor was passing, when in fact the prosecutor passed over another part of the fence, at more than five yards distant from it, it was holden on the old English statute, not to be a shooting at. (Archbold's C. P. 270.)

ground upon which such a question rests is, whether it would have been murder, had death ensued from the stroke.[j] The intent forming the gist of the offence must be specifically proved.[k]

§ 1280. On an indictment for feloniously assaulting, and beating with intent to disfigure, stronger circumstances of malice aforethought must be proved than on an indictment for murder. It seems express proof of the intent to disfigure must be made.[l]

Where the stabbing is proved, the law presumes the existence of malice, to rebut which, the proof either on the part of the State or the prisoner, must demonstrate the fact that the stabbing was done under such circumstances as would, had death ensued therefrom, have mitigated the offence from murder to manslaughter or excusable homicide, or left it doubtful whether it was not so done.[m]

If intending to murder A., and supposing B. to be A., a person shoots at and wounds B., he may be convicted of wounding B. with intent to murder him.[n]

As has already been observed, the defendant, when the felonious intent is not proved, may be convicted of the assault alone.[o]

Where the present ability to commit a felonious attack is wanting, the offence is not complete, so where a man was indicted for shooting at another with intent to murder, and on trial it appeared that the gun contained in it nothing but powder and cotton wad (though the man shooting believed it contained a bullet), and the man shot at was forty feet distant; it was held that he was not guilty as charged.[a]

An assault with intent to kill may be committed without actual striking or wounding.[b]

Evidence showing that if death had ensued the killing would have been murder, will support an indictment for assault with intent to murder.[c]

An indictment for an assault with intent to commit murder is not supported by evidence of an assault, death resulting from which, would not have been murder.[d] But it is immaterial whether the intended murder would, if consummated, be murder of the first or of the second degree.[e]

In the trial of an indictment for maliciously stabbing with intent to wound, it is not error for the court to refuse to charge the jury that they cannot rightfully convict, save for an assault, or assault and battery, if they find the

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[j] State *v.* Anderson, 2 Tenn. R. 6; State *v.* Neal, 37 Maine, 468; People *v.* Vinegar, 2 Parker C. R. (N. Y.) 24.

[k] State *v.* Negro Bill, 3 Harrington, 577; State *v.* Johnson, Id. 571; Morgan *v.* State, 13 S. & M. 242; Moman *v.* State, 24 Miss. 54; State *v.* Neal, 37 Maine (2 Heath), 468; but see U. S. *v.* Thorp, 5 Cranch C. C. R. 39.

[l] Penn'a *v.* M'Birnie, Add. 30.

[m] Wright *v.* State, 9 Yerger, 342; though see § 706–9, &c.

[n] R. *v.* Smith, 33 Eng. Law & Eq. 567.

[o] State *v.* Bowling, 10 Humph. 52; Stewart *v.* State, 5 Ohio R. 242; Clark *v.* State, 12 Georgia, 350; Gardenhier *v.* State, 6 Texas, 358; see R. *v.* Mitchell, 12 Engl. Law & Eq. 588; ante, § 385, 560, 565.

[a] State *v.* Swails, 8 Ind. 524.

[b] State *v.* M'Clure, 25 Mis. (4 Jones) 29.

[c] King *v.* State, 21 Geo. 220.

[d] State *v.* Neal, 37 Maine (2 Heath), 469.

[e] People *v.* Scott, 6 Mich. (2 Cooley) 287.

facts to be such that, had death ensued from the wound, the crime would have been manslaughter; nor is it error for the court to charge the converse of the proposition requested to be charged.[f]

§ 1281. In an indictment for an assault with intent to commit an offence, the same particularity is not necessary as is required in indictments for the commission of the offence itself. Thus, it may be laid down generally, that in an indictment for soliciting or inciting to the commission of a crime,[p] or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. So an indictment for an assault with intent to steal from the pocket, without stating the goods or money intended to be stolen, is good.[q] In an indictment for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant to effectuate the murderous intent.[r] The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.[s]

§ 1282. An indictment which charges the accused with "an assault and battery, with a deadly weapon, upon a certain slave with intent to commit manslaughter," cannot be construed to be an indictment for an assault with intent to kill, which is understood, and has been held, an intent to commit murder.[t]

§ 1283. In an indictment for assault with intent to kill, the person intended to be killed must be named or designated. A charge "with intent, in so striking and beating him, the said J. W. with the club, &c., feloniously, &c., to kill and murder, against, &c," is bad for uncertainty, J. W. being only named as the person assaulted.[tt]

In Maine, an indictment contained four counts. The first two charged an assault, in different forms, with intent to murder; the last two charged an assault with intent to kill. It was held, that they all charged but one substantive offence, and the verdict might be guilty of an assault simply, or of an assault with intent to kill, or of one with intent to murder.[u]

§ 1284. An assault with intent to kill cannot be justified on the ground that it was necessary for the defence of property.[v] The law, in this respect, must be the same as exists in homicide. If there is an aggression—a going *out* of the house for the purpose of attack—self-defence ceases. It is necessary that the danger should have been personal, imminent, and immediate; and though, when the assault with intent to kill is necessary to prevent the

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[f] Nichols *v.* The State, 8 Ohio State R. (N. S.) 435.

[p] R. *v.* Higgins, 2 East, 5; though see Beasley *v.* State, 18 Ala. 535; Trexler *v.* State, 19 Ala. 21, where it is said that the facts must be stated; see ante, § 292.

[q] Com. *v.* Rogers, 5 Serg. & R. 463; Com. *v.* M'Donald, 5 Cush. 365; see ante, § 292.

[r] State *v.* Dent, 3 Gill & John. 8; U. S. *v.* Herbert, 5 Cranch C. C. R. 87; State *v.* Chandler, 24 Mis. (3 Jones) 1281.

[s] Ibid.; but see contra, State *v.* Johnson, 11 Texas, 22; State *v.* Jordan, 19 Mis. (4 Bennett) 213.

[t] Bradley *v.* State, 10 S. & M. 618.

[tt] State *v.* Patrick, 3 Wis. 812.

[u] State *v.* Phinney, 42 Maine, 384.

[v] State *v.* Morgan, 3 Iredell, 186.

commission of one of the higher felonies, it is justifiable, it is otherwise as to a larceny or trespass.[w]

§ 1285. In Georgia, an indictment for an assault with intent to murder, must charge that the *act* was done feloniously, with malice aforethought; it is not sufficient that this allegation is made in the first part of the indictment, where the assault is charged.[x]

It is not necessary that the term "unlawfully" should be used.[y]

§ 1286. Where a person had been forbidden a house by the owner, but visits it at the invitation of a servant, at an hour when he may expect to meet the owner, for the purpose of having music; when instead of bringing his violin, he comes armed with a deadly instrument, a six barrelled revolving pistol, and when, upon being ordered out by the owner, he asked the latter to go with him, and this being refused, he stopped at the door, and made an assault by presenting his pistol—this, if death ensues, would have been murder; and therefore, even according to the old authorities, he might well be convicted of an assault with intent to murder.[z]

§ 1287. An assault with intent to commit murder, though formerly considered a felony, is, it seems, now held to be a misdemeanor only; and although it may be a high misdemeanor, it is not subject to any additional punishment, but only such as in the discretion of the court may be inflicted for other misdemeanors at common law.[a]

III. Assault on officers, &c., when in the execution of their duties.[b]

Statutes.

United States.

§ 1288. *Obstructing or opposing any Officer in the Discharge of his Duty.*—If any person shall knowingly or wilfully obstruct, resist, or oppose any officer of the

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[w] See ante, § 1019, etc.

[x] State *v.* Howell, Ga. Decis. Part i. 158; State *v.* Wilson, 7 Ind. 516; but see U. S. *v.* Gallagher, 2 Paine, C. C. 447.

[y] State *v.* Williams, 3 Foster (N. H.), 321; § 404.

[z] State *v.* Royden, 13 Iredell, 505.

[a] Stout *v.* Com. 11 S. & R. 179; State *v.* Scott, 24 Verm. (1 Deane) 127; though see Curtis *v.* People, 1 Breese, 199; State *v.* Boyden, 13 Iredell, 505.

[b] See Wharton's Precedents, as follows:—

(872) Assault and rescue.
(873) Against two for a rescue, one of them being in custody of an officer of the marshal's court, upon process, &c.
(874) Assault, and rescuing goods seized as a distress for rent after a fraudulent removal.
(875) Assault on an officer of justice, and taking from him goods which had been seized by him on execution.
(876) Rescuing goods distrained for rent of a house.
(877) Riot, and rescue of fugitive slaves from their masters.
(878) Prison breach.
(879) Assault on a constable, etc.
(880) Another form for same.
(881) Second count. Averring arrest of defendant by said constable, &c., and proceedings before a justice of the peace, upon which defendant was committed in default of bail, charging resistance by defendant to the officer when detaining him in custody.

United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat, or wound any officer, or other person duly authorized in serving or executing any writ, rule, order, process, or warrant aforesaid, such person shall, on conviction, be imprisoned, not exceeding twelve months, and fined not exceeding three hundred dollars.—(Act of 30th April, 1790, sect. 21.)[c]

PENNSYLVANIA.

If any person shall knowingly, wilfully, and forcibly obstruct, resist, or oppose any sheriff, coroner, or other officer of the commonwealth, or other person duly authorized, in serving or attempting to serve or execute any process or order of any court, judge, justice, or arbitrator, or any other legal process whatsoever, or shall assault or beat any sheriff, coroner, constable, or other officer or person duly authorized, in serving or executing any process or order as aforesaid, or for and because of having served or executed the same; or if any person shall rescue another in legal custody; or if any person being required by any sheriff, coroner, constable, or other officer of the commonwealth, shall neglect or refuse to assist him in the execution of his office in any criminal case, or in the preservation of the peace, or in apprehending and securing any person for a breach of the peace, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment not exceeding one year, and to pay a fine not exceeding one hundred dollars, or either, or both, in the discretion of the court. (Rev. Act, 1860, tit. 2, § 8.)

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(882) Resistance to a constable employed in the arrest of a fugitive charged with larceny.
(883) Resistance to a peace-officer in the performance of his duties; form used in New York.
(884) Resisting constable, while serving State warrant, under Ohio statute.
(885) Resistance to the marshal of the United States in the service of a writ of arrest.
(886) Refusal to aid a constable in the service of a *capias ad respondendum*, issued by a justice of the peace.
(887) Assault, with intention to obstruct the apprehension of a party charged with an offence.
(888) Assault on a deputy-jailer in the execution of his office.
(889) Resisting a sheriff in execution of his office. First count, assault on sheriff at common law.
(890) Second count. The same under statute, specially setting out the execution which the sheriff was serving, &c.
(891) Assault on police officer of the city of Boston.
(892) Assaulting a person specially deputized by a justice of the peace to serve a warrant.
(893) Assaulting peace or revenue officers in the execution of their duties.
(894) Resisting an officer of the customs in the discharge of his duty.

[c] This section prohibits the obstruction of process of every species, legal and judicial; whether issued by the court in session, or by a judge or magistrate acting in that capacity out of court, in execution of the laws of the United States. On an indictment under this section, for resisting an officer, it is not necessary it should appear that the accused used or even threatened violence. (U. S. *v.* Lukens, 3 Wash. C. C. R. 335.)

A mere threat of resistance to the writ is not an offence under the act; but if, where the officer proceeds with a writ to the land, and is about to execute his process, a threat is used by a person forcibly retaining the possession, accompanied by the exercise of force, or having the capacity to employ it, and the officer does not execute his writ, the offence is complete. (U. S. *v.* Lowery, 3 Wash. C. C. R. 169.)

§ 1289. The New York statute makes the resisting of any *legal* process, a felony. To constitute the offence, however, it must be shown that the process is legal.[d] The defendant, also, must have had due notice of the officer's business;[e] and unless there be some such notification, the killing of the officer upon resistance made against the arrest will not be murder. Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning in order to arrest him, but not telling his business or using words of arrest, and the party not knowing that the other was an officer, in the first surprise snatched down a sword which hung in his room and killed the bailiff, this was ruled to be manslaughter.[f]

An officer making an arrest by virtue of a warrant, however, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resists.[ff]

§ 1290. With regard, says Mr. East, to such ministers of justice who, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary that the parties concerned should have some notice of the intent with which they interpose; otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they come to take a part in it. But in these cases a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged to bear the office he assumes; or if in order to keep the peace, he produce his staff of office, or any other known ensign of authority, the law will presume that the party killing had due notice of his intent, especially if it be in the daytime. In the night, indeed, when such ensigns of authority cannot be distinguished, some further notification is necessary; and commanding the peace, or using words of the like import notifying his business, will be sufficient. These kinds of notification by implication of law hold also in cases where such officers, having warrants directed to them as such to execute, are resisted in the attempt.[g] But even when the officer is properly authorized, this protection does not shelter him in case of any irregularity in his procedure. Thus, where the defendant was indicted for assaulting a constable in the execution of his office, it appearing that the prosecutor had an execution issued by a magistrate against the goods of a Mrs. Craig, who lived as tenant in the house of the defendant; and that when the constable attempted to remove the goods, the defendant resisted the removal of them until his rent was paid, and that resistance was the assault complained of; it was held, that the defendant was justified in resisting the removal of the goods until his rent was paid, using no more force than was necessary.[gg]

§ 1291. It is no defence to an indictment for forcibly obstructing an officer of the customs in the discharge of his duties, that the object of the

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[d] People *v.* Muldoon, 2 Parker, C. R. (N. Y.) 13; Barbour's Cr. Treatise, 82; Roscoe's Cr. Evid. 625, 656.

[e] 1 Hale, 470.

[f] Ibid.

[ff] Com. *v.* Cooley, 6 Gray, Mass. 305.

[g] See ante, § 1041, etc.

[gg] State *v.* Dunn, 1 Rice's Digest, 49.

defendant was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged.[h]

Even though an officer attempting to execute process, be unauthorized, and therefore a trespasser, yet he is not bound to submit to unreasonable and unnecessary violence, and may defend himself against the same without being guilty of an assault.[i]

On the trial of several persons for an assault upon an officer while serving a criminal process on one of them, an instruction to the jury that any act of that defendant, after he was arrested, which amounted to a resistance or obstruction of the officer, would render him liable, and that any person present, aiding, abetting, or approving that resistance, by words, acts, or signs, would be equally liable, affords no ground of exception, if that defendant only is found guilty of an assault on an officer in the discharge of his duty, and the others of a simple assault.[ii]

Persons interfering with an arrest by an officer under criminal process, not knowing that he is an officer and acting in the discharge of his duty, but interfering with the intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault.[j]

§ 1292. In an indictment for a misfeasance against a public officer, it is sufficient to allege that he was duly elected to the office by the qualified electors of, &c., and took upon himself the trust.[jj]

§ 1293. In an indictment for resisting an officer while attempting to serve a lawful process, it is not necessary to describe particularly the nature of the process, or the mode of the resistance.[k] But the indictment must set forth that such process was legal, or so describe it as to show it to be so; and if issued from a court of limited jurisdiction, it must appear that the court, in issuing it, acted within the sphere of their authority.[l]

§ 1294. An indictment for assaulting and obstructing an officer in the discharge of his duties as such, averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly and designedly, hinder and oppose him," &c., this was held to be a sufficient allegation that the defendant knew that the person assaulted was an officer.[m]

§ 1295. The federal fugitive slave law of 1850 makes the obstructing of process for the reclamation of slaves a misdemeanor, triable in the U. S. courts. The "hindering" and "resisting" officers under that act are to be considered as governed by the same rules as the ordinary cases of the resistance of officers of justice.[n]

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[h] U. S. *v.* Keen, 5 Mason's U. S. R. 453.

[i] People *v.* Gulick, Hsll & Denio (N. Y.) 229.

[ii] Com. *v.* Cooley, 6 Gray, Mass. 350.

[j] Ibid.

[jj] Edge *v.* Com. 7 Bar. 275.

[k] M'Quoid *v.* People, 3 Gilman, 76.

[l] Cantrill *v.* People, 3 Gilman, 356; Slicker *v.* State, 8 Eng. (13 Ark.) 397; see State *v.* Henderson, 15 Miss. 486; State *v.* Burt, 25 Vt. (2 Deane) 373.

[m] Com. *v.* Kirby, 2 Cushing, 577-8.

[n] In a recent case (U. S. *v.* Williams), Kane, Dist. J., thus charged the jury (Phil. 1852). "The descriptive words of the section are as follows:—

"'That any person who shall knowingly and willingly obstruct, hinder, or prevent

such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such fugitive from service or labor, either with or without process as aforesaid; or shall rescue or attempt to rescue such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from labor or service as aforesaid:' shall, &c. &c. &c.

"The power of Congress to legislate upon this subject is derived from the 2d section of the 4th article of the Constitution: 'No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such labor or service may be due.' As the provisions of the law must be understood of course with reference to the authority under which it was enacted, and as the Constitution provides only for the case of fugitives escaping from one State into another, and there claimed; it is plain that the act of aiding a slave to escape from the domestic custody of his master, however reprehensible such an act may be, is not an offence within the meaning of the Fugitive Slave Law. The action which it forbids is of a subsequent time, when the slave has passed beyond the limits of the State under whose laws he was held; and it must be such action as tends to make the master's claim of recaption ineffective, or to molest him in its exercise. Beyond this the act does not go."

"Bearing this in mind, we may distribute the subjects of this section under four titles, two of which relate to offences that may be committed before the arrest, and two to offences that may be committed after it:—

"1st. The harboring or concealing a fugitive, after knowledge or notice that he is such, so as to prevent his discovery and arrest:

"2d. The knowingly and willingly obstructing, hindering, or preventing the claimant or his representative from arresting the fugitive:

"3d. The rescuing or attempting to rescue a fugitive after arrest:—and,

"4th. The aiding, abetting or assisting him to escape from the claimant or his representative after recaption.

"I repeat it; for in other cases, though not perhaps in this, the remark may be important; the 'escape,' to which this part of the section refers, is an escape after recaption. As I have already shown, the constitutional provision, under which alone Congress has power over the subject, has no application to the original escape from the master's homestead; and there can be no second escape until after recaption.

"Not that it is lawful to abet or assist the slave, after he has passed into our State, in frustrating or eluding the claimant's pursuit. But this is not the offence of assisting him to escape, though it may be included appropriately in that of obstructing, hindering, and preventing the arrest.

"There is then but one form of offence in question here; for there is no evidence of harboring, and none of attempted rescue or escape after arrest. The only part of the section which we have to consider, is that which speaks of obstructing, hindering or preventing an attempted arrest.

"'Obstruct, hinder, prevent,' these words as commonly used are synonymous, and are given as such in the dictionaries. But they are of different roots, and are employed conventionally to express varying shades of meaning. Speaking etymologically, to obstruct, *ob-struo* (Lat.), is to build or set up something in the way; to hinder, *hind* (Anglo-Saxon), as in *behind*, *hindmost*, is to pull back; to prevent, *prævenio* (Latin), is to come before, to thwart by anticipating. In a more critical acceptation, *obstruct* implies opposition without active force, and does not imply that the opposition was in the end effective; *hinder* implies action, and to some extent effectiveness; to *prevent* is to be effective, but not necessarily by force, either active or inert. Thus, it may be, that an officer of the law was obstructed in his duty, and hindered perhaps for a time, but not finally prevented from performing it. So, too, he may have been obstructed; but surmounting or avoiding the obstruction, he may have been not even hindered. Again, he may be prevented by stratagem though stratagem alone can neither hinder nor obstruct him; and yet, should the success of the stratagem involve action, as it would almost necessarily, it might be very questionable whether the act ought not to be regarded as a hinderance.

"These distinctions are, however, the appropriate subjects of scholastic, rather than juridical disquisitions. Statutes defining crimes, unless the phraseology they employ has been itself legally defined, must be interpreted as their language is understood by

mankind at large—according to the every-day import of the words. I shall, therefore, charge you, that the words 'obstruct,' 'hinder,' and 'prevent,' in the act before us, mean substantially the same thing, and that it is accordingly criminal, knowingly, and wilfully to frustrate or retard the attempted recaption of a fugitive slave by his master or his representative, whether it be by force, active or passive, or by stratagem. And I further charge you, that, the offence being a misdemeanor, he who aids, abets, or assists another to commit it, whether he be present or absent at the consummation of the deed, is himself guilty as a principal.

"But the aiding, abetting, and assisting, must have reference both to the principal wrong-doer and to his crime. It is not every act, which contributes to or facilitates the perpetration of an offence, that is regarded in law as accessorial to it; even though the act be in itself immoral or unlawful. It must be something that is connected with the particular offence, and that supposes some degree of complicity in it with the principal offender.

"To convict one as accessary to a felony, or to involve him in the guilt of a misdemeanor for an act in which he participated indirectly, it must be shown that he was privy to its commission by others, or at least that there was a concert of purpose and of act between him and them in regard to it. So, in the case of Rex *v.* Bingley, before the twelve judges, Russ. & Ry. 448; while it was held not to be necessary that all should be present at the consummation of the crime, but that all might be guilty, though each had contributed his part towards it separately from the rest, yet the conviction was sustained on the ground that the act of each was 'in pursuance of a common plan.'

"And there is cardinal good sense in all this. For while, on the one hand, it would be a mockery of justice, if criminals could elude conviction, by ingeniously distributing the parts of their drama—on the other hand, no man could be safe in rendering the commonest offices of friendship or charity, if he were held liable to share all the guilt which his kindness towards others might enable them to commit. An act innocent in purpose, and innocent in fact at the time, cannot be made unlawful by the acts of others.

"I believe these few and simple propositions embody all the views which I need present to you of the law of this case. So far as they relate to the statute under which the defendant is indicted, you will perhaps agree with me that they do not justify the obloquy with which that statute has been assailed. It is not true, as I read its history and its provisions, that it strikes at the justly regulated sympathies of manhood: for the first sympathies of every man should be with his country, her safety, and her honor, and these exact as indispensable a ready and abiding fidelity to the constitutional compact. It does not violate the domestic charities: you may give rest to the weary, food to the hungry, clothing and a home to the necessitous—yes, and speed him on his way, whether he be bond or free; if your motive be honest, your purpose ingenuous, if you have not sought to wrong the master under cover of charity to the slave, this law does not condemn you. But you shall not, because you disbelieve in the wisdom, or the safety, or the justice of the institutions, which the people of other States have made for their own government, and while your faith stands pledged to them that their institutions shall be respected, and while you are receiving the benefits which they plighted to you in return, you shall not justify the forfeiture of your pledge by appealing to your conscience. You shall not, under pretext of exercising charities or indulging sympathies, stand between your neighbor and his covenanted rights, make inroads upon his estate, or endanger his fireside; you shall not harbor or conceal a fugitive whose arrest is authorized by the Constitution under which you live; you shall not obstruct, or resist, or prevent the man, who with lawful authority seeks to arrest him; you shall not seek to rescue him when arrested; or make the arrest futile by ministering to his escape.

"Such, as I understand it, is the Fugitive Slave Act; an act called for, as I have always thought, by the exigencies of the time, in accordance with the Constitution, both in principle and terms, and to be construed by it; an act, which can be held up to popular censure, only by expanding its provisions beyond their object and import, and thus violating the fundamental rules of legal interpretation.

"There are several questions of law, that have been raised by the counsel for the defence, to which I have not thought it necessary now to advert, some of them grave ones. Should your verdict make them important, they can be discussed hereafter.

"If you believe the evidence, it is in proof that the crime of obstructing, hindering, and preventing the claimant of a fugitive from making the arrest of his fugitive has been committed, within the meaning of the act of Congress. It is, on the other hand, admitted, that this defendant was not, at the time when the offence was committed, personally present at the place of its commission. The question, to be answered by

your verdict, is whether he was so connected with the perpetration of the crime, as to share the guilt of the immediate actors?

"The answer to this question involves two inquiries, on both of which you must pass: 1. What connection in point of fact? and 2. What community of purpose, or in the words of the twelve judges, what 'common plan' does the evidence establish between Williams and the men who assembled at Parker's house, to obstruct, hinder, or prevent the arrest or capture of Mr. Gorsuch's slaves? For, such a connection in fact, and such a community of purpose, must be established in proof: or your verdict must be one of acquittal.

"The evidence that bears on these inquiries is in a small compass. It is before me, as reported with admirable accuracy by the phonographic reporters, and I will with much pleasure read over to you such parts as any of you may judge material. As I understand the facts supposed to be proved, they are, on the part of the prosecution, these:—

"That the defendant went up in the cars on the night of the 9th of September (the outbreak near Christiana being on the morning of the 11th), as far as Penningtonville, arriving there about two o'clock in the morning of the 10th, that he was recognized there by one of the officers who had been employed by Mr. Gorsuch; and that when this officer afterwards proceeded on in a wagon, he saw a person whose dress appeared in the dim light to resemble the defendant's, following the wagon for a time at a distance; that the defendant went after daylight on the morning of the 10th to the house of a witness, whom he did not know, some three miles from Parker's house, saying that he had mistaken it for the house of another man, whom he wished to inform that he had come up in the cars with several men who were after slaves, and he requested witness to let the slaves know; that he said one of the slaves was named Nelson, and that the names of three others were on a paper that he had left at Christiana, but without saying with whom, or where the slaves were to be found; that he parted with the witness to go back to the railroad; and that he got into the cars about nine o'clock in the morning, and returned to Philadelphia; and that when arrested for treason some five days afterwards, he said to the officer who arrested him, in the hearing of the witness, an assistant officer, that he had conveyed the news to Christiana, and would do so again if he was at liberty, and that he considered it his duty to do so.

"On the part of the defence, the defendant's visit to Penningtonville was explained by the fact that he went there to demand payment of a note which was due to him from a colored person living there; and it was argued that the bearing of the officer at Penningtonville as well as his imputed character, was such as to justify the suspicion that he was on an illicit errand; that there having been anxieties and alarm for some weeks before among the colored population of the neighborhood, in consequence of attempts made to kidnap free persons near them, some of which had been successful, as was proved, and the defendant being himself a colored man, he would naturally, and might lawfully desire, that what he had seen and what he suspected should be known to the parties endangered; and the officer who arrested him, who made a minute at the time of the defendant's language, swore that he spoke of kidnappers and kidnapping, and not of the reclamation of slaves. Besides this, the defendant has proved by several witnesses of standing among us, that he has for many years been known as a meritorious and law-abiding man.

"If these are the facts, it will be for you to say, whether they establish any connection whatever between the defendant and the law-breakers at Parker's house; and whether, if so, they establish a complicity on his part in any of the transactions that occurred there, any combination with the principal wrong-doers, any community of purpose and of plan.

"You are not to presume guilt; but if you have reasonable doubts, they are to make for the defendant. On the other hand, you are not to require direct proof of that which, from its very character, can only be reached by inference from attending circumstances. The question of fact is for you, not for the court, to pass upon. I leave it with you, satisfied that you will render an honest and impartial verdict."

INDEX TO VOLUME I.

[THE FIGURES IN THIS INDEX REFER TO THE SECTIONS.]

ABATEMENT. (See PLEAS.)

ABDUCTION AND KIDNAPPING.

Statutes.

Massachusetts.

Secretly confining or imprisoning any other person, or forcibly carrying or sending such person out of State, 1176.

Offences mentioned in preceding section—where they may be tried, 1177.

Fraudulently enticing or taking away any unmarried woman of chaste life, 1178.

Time of commencing prosecutions, 1179.

New York.

Compelling a woman to marry a man by force, menace, or duress, 1180.

Taking any woman unlawfully with intent to compel her by force, etc., to marry him or other person, 1181.

Taking away any female child under fourteen years, from her father, mother, guardian, &c., 1182.

Forcibly seizing or confining any person, 1183.

Trial of offence in last section, 1184.

Consent of person kidnapped or confined no defence, 1185.

Necessary after fact, to kidnapping or confining, 1186.

Selling or transferring the services of any black, who has been forcibly taken away, 1187.

Where offence prohibited in last section may be tried, 1188.

Forcibly or fraudulently leading, taking, or carrying away, any child under twelve years, 1189.

Exposing child with intent to abandon it, 1190.

Abduction of female under twenty-five years, of previously chaste character, 1191.

Pennsylvania.

Attempt to seduce or carry away any mulatto, with design of selling, &c., 1192.

Knowingly selling, transferring, &c., any mulatto to carry out State, 1193.

Punishment of same, 1194.

Enticing or carrying away any free negro or mulatto, &c., 1195.

Selling, transferring, or assigning, any free negro, &c., for the purpose of making him or her a slave, &c., 1196.

Virginia.
Taking or detaining a white female against her will, with intention of marrying or defiling her, 1197.
Free person selling a free person as a slave, 1198.
Construction of English statute, 1202, &c.
Woman abducted may be a witness against the offender, 1203.
And this though she was married to him, 1203–4.
Under the statute, he who receives the offender not accessary after the fact as at common law, 1205.
Kidnapping an offence at common law, 1208.
Not necessary that actual force and violence be used, 535.
Requisites of an indictment for, 1212–13.
Nature of evidence in indictment for conspiracy to abduct, 1213.
(See SEDUCTION.)
Ohio.
Kidnapping a white person, 1200.
Kidnapping, &c., negroes; prohibit, 1200.
Punishment, &c., 1204.
Offence at common law, 1205.
ABORTION.
Statutes.
Massachusetts.
Procuring the miscarriage of a woman, 1214.
Advertising, &c., for purpose of informing where medicine, &c., may be obtained for the causing of miscarriage, 1215.
New York.
Administering to woman pregnant with quick child, any medicine, &c., for the destroying of child, 1216.
Administering medicine, &c., for the purpose of procuring miscarriage, 1216.
Solicitation of woman for purposes of procuring miscarriage, 1217.
Pennsylvania, 1217, *a*.
Virginia, 923.
Ohio.
Administering medicine, &c., to produce abortion, 1218.
Of taking life of pregnant woman or an unborn child—shall be guilty of misdemeanor, 1219.
Offence at common law, 1220.
Definition of quickening in England, 1220.
General law as to same' 1220–7.
Under New York statute of 1846, intent to destroy the child must be alleged, 1228.
Construction of same statute as to convictions, 1228.
In Pennsylvania, advising woman to kill her child, after whose birth she kills it, makes accessary before the fact, 1230.
(See INFANTICIDE, HOMICIDE, PREPARATION FOR TRIAL.)
Conspiracy to procure.
(See CONSPIRACY.)
ABSENCE OF MATERIAL WITNESSES,
when ground for new trial.
(See NEW TRIAL.)
ACCESSARY. (See PRINCIPALS AND ACCESSARIES.)

ACCOMPLICE,
letters to, parol evidence of contents of.
(See Forgery.)
ACCOMPLICES,
when admissible as witnesses.
(See Witnesses.)
ACQUITTAL,
where new trial can be granted, after.
(See New Trial.)
ACTS OF ASSEMBLY. (See Statutes, Crimes and Misdemeanors.)
ADDITIONS,
pleading of.
(See Indictment.)
ADJOURNMENT. (See Continuances.)
ADMISSION. (See Evidence.)
AFFRAY. (See Riot.)
AGE,
want of, how affecting capacity of witnessess, 755.
AGENTS. (See Principals and Accessaries.)
AGENT,
liability of principal for, 151.
Where the agent acts directly under the principal's commands, 152.
Where the agent is acting at the time in the line of the principal's business, but without specific instructions, 153.
Where the principal resides out of the jurisdiction, 154.
AGGRAVATION,
may be discharged as surplusage, 624–9.
ALLEGATIONS,
divisible, how far to be proved.
(See Evidence.)
ALTERING FIGURES IN A BILL. (See Forgery, 1481, &c.)
AMENDMENT,
statutes of, and their effect, 215.
ANIMALS,
malicious killing of, 5.
(See Malicious Mischief.)
How to be described, 377, 611.
(See Indictment.)
ANNOYANCE OF OTHERS,
how far indictable, 5, 6, 7.
ARDENT SPIRITS,
unlicensed sale of.
(See Nuisances.)
ARRAIGNMENT,
practice concerning.
(See Pleas.)
ARREST OF JUDGMENT,
Duplicity and misjoinder, however, cannot be taken advantage of in arrest, 395.
And so of irregularities in grand jurors, 468, &c.
And of misnomer, 233–59.

ARREST OF JUDGMENT.—*Continued.*
When on the face of the indictment, the offence appears excluded by the statute of limitations, it seems judgment may be arrested, 415.
ARSON.
Homicide committed, necessary to prevent, excusable.
ASPORTATION. (See LARCENY.)
ASSAULTS.
Assaults generally, 1240.
Statutes, &c., 1240.
Definition of, 1241.
Attempt must be intentional, 1241.
No assault, if there is not a present purpose to do an injury, 1241–5.
If threat be qualified, no assault, 1241–5.
There must be attempt to commit violence, 1241–5.
An offer to strike is an assault, although assailant is not near enough to reach his adversary, 1241–5.
It is an assault to point a loaded pistol at any one, but not an assault to point a pistol which is proved to be not so loaded, as to be able to be discharged, 1241–5.
Threatening to strike, is an assault, 1241–5.
False imprisonment will sustain indictment for assault, 1245.
What acts amount to an assault, 1247.
Putting cantharides in rum, not an assault, 1249.
It is for the jury to judge whether there is a present purpose to do harm, 1250.
The secrecy of an assault is no defence, 1250.
Assent on part of injured party, negatives assault, 1262.
In assaults, all persons concerned are principals, 1251.
Prosecutor who brings civil suit, will not be compelled to elect or abandon civil suit or prosecution, 1252.
Severe punishment, however, will not be given on criminal prosecutions, unless suit be relinquished, 1252.
No words will justify an assault, 1253.
What would be a defence to an indictment for homicide on ground of misadventure, is also a defence to an indictment for assault, 1254.
When a party can compel another to leave his premises, 1255–6.
Railway conductor, power of, 1255.
Trespasser may be ejected by force, 1255–6.
Proprietor of an inn has a right to request a visitor to leave, 1255–6–7.
Prior blow by prosecutor a good defence, 1258.
A stranger has no right to chastise the slave of another person, 1259.
Correction of child by parent, 1259.
Correction of child by teacher, 1259.
Correction of wife by husband, 1260.
Arrest by officers of justice, 1260.
Arrest by coroner or magistrate, 1260.
Indictment need not contain the word "unlawfully," 1263.
Nor need it allege that the assault was committed in public, &c., 1263.
Indictment in other respects, 1263.
Assaults with felonious intents, 1264.

ASSAULTS.—*Continued.*
Statutes.
United States, 1264.
Massachusetts, 1266.
New York, 1270.
Pennsylvania, 1275 (*a*).
Ohio, 1276.
Felonious results generally.
At common law, in an indictment with intent to murder, &c., it is the intent which constitutes the offence, 1279.
Proof of the intent necessary to convict, 1279.
When felonious intent is not proved, the defendant may be convicted of the common assault, 385, 560, 565, 1280.
An indictment for assault, the same particularity is not necessary as is required in indictments for the constituent offence, 1281.
Not necessary that the reasons should be set out, 1281.
The law as to the necessity of defence in an indictment for an assault with intent to kill is the same as in homicide, 1284.
Felonious intent must be charged, 1283.
An assault with felonious intent is but a misdemeanor, 1287.
Assaults on officers in execution of their duties, 1288.
United States Statute, 1288.
Construction of, 1288.
Pennsylvania, 1288.
Nature of process which is protected, 1289–90.
When notice is necessary to protect officer, 1289–95.
Obstruction for process under fugitive slave law, 1295.
What indictments for resisting officers must aver, 1295.
Assaults, with intent to ravish, evidence of, 1155.
What constitutes, 1155.
With intent, counts for may be joined with counts for the consummated felony, 414–17.
Particularity necessary in setting forth.
(See INDICTMENT.)

ASSEMBLY,
unlawful.
(See RIOT.)

ASSIGNMENT,
fraudulent.
(See SECRETING GOODS, &c.)

ATHEISM,
when affecting competency of witness.
(See WITNESS, 795, &c.)

ATTEMPTS TO COMMIT OFFENCES,
indictments for 292.
(See VOL. II.)

ATTORNEY,
altering execution day of writ.
(See FORGERY.)
Cannot plead for client in felony, 530.
Competency of, as witness.
(See WITNESSES.)

ATTORNEY-GENERAL,
signature of to bills.
(See Grand Jurors.)
Entitled to attend Grand Jury.
(See Grand Jurors.)
Assent of, necessary to finding of bill, but may be assisted on trial by other counsel, 474, &c.
When he may institute prosecution without previous binding over, 458-9-60.
Functions of, with grand jury, how far extending, 495, &c.
Misconduct of.
(See Misconduct in Office.)
Power of, as to *nolle prosequi*, 512, &c.
AUTREFOIS ACQUIT. (See Pleas.)
AVERMENT,
descriptive, how far to be proved.
(See Evidence.)

BAILIFFS,
homicide of or by, 1030-4.
Assaults on, 1288, &c.
BALANCE OF PROOF,
when supposed to shift from prosecutors to defendant, 327, 339.
BANK NOTES,
forgery of.
(See Forgery.)
How falsity of to be proved.
(See Forgery.)
How to be described, 305-49.
BARRATOR,
common, indictable at common law, 288.
BASTARD CHILD,
concealing death of.
Statutes.
Massachusetts.
Concealing death of an infant, which would otherwise have been a bastard, 1231.
Indictment for the murder of an infant bastard child, 1232.
Pennsylvania.
Concealing death of an infant bastard child, whether it was born alive or not, 1233.
Concealment of death of child, not conclusive evidence to convict party of murder, 1234.
Decisions under English and American statutes, 1234.
BATTERY. (See Assault.)
BAWDY-HOUSE. (See Nuisance.)
BEASTS,
malicious mischief to.
(See Malicious Mischief.)
When subjects of larceny.
(See Larceny.)
BIGAMY. (See Vol. II.)

BLASPHEMY. (See Vol. II.)
BRIBERY. (See Vol. II.)
Burden of proof.
(See Presumption.)
BURGLARY. (See Vol. II.)
Where the chamber of a guest at an inn is forced open and his goods stolen, it must be laid as the dwelling-house of the landlord, 609.
The intent may be inferred from facts, 631.
Presumption from possession of stolen goods, 728.
Indictment.
The offence must not only be laid to be done feloniously, but also *burglariously*, 402.
Need not aver the intent to be felonious, 1.
Effect of new trial when defendant is convicted of larceny only, 550.
Homicide committed necessarily to prevent, excusable, 1024.
BURNING. (See Arson.)

CAPTAIN OF VESSEL,
usurping command of, &c.
(See Confining Master.)
Maltreatment of men by.
(See Maltreatment.)
Forcing seamen on shore by.
(See Forcing Seamen.)
CAPTION. (See Indictment.)
CARRYING AWAY. (See Larceny.)
CASHIER. (See Embezzlement.)
CASTRATION,
when a mayhem, 1171, &c.
CATTLE,
malicious mischief to.
(See Malicious Mischief.)
CHALLENGES OF GRAND JURORS. (See Grand Jury.)
CHALLENGES OF JURORS. (See Vol. II.)
CHALLENGING TO FIGHT. (See Vol. II.)
CHARACTER,
evidence of, 636–824.
Defendant may call witnesses to speak generally as to his character, but not to prove particular facts, 636–7.
Must not be general, but pointed to the particular crime charged, 636.
Whether prosecution may prove particular facts, *dubitatur*, 636–7.
Evidence of prior misconduct, though defendant does not put his character in evidence, is admissible to drove malice or scienter, 639.
Not admissible to prove defendant had a tendency to a particular crime, 640–824–5.
Bad character of deceased is inadmissible, 641–2.
Though otherwise when it enters into nature of defence, 642.
Omission to produce evidence of good character not ground of presumption of bad, 627.
General view as to character, 643.
Sir W. Russell, 643.

CHARACTER.—*Continued*—Opinion as to weight of.
Mr. Sergeant Talfourd, 644.
Mittermaier, 646.
(See WITNESSES.)
CHATTELS.
how to be described.
(See INDICTMENT.)
Variance in proof of.
(See EVIDENCE.)
CHEAT,
Conspiracies to.
(See CONSPIRACY.)
CHEATS. (See VOL. II.)
CHRISTIANITY.
Reviling of, indictable, 6.
CIRCUMSTANTIAL EVIDENCE.
General effect of, 732.
Opinion of Story, J., 734.
Opinion of Whitman, C. J., 735.
Opinion of Park, J., 736.
Opinion of Gibson, C. J., 737.
Opinion of Shaw, C. J., 739.
Prerequisites to, 744.
Onus of proof is on the prosecution, 744.
Clear proof of the *corpus delicti* required, 745.
Conviction of larceny not to be sustained without proof of theft, 745.
Nor of homicide without proof of death, 745–51.
Though otherwise where body was destroyed, 745–51.
In infanticide, birth necessary to be proved, 748.
In death by poison, effect of poison must be specially proved, 745–51.
Marks of violence on the person indicating the weapon used, presumption to be drawn from, 831.
Inquiries in connection with wounds, whether accidental, self-inflicted, or given by another, 831–40.
Suicide, presumptions concerning, 833.
Passion or premeditation, how far to be drawn from character of wounds, 835.
Instrument of death, importance of determining nature of, 836.
Poison, 837.
Inspection and chemical analysis of corpse to be resorted to, 837–8.
Vessels and dishes found near deceased to be examined, 838–40.
Symptoms of disease and death to be examined, 838–40.
In conducting chemical analysis, earth near body to be examined, in order to see whether it is impregnated with arsenic, 838–41.
Specimens to be preserved by being carefully detached from external influences, 838–41.
Nature of veneficial test, 841.
Results of examination, 842.
Existence of poison to be proved, 842–4.
Inquiries as to parties within the range of suspicion, 844.
Materials appropriate to be converted into instruments of crime, 845.
Detached circumjacent bodies, 846.

CIRCUMSTANTIAL EVIDENCE.—*Continued.*
Position of deceased, 847.
Traces of blood, 848.
Examination of clothes, &c., 848.
Liability of deceased to attack, 849.
Possession of money or valuable articles, 849.
Old grudge, 850.
Jealousy,
Larceny, embezzlement, burglary, etc., 853.
Inquiries as to stolen articles, 853.
Inquiries as to burglarious instruments, 854–6.
Arson—inquiries concerning, 857.
Identification of offender, 8.
Inquiries for the purpose of suspicion, 858.
What facts lead to the particular person, 858–9–60.
What facts concern the effects of the crime, 861.
What facts appear as necessary conditions of the perpetration, 862.
Particular intent of supposed perpetrator, 862–3.
Threats uttered by such person, 862–3.
Marks on person, such as stains of blood, &c., 861.
Possession of articles known to have belonged to deceased, 728.
Intentional removal or destruction of traces of crime, 722–861.
Anxious inquiries into crime and judicial measures, 861.
Disclosures of circumstances to be known only to one acquainted with the particulars of the crime, 861.
Attempts to compound the matter with injured party, 714–861.
Uneasy deportment, 714–861.
Flight without proper motive, 714–861.
Presence of accused at probable time of crime, 861–2.
Discovery at the *locus in quo* of articles known to have belonged to the accused, 728, 861–2.
Footsteps leading from the place to the dwelling of the party, 861–2.
Possession of instruments adapted to the purpose, 631–862.
Peculiar qualifications pre-eminently adapted for the undertaking, or perfect acquaintance with the localities, 862.
Merits of direct evidence as to individuality as distinguished from *indicatory*, 863.
Preparation in forgery and counterfeiting.
(See FORGERY.)
Proper that in such case the writings should be placed under the custody of the court, 864.
Similitude of hands, 865.
Chemical tests, 867.
Circumjacent tests, 868.
Main question, did the accused *write* the instrument, 865–70.
General opinion as to handwriting, 865.
(See PRESUMPTIONS, EVIDENCE.)

CIVIL PROCEEDINGS,
pendency of, no bar to indictment, 549.

CLERGYMEN,
when privileged as witnesses, 775.

CLERGYMEN.—*Continued.*
Clerical errors.
(See INDICTMENTS.)
Clerk.
(See EMBEZZLEMENTS.)
Cock fighting.
(See NUISANCES.)
Co-conspirators, declaration of.
(See EVIDENCE.)
Co-conspirators, when admissible as witnesses.
(See WITNESSES.)
Co-defendants, when admissible as witnesses.
(See WITNESSES.)
COIN,
how to be described, 363–610.
Forgery of.
(See FORGERY.)
COMBINATION OF WORKMEN. (See CONSPIRACY.)
COMFORT.
Offences against.
(See NUISANCE, MALICIOUS MISCHIEF.)
COMMENCEMENT. (See INDICTMENT.)
"COMMON BARRATOR," "COMMON SCOLD,"
good in indictments without further specification, 289.
COMMON LAW JURISDICTION,
extent of, in U. S. Court, 163.
COMMON NUISANCE. (See NUISANCES.)
COMPARISON OF HANDS. (See PREPARATION OF EVIDENCE.)
COMPETENCY OF WITNESSES. (See WITNESSES.)
COMPOUNDING FELONY. (See VOL. II.)
CONCEALING DEATH OF BASTARD CHILD.
Statutes, 1231.
Decisions under English and American statutes, 1234.
not necessary that the concealment should be entire, 1234–9.
What indictment should state, 1234–9.
Construction of Pennsylvania acts, 1234–9.
CONCLUSION OF INDICTMENTS,
how to be framed.
(See INDICTMENT.)
CONFESSIONS. (See EVIDENCE.)
CONFINING MASTER OF VESSEL. (See VOL. II.)
CONSPIRACY. (See VOL. II.)
Conspiracy, in trial for, wife of one defendant inadmissible for others, 702–6.
CONTINUANCES. (See VOL. II.)
CONVICTION.
When incapacitating a witness, 758–65.
(See WITNESSES.)
Effect of, on second prosecution.
(See PLEAS.)
COOLING TIME. (See HOMICIDE.)

CORPORATION,
when necessary to show existence of.
(See FORGERY.)
Name of, how to be pleaded.
(See INDICTMENT.)
How far indictable, 85.
Indictable for breach of duty, but not for felony, 85–90.
And how for misfeasance, 87.
How appearance may be compelled, 89.
Municipal corporations, 90.
Name of, how to be averred, 233.
(See LARCENY.)
Intent to defraud.
(See FORGERY.)
CORPSES,
indignities to, how far indictable, 6.
Malicious trespass upon.
(See MALICIOUS MISCHIEF.)
CORPUS DELICTI,
necessary to be proved, 745–6–7, &c., 832–49, 873.
Conviction of larceny not to be sustained without proof of theft being committed, 745.
In murder, death should be proved, 745–6–7.
Though if body is proved to have been destroyed, not necessary to prove anything further than death, 746–7–8.
CORRUPTION IN PUBLIC OFFICES. (See MISCONDUCT.)
COUNSEL,
competency of, as a witness.
(See WITNESS.)
COUNTERFEITING. (See FORGERY.)
COUNTS FOR DIFFERENT OFFENCES,
when joinable, 414.
COURTS,
what, have jurisdiction in the United States.
Federal courts, 156.
What functions given them by Congress, 156–7–8.
Now thought to have no common law jurisdiction, 163–70.
Former view was to the contrary, 163–70.
Henfield's case, 167.
Worrel's case, 168–9.
Coolidge's case, 168–9.
Questionable how far the law is settled, 171–3.
Statutory offences falling under following heads:—
Arising in dock-yards, ships, &c., 174.
Against the law of nations, 175.
Against federal sovereignty, 176.
Against individuals, 177.
Against property, 178.
Against public justice, 179.
In such cases State courts have concurrent jurisdiction, 181–95.
How far such jurisdiction extends, 181–95.

COURTS.—*Continued.*
General opinion as to concurrent jurisdiction, 181–95.
Acts with regard to habeas corpus, 195.
How far federal and State courts can act on habeas corpus, 195–7.
Criminal jurisdiction of federal government, how disturbed, 199.
Original, 200.
Appellate from Circuit Court, 201.
Appellate from District Court, 202.
Appellate from Circuit Court for the District of Columbia, 203.
Appellate from the Territorial Courts, 204.
Appellate from the highest State Courts, 205.
Jurisdiction of Circuit and District Courts, 208.
Jurisdiction of Territorial Courts, 210.
COVERTURE, (See FEME COVERTS.)
CREDIT OF WITNESS,
how to be impeached.
(See WITNESS.)
CREW,
maltreatment of.
(See MALTREATMENT.)
forcing on shore.
(See FORCING SEAMEN, &c.)
CRIMES AND MISDEMEANORS,
generally.
General division of, at common law, 1.
Treason, what generally including, 1–2.
(See TREASON.)
Petit treason, abolished here, 1.
Felonies, general scope of, 2.
(See TREASON.)
Felonies defined in New York, 2
Felonies defined in Virginia, 2.
Misdemeanors, general definition of, 3.
In this country more extended than in England, 3.
Include whatever is productive of disturbance of the public peace, or of malicious injury to another, or of nuisance or of scandal to the community, or of personal lewdness, or tends to the commission of other crimes, 3–4.
Disturbance of public peace, 5.
Malicious injury to animals, 5.
(See MALICIOUS MISCHIEF.)
" " fruit trees, 5.
(See MALICIOUS MISCHIEF.)
Annoyance to sick persons, 5.
(See MALICIOUS MISCHIEF.)
Trespass on other property, 5.
(See MALICIOUS MISCHIEF.)
Indignity to corpses, 6.
Eaves-dropping, 6.
Unwholesome food, sale of, 6.
(See NUISANCE.)

CRIMES AND MISDEMEANORS.—*Continued.*
Wife, sale of, 6.
Voting, double, 6.
Drunkenness, 6,
(See NUISANCE.)
Lewdness, 6.
(See NUISANCE.)
Profane swearing, 6.
(See NUISANCE.)
Obscenity, 6.
(See NUISANCE.)
Blasphemy, 6.
(See NUISANCE.)
Sunday, disturbance of, 6.
(See NUISANCE.)
Challenging to fight, 8.
(See CHALLENGING.)
Adultery, 7.
(See ADULTERY.)
Fornication, 7.
(See FORNICATION.)
Attempts to commit offences, 5.
(See Attempts.)
Misdemeanors, when *mala prohibita,* 10.
Violation of statutes, 10, 11, 12.
Public officers, violation of duty of, 10, 11, 12.
Misdemeanor, when merged in felony, 71, 400.
Acts enjoined or forbidden by statute, though no statutory remedy by indictment is prescribed 10.
Where the statute prescribes the punishment, 10.
Where a new punishment is given to a common law offence, 10.
Where a common law misdemeanor is made a statutory felony, 10.
When common law is absorbed in statute generally and herein of the Pennsylvania Act of March 21, 1806, 11.
CRIMINATION OF WITNESS. (See WITNESS.)
CRUEL OR UNUSUAL PUNISHMENT,
by master, of seamen.
(See MALTREATMENT.)
CRUELTY TO ANIMALS. (See MALICIOUS MISCHIEF.)

DAM,
unlawful erection of.
(See NUISANCE.)
Malicious injury to,
(See MALICIOUS MISCHIEF.)
DATE, (See INDICTMENT.)
DEAD BODY,
neglect in burial, 6.
Disinterring, 6.
DEAF AND DUMB,
when admissible as witnesses, 754.

DEAF AND DUMB.—*Continued.*
Person, how to be arraigned, 532.
When witnesses.
(See WITNESSES.)
DEATH, (See EVIDENCE, PREPARATION, HOMICIDE.)
DEATH-BED DECLARATIONS. (See DYING DECLARATIONS.)
DEBASING COIN, &c. (See FORGERY.)
DEBENTURE,
counterfeiting.
(See FORGERY.)
DECLARATIONS,
of third parties inadmissible as to facts of defendant's guilt, 662.
Exceptions to this rule.
Information going to make up the bona fides of an act, 663.
Opinions as to condition of a party's mind, &c., and his own representations on the subject, 664.
Declarations of prosecutrix in rape, 665.
Pedigree, 666.
Testimony of a deceased witness, 667.
Where the indictment charges a common and gross offence, *e. g.*, a nuisance, 668.
Of co-conspirators.
(See EVIDENCE.)
Of defendants,
(See EVIDENCE.)
DEFAMATION,
conspiracy for.
(See CONSPIRACY.)
DEFENDANTS,
practice as to joining of, 429–34.
(See NEW TRIAL.)
Name, how to be set out.
(See INDICTMENT.)
Proved.
(See EVIDENCE.)
Errors in, how to be taken advantage of.
(See PLEAS.)
When the aggressor in assault and battery.
(See ASSAULT.)
When admissible as witnesses for each other.
(See WITNESSES.)
Dying declarations, 669, &c.
Number of, 431.
Who may be joined, 429.
Where a particular number of defendants is necessary, as in riot or conspiracy, 431.
How misjoinder may be excepted to, 432.
Severance on trial, 433.
Verdict and judgment, 434.
DEFRAUD,
conspiracies to.
(See CONSPIRACY.)

DEFRAUD THE UNDERWRITERS,
attempt to, by destroying a vessel.
(See DESTROYING VESSEL.)
DEGREE OF DEFENDANT,
when to be set out.
(See INDICTMENT.)
DELUSIONS,
insane, how far a defence.
(See INSANITY.)
DELIRIUM TREMENS, (See DRUNKENNESS.)
DEMURRER, 525.
General effect of, 525–8.
At common law, subordained to motions in arrest of judgment, 525–8.
Practice where judgment is entered on demurrer against defendant, 528.
When defendant has leave to plead over, 528.
Demurrer to evidence allowable in Pennsylvania and Virginia and Alabama, 529.
When the prosecution may plead over after judgment against it, 528–9.
DEPOSITIONS,
when admissible, 668, &c.
DESCRIPTIVE AVERMENT,
how far to be proved.
(See EVIDENCE.)
DESTROYED INSTRUMENTS OF WRITING,
how to be pleaded.
(See INDICTMENT AND EVIDENCE.)
DESTROYING LETTERS CONTAINING MONEY. (See POST OFFICE.)
DESTROYING A VESSEL WITH INTENT TO DEFRAUD. (See VOL. II.)
DISCHARGE,
for want of prosecution, when a bar, 513–7, 544–5.
DISGRACE OF SELF-CRIMINATION,
when a witness will be excused from answering on the ground of.
(See WITNESSES.)
DISHONOR,
how far a provocation adequate to reduce to manslaughter.
(See HOMICIDE.)
DISJUNCTIVE STATEMENT OF OFFENCE NOT PERMISSIBLE.
(See INDICTMENT.)
DISORDERLY HOUSE. (See NUISANCE.)
DISTRICT ATTORNEY. (See ATTORNEY GENERAL.)
DISTRICT COURT OF THE U. S. (See COURT.)
DISTURBING RELIGIOUS CONGREGATION. (See RIOT.)
DISTURBANCE OF OTHERS. (See NUISANCE.)
DIVISIBLE AVERMENTS,
how far necessary to be proved.
(See EVIDENCE, 616.)
How to be pleaded, 381–93.
DIVORCE,
effect of it, on competency of husband and wife as witnesses for or against each other, 767–72.

DOGS,
when subject of larceny.
(See LARCENY.)
DOUBLE OFFENCE,
when to be joined in a count.
(See INDICTMENT.)
DOUBT,
when sufficient to justify acquittal, 744–7.
(See PRESUMPTIONS.)
DRIVING,
death through negligent.
(See HOMICIDE.)
DRUNKENNESS,
public and notorious.
when indictable.
(See NUISANCE.)
No defence to the fact of guilt, 33.
Insanity produced by *delirium tremens*, affects the responsibility in the same way as insanity produced by any other cause, 33.
Insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated, 37.
While intoxication *per se* is no defence to the *fact* of guilt, yet when the question of *intent* or *premeditation* is concerned, evidence of it is material for the purpose of determining the precise degree, 41.
DUELLING. (See CHALLENGING TO FIGHT.)
Seconds, principals in second degree, 121, 959, 990, 996.
Statutes.
Massachusetts, 890.
New York, 895.
Ohio, 929.
common law, 959, 990–6.
DUPLICITY. (See INDICTMENT.)
DURESS,
when set up as a defence, must be proved to satisfaction of jury, 744, &c.
DWELLING-HOUSE. (See ARSON, BURGLARY.)
DYING DECLARATIONS. (See EVIDENCE.)

EAVES-DROPPING,
when indictable, 6.
ECCLESIASTICAL OFFENCES,
when in this country offences at common law, 3.
ELECTIONS,
double voting at, 6.
ELECTION,
when prosecution to be compelled to between different counts, 422.
ELOPEMENT,
conspiracy to procure.
(See CONSPIRACY.)
EMBEZZLEMENT. (See VOL. II.)
EMBRACERY. (See BRIBERY.)
ENGAGING IN SLAVE TRADE. (See VOL. II.)

ENTICING
away woman for purpose of prostitution, 1178, 1179, 1205, &c.
(See Abduction, Seduction.)
ENTRY, (See Burglary.)
ERROR,
writ of.
(See Vol. II.)
ESCAPE AND BREACH OF PRISON. (See Vol. II.)
Presumption to be drawn from.
(See Presumption.)
ETHER,
effects of administration in rape, 1146-7-8, (*note.*)
EVASION OF JUSTICE,
presumption to be drawn from.
(See Presumption.)
EVIDENCE, 592.
Variance, what constitutes, 592.
No variance exists where the evidence corresponds with the indictment, 592-3.
Averment of principal doing act supported by proof of principal, 594.
Names of prosecutors and third persons, 595.
When a variance is fatal, 595-6-7.
How far false spelling vitiates the setting forth of name, 258-597.
Variation in spelling, no variance if sound is preserved, 258-599.
Rule, where there is a material variance, 258-597.
Rule, when third parties were unknown, 242, 250-9, 598.
Time, how to be proved.
Time not material, except when of the essence of the offence, 277, 600.
Exceptions to this rule comprise the setting forth of deeds, wills, notes, the date in perjury, and the night-time in burglary, 267, 600.
Place, how far proof of, is necessary, 601.
Enough, if a presumption arises that the offence was committed in the county where the trial is held, 601-4.
When place is stated as matter of local description, and not as venue, variance is fatal, 602.
Thus, in burglary, arson, &c., local description of tenement must be proved, 602.
When a county has jurisdiction of a part of an offence, it has jurisdiction over the whole case, 603.
Venue in larceny and conspiracy may be laid in any county through which property is carried, or in which overt act is committed, 603.
Party may be indicted for offence committed out of jurisdiction, 604.
Venue in cases of threatening letters, 605.
Written instruments and records, 606-9.
Variance of a letter in written instruments not fatal, when the variance does not make a word different in sense or grammar, 606.
When it is averred that the writing is to "tenor and effect," the setting out must be exact, 606.
When an instrument is lost, it is enough to set out its substance, when it is only necessary to prove such substance, 608.
Great care required in setting forth records, 308, 609.
Any variance in such case fatal, 308, 609.

EVIDENCE.—*Continued.*

Goods, variance in proof of, how far fatal, 354–62, 610–13.
Value of property, how far variance in evidence of, is fatal, 613.
Negative averments, how far to be proved, 614–15.
When the subject of an exception relates to matters particularly known to the defendant, or to matters within his own knowledge it need not be proved by the prosecution, 614–15.
Otherwise, where the exception is not within the defendant's particular province, 614–15.
Defendant, on indictment for breach of license law, must prove license, 615–708–9–10.
Not necessary to prove official station of party acting in public capacity, 615–713.
Divisible averments, 616–627.
Sufficient to prove so much of the indictment as shows the defendant to have been guilty of the substantive crime therein stated, though not to the full extent charged, 616.
When two intents are charged, it is enough to prove one, 616.
Matter of aggravation may be discharged as surplusage, 616–624.
Assaults with intent, may be treated as mere assaults, 617.
Where there are several assignments in perjury, or indictments for false pretences, any one assignment is sufficient, 618.
Where several articles are contained in an indictment for larceny, &c., proof of any one is sufficient, 619.
"Forged and caused to be forged," proof of either averment is enough, 620.
Surplusage, what may be rejected as, 622.
All unnecessary words may be so treated, 622.
Matters of mere aggravation may always be discharged, 624.
Whatever is not essential to constitute the offence, may be treated as surplusage, 624.
Aud so as to allegations which only affect the magnitude of the offence, 624–9.
Mere inducement need not be accurately proved, 624–6.
When lesser offence is contained in greater, evidence of it will sustain a correction, 627.
And so as to allegations of number, quantity and magnitude, 628.
Descriptive averments, how far necessary to be proved, 629.
Merely formal language is enough, 629.
Allegation descriptive of identity, not to be treated as nullities, 630.
Knowledge and intent, 631.
Guilty knowledge, when an ingredient of the offence, must be proved, 631, 640, 649.
Evidence of intent is always admissible, 631, 640, 649.
Or indictments for murder, evidence of former attempts are always admissible, 635, 640, 649, &c.
Knowledge and intent may be proved by evidence of acquaintance with the acts charged, 631.
Thus, in trials for passing counterfeit money, former acts may be proved, 631–5, 649, &c.
Where there are two intents, proof of one is enough, 635.
Corpus delicti must be proved before guilty knowledge can be shown, 635.
Character, evidence of, 636–43, 824.

EVIDENCE—Character.—*Continued.*

Defendant may call witnesses to speak generally as to his character, but not to prove particular facts, 636.

Character must not be general, but pointed to the particular crime charged, 636.

Whether prosecution may prove particular acts, *dubitatur*, 636–7.

Evidence of prior misconduct, though defendant does not put his character in evidence, is admissible to prove prior malice or guilty knowledge, 631–6–7–9.

But not evidence of independent crimes, 635–6–7.

Not admissible, however, to prove that defendant had a tendency to a particular crime, 640, 824, 859.

Bad character of deceased inadmissible, 641.

Character of deceased cannot be taken in controversy, unless part of the *res gestæ*, 641–2.

But when the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, *it seems*, may be put in evidence, 641–2.

Failure to produce evidence as to good character, no ground of presumption of bad, 637.

General observations as to weight of character, 643.

Sir W. Russell, 643.

Mr. Sergeant Talfourd, 644.

Ch. J. Shaw, 645.

Mittermaier, 646.

Evidence to be confined to issue, 647.

Nothing to be given in evidence which does not directly tend to the proof or disproof of the matter in issue, 647, 725.

Proof of a distinct crime inadmissible, 648–9, &c.

Where, however, *quo animo* or *scienter* can be proved, independent felony may be shown, 631–2–3–4–5, 649–51.

Independent offence receivable, when offered to show intent, 648–9.

Former assaults to prove murder, 548, 707.

Improper familiarities to show adultery, 649.

Secondary evidence, 652.

No evidence can be received except the best that can be obtained, 652.

Written instruments cannot be supplied by parol testimony, 652–8.

But when there is no withholding of evidence, but only a substitution of stronger for weaker points, the rule is not infringed, 652–3.

Proof that a party acts notoriously as a public officer, is *primâ facie* evidence of official character, 653.

Contents of records may be proved by an officially examined copy, 654.

When evidence is the result of voluminous facts, or of the inspection of many books and papers, an abstract can be received, 655.

Inscriptions on monuments, &c., may be received, 655.

Voire dire, &c., 656.

When written instruments are in the hands of an opposite party, he should be notified to produce it, and then secondary evidence is admissible if not produced, 657.

Rule in this case, the same in criminal as in civil cases, 657.

EVIDENCE—Voire dire.—*Continued.*
Oral evidence cannot be received in the place of an instrument which the law requires to be in writing, 659–61.
Oral proof cannot be substituted for the written evidence of a contract, 659–61.
Oral evidence cannot be substituted for any writing, the existence of which is disputed, &c., 659–61.
So of banners, placards, &c., 655–61.
Hearsay, 662.
Hearsay denotes that kind of evidence which does not derive its value from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person, 662.
Declarations by third persons in reference to the offence, inadmissible, 662.
Exceptions to the rule, 663.
Hearsay, admissible in rape, to what extent, 665.
General reputation, evidence of, when inadmissible, 668.
Pedigree, hearsay, evidence of, admissible, 666.
Cries of mob in cases of riot, admissible, 666.
Opinions as to conditions of a party's mind, and his own declarations, 664.
General reputation admissible when defendant is charged as a common barrator, common scold, &c., 668.
Depositions, 668.
Testimony of deceased witness, 669.
Dying declarations, 669.
Must be made under a sense of impending dissolution, 669.
Only admissible when death is the subject of the charge, 675.
Admissible by husband against wife, and vice versa, 676.
The deceased must have been competent as a witness, 677.
The evidence must have been admissible had the deceased been sworn, 678.
When part of the res gestæ, 680.
May be by signs, 680.
Admissibility is for the court, 681.
How to be examined and impeached, 682.
When in prisoner's favor, 683.
Confessions and declarations, 683.
General weight of confessions and degree of caution with which they should be received, 683.
How far the admissibility of confessions is affected by, 685.
  Threats, 685.
  Promises, 686.
  Duress, 689.
  Interrogations, either voluntary or under oath, 690.
  Artifice, 691.
  Authority or influence of the party by whom the confession is elicited, 692.
How far an original improper influence vitiates subsequent confessions, 694.
How far extraneous facts, deduced through an inadmissible confession may be received, 695.
How far confessions of one are evidence against another, and herein of the defendant's silence under statements of others implying his guilt, 696.
How confessions are to be construed, 697.
By whom the admissibility of confession is to be determined, 698.

EVIDENCE—Confessions and declarations.—*Continued.*
How far a defendant's declarations in his own favor can be received, 699.
Confessions of slaves, 701.
Declaration of co-conspirators.
When confederacy is proved, acts or declarations of co-conspirators are admissible against each other, 702.
When the common enterprise is at an end, subsequent declarations are admissible, 702-3.
Even a plea of guilty by one conspirator is admissible only against himself, 702-3-4.
Declarations by one conspirator, not at the time of acts committed in pursuance of a common design, as to the agency of others, are not admissible against the other, 703-4-5.
It makes no difference whether the co-conspirators were indicted together or otherwise, 705-6.
Presumptions, 707.
Presumption of innocence, and herein of presumption of sanity, 707.
Presumption of intent, 712.
Presumption that everything is rightfully done until the contrary appears, 713.
Presumption arising from attempts to escape or evade justice, or from deportment when charged with offence, 714.
Presumption arising from forgery of evidence, 715.
with a view to self-exculpation, 716.
maliciously, with the intention of injuring the accused or others, 718.
in sport, or in order to effect some moral end, 721.
Presumption arising from suppression or destruction of evidence, 722.
Presumption arising from antecedent preparations and previous attempts, 725.
Presumption arising from declarations of intentions and threats, from which the presumption of guilt may be drawn with great strength when there is preliminary ground laid, 727.
Presumptions arising from possession of fruits of offence, 728.
Presumptions arising from extrinsic and mechanical inculpatory indications, 731.
Circumstantial evidence, 732.
The onus of proving everything essential to the establishment of the charge lies on the prosecutor, though the non-production of explanatory evidence, clearly in the power of the defendant, must weigh against him, 744.
There must be clear and unequivocal proof of the corpus delicti, 745.
Witnesses—want of discretion, 752.
Idiots and lunatics, 752.
Intoxicated persons, 753.
Deaf and dumb persons, 754.
Infants, 755.
Infamy, 758.
What convictions disable, 758.
Home convictions, 759.
Foreign convictions, 762.
Verdict without judgment, 763.
Defective conviction, 762.
Pardon, 765.

EVIDENCE—*Continued.*
Relationship, 767.
Husband and wife, 767.
Other relations, 772.
Privilege, 773.
Attorney or counsel, 773.
Medical attendants, 774.
Clergymen, 775.
Public officers, 776.
Judges and jurors, 777.
Interest, 778.
Accomplices and co-defendants, 783.
How far accomplices are competent for the prosecution, 783.
Accomplices and co-defendants for the defence, 790.
Want of religion, 795.
Number of witnesses necessary, 801.
When a witness will be excused from answering, on the ground of self-crimination or disgrace, 805.
How character of witness may be attacked, 814.
How witness may be contradicted, 817.
Preparation of evidence.
Character, 824.
Intent, 825.
Attempts to escape or evade justice, 826.
Forgery of evidence, 827.
Suppression or destruction of evidence, 828.
Antecedent preparations and previous attempts, 828.
Fruits of the offence, 829.
Extrinsic and mechanical inculpatory indications, 830.
Marks of violence on the person, 831.
The weapon used, 832.
Whether the wounds are accidental, self-inflicted, or given by another, 833.
Whether the wound, if given by another, is to be considered as the result of a momentary passionate impulse, or of premeditation, 835.
Instrument of death, 836.
Poison, 839.
Materials appropriate to be converted into instruments of crime, 845.
Position of deceased, 847.
Traces of blood, 848.
Liability of deceased to attack, 849.
Possession of money or valuable articles, 849.
An old grudge, 849.
Jealousy, 849.
Preparation of evidence in larceny, embezzlement, burglary, etc., 853.
Preparation of evidence in arson, 857.
Identification of offender, 858.
Facts leading to the supposition that a particular person was the criminal, 860.
Facts concerning the effects of the crime, 861.
Facts concerning the conditions of the crime, 862.

EVIDENCE.—*Continued.*
Forgery and counterfeiting, 864.
Similitude of hands, 865.
Chemical tests, 867.
Circumjacent tests, 868.
Proof that the paper was written by a third party, 870.
Infanticide and fœticide, 872.
Condition of the body of the child, 873.
Person suspected, 877.
Cause of death, 879.
Quickening, 883.
(See PRESUMPTIONS, WITNESSES, CIRCUMSTANTIAL EVIDENCE, PREPARATION OF EVIDENCE.)

EXAMINING COURT,
necessary in Virginia in cases of treason or felony, 462.

EXCEPTIONS IN INDICTMENT,
how far to be proved, 707–8–9.
(See EVIDENCE.)
In statutes, how far to be pleaded.
(See INDICTMENT.)

EXCUSES FOR WITNESSES ANSWERING. (See WITNESS.)

EXPERT,
testimony of, how far admissible, 45.
In insanity, 45–6–7, &c.

EXPOSURE
of children, death by.
(See HOMICIDE.)
of person.
(See NUISANCE.)

EXTORTION. (See VOL. II.)

FACTOR. (See EMBEZZLEMENT.)

FALSE ACCUSATION OF CRIME. (See CONSPIRACY.)

FALSE PERSONATION. (See VOL. II.)

FALSE PRETENCES,
cheats by.
(See VOL. II.)

FARO BANK. (See NUISANCE.)

FEDERAL COURTS. (See COURTS.)

FELO DE SE,
presumption concerning, from state of body, 883.
Accessaries to.
(See PRINCIPALS.)
Responsibility of party aiding another to commit, 122, 964.

FELONIES,
in England originally comprised all crimes occasioning forfeiture of goods, 2.
New ones created by statute, 2.
Definition of, in New York and Virginia, 2,
In Massachusetts, 400.
Conviction of, when incapacitating a witness, 758–65.

FELONIES.—*Continued.*
When under indictment for, there can be conviction for misdemeanor, 388, 400.
Merger of misdemeanors in.
(See MERGER.)
Compounding.
(See COMPOUNDING.)
FELONIOUS ASSAULTS. (See ASSAULTS.)
FELONIOUSLY,
necessity of, in indictments for felony, 400.
Whether it can be discharged as surplusage, 388, 400.
FEME COVERTS.
How feme coverts are to be indicted, 67.
Indictments against the wife alone, 67.
When husband must be joined, 69.
" wife jointly with husband, 69.
Misnomer of wife, 70.
Where the marital relation is a defence, presence of the husband at the time implies coercion, 71.
What circumstances rebut the presumption of coercion, 71.
Where the offence is one which peculiarly concerns the husband, the wife is not chargeable, 71, 75.
And so where the wife is to be considered merely the husband's servant, 75–7.
Where the offence is one that appertains particularly to the wife, she is primarily indictable, 78.
Where the wife may be treated as an accessary, 80.
Conspiracy, &c., does not lie against husband and wife alone, 79.
How far property of, to be averred in larceny.
(See LARCENY, INDICTMENT.)
FENCE,
malicious injury to.
(See MALICIOUS MISCHIEF.)
FIGHTING. (See CHALLENGING TO FIGHT.)
FIGURES,
how to be set out.
(See INDICTMENT, FORGERY.)
FILLIBUSTERING. (See NEUTRALITY LAW.)
FISH. (See LARCENY, MALICIOUS MISCHIEF.)
FŒTICIDE. (See ABORTION, INFANTICIDE.)
FOOD,
unwholesome, indictable at common law, 5–6.
sale of.
(See NUISANCE.)
FORCIBLE ENTRY AND DETAINER.
Responsibility of infants for, 62.
Responsibility of feme coverts, 71.
Offence generally.
(See VOL. II.)
FORCING SEAMEN
on shore, or deserting them in foreign places.
(See VOL. II.)

FOREIGN JUDGMENT
of an infamous offence, when working disqualification of witness, 762.
FORGERY. (See Vol. II.)
FORNICATION. (See Vol. II.)
FRAUDS. (See Cheats, Secreting Property, with intent to defraud, False Pretences, Destroying Vessel, &c.
FRAUDULENT CONVEYANCE, OR INSOLVENCY. (See Secreting Property, &c.)
FRUITS OF OFFENCE,
presumption arising from possession of, 728, 829.
FUGITIVE SLAVE LAW,
obstruction of persons connected with, 1293–95.

GAMBLING. (See Nuisance.)
GENERAL REPUTATION,
when admissible, 668–814–824.
(See Common Scold, Common Barrator, &c.)
GOODS,
variance in proof of.
(See Evidence.)
How to be described.
(See Indictment.)
GRAMMATICAL ERRORS,
not fatal, 405.
GRAND JURY,
challenges of.
(See Challenges.)
GRAND JURY, 452*d*.
General view as to grand juries, 452.
I. That grand juries may on their own motion institute prosecutions, 453–8.
Authorities supporting this view, 453–8.
II. That grand juries may present such offences as are of public notoriety, or are given them in charge by the court or the attorney-general, but in no other cases without previous binding over, 458–9.
Authority sustaining this view, 458.
III. That grand juries are limited in their action to cases where there has been a primary hearing, 459.
Practice of grand juries, 460.
Powers co-extensive with jurisdiction of the courts with which they are connected, 460–1.
In Virginia, in cases of treason or felony, examination by an examining court is a prerequisite, 462.
Method of summoning grand juries in England, 464.
New York, 464.
Pennsylvania, 464.
Twenty-four make the usual number, 465.
But only twenty-three can be impanelled, 465.
In New England, foreman chosen by jury themselves, 466.
In the rest of the United States, usually appointed by court, 466.
Oath by grand jury, 466.
Effect of disqualified person acting, 467.
How challenges to be allowed, 468.

GRAND JURY.—*Continued.*

Powers of the court in the premises, 468–9–70.

General rule is that disqualification of grand juries may be taken advantage of after bill found, 469.

It is too late after plea pleaded, 469–72.

Plea in such case must be in abatement, 472–3–4.

But it is otherwise when the error is of record, 472–3.

Cannot be done by motion in new trial, 462–3.

Or by plea in bar, 472–3.

At common law, not necessary that any part of a jury should be aliens, 473.

Assent of Attorney-General, necessary to bill, 474.

Signature in most instances necessary, 474.

Attorney-General may be assisted in court by other counsel, 474.

Witnesses—At the opening of court witnesses' names to be called, 476.

Witnesses' names usually endorsed on bill by attorney-general and called by grand jury, 476–7.

Statute requiring prosecutor's name to be endorsed, 476–87.

Effect of omission of, 476–87.

Witnesses sent to grand jury to be previously sworn in court, 488.

Where grand jury can administer the oath, 480.

Bill found on unsworn testimony will be quashed, 480–8–9.

Not ground for motion in arrest of judgment, 480–3–8–9.

Hearing case—Grand jury hear only case of prosecution, 490.

May, however, of their own motion call for other witnesses, 490.

Not proper that witnesses for the defence should be called, 490–4.

Degree of proof that grand jury should require, 491.

Better opinion now is that a *prima facie* case is sufficient, 491–4.

Grand jury bound to take the best legal proof, 493.

Incompetent evidence should not be submitted, 493.

Effect of it, 480–493.

Attorney-General—Attorney-General's functions with grand jury, 495.

How far he has a right to attend their session, 495.

Defendant's attendance—Defendant or his counsel not permitted to attend session of grand jury, 496.

In Connecticut held to be otherwise, 496.

Finding of bill—Twelve of the grand jury must agree to the finding, 497.

If that number do not consent, the bill is *ignored*, 497.

Usual practice is for foreman to sign the return, 497–9.

How his signature to be entered, 497–9.

Grand jury then bring the bill into court, 500.

Finding to be recorded, 500–5.

Bill may be altered by attorney-general and returned to grand jury who may refind it as amended, 503.

When second bill may be found pending first, 503.

Grand jury must either find or reject the whole of a particular count, 504.

Otherwise as to different counts, 504.

And otherwise as to distinct defendants, 504.

Court may recommit finding, or poll the grand jury, 506.

Misconduct of Juror—Indictment lies against grand juror for misconduct, 507.

GRAND JURY.—*Continued.*
Member of grand jury at common law was held incompetent to testify as to what a witness swore when under examination, 508.
Law now held to be otherwise, and grand juror may now be examined on indictment against witness for perjury, 508.
Grand juror's affidavit not receivable to impeach conduct of jury, 509–10.
GRAVES,
malicious trespass.
(See MALICIOUS MISCHIEF.)
GUILTY KNOWLEDGE AND INTENT. (See KNOWLEDGE AND INTENT.)

HABEAS CORPUS,
concurrent power of Federal and State courts in regard to, 195.
Act of South Carolina, discharge under final, 543.
The general rule otherwise, 543.
HANDWRITING,
evidence of.
(See FORGERY.)
evidence of correspondent, 865–8, &c.
testimony of expert, 865–8, &c.
HEALTH,
offences against.
(See NUISANCE.)
HEARSAY. (See EVIDENCE.)
HIGHWAYS,
obstructing.
(See NUISANCE.)
HOMICIDE,
preparation of evidence in.
(See PREPARATION.)
HOMICIDE.
Statutory Homicide.
United States, 884.
Murder on the high seas, 884.
Manslaughter on the high seas, 885.
Murder on high seas where death is on land, 886.
Murder or manslaughter on dock-yard, &c., 887.
Manslaughter by negligence of steamboat officer, 888.
Massachusetts.
Murder, 889.
Death by duel, 890.
Seconds by duel, 891.
Manslaughter, 893.
New York.
Murder, 894.
Death by duel, 895.
Justifiable and excusable homicide, 898–9.
Manslaughter in the first degree, 900.
Manslaughter in the second degree, 901.
Manslaughter in the third degree, 902.
Manslaughter in the fourth degree, 904.

HOMICIDE.—*Continued.*
Punishment, 911.
Murder in first and second degrees as provided by act of 1860, 912(*a*).
Pennsylvania.
Murder in the first and second degree, 913–14.
Involuntary manslaughter, 915.
Murder in second degree; punishment, 917.
Voluntary manslaughter; punishment, 918.
Virginia.
Murder in the first and second degree, 919.
Involuntary manslaughter, 920.
When death occurs out of State, 921.
Poisoning well, 922.
Abortion, &c., 923.
Ohio.
Murder in first degree, 924.
Murder in second degree, 925.
Manslaughter, 926.
Trial to be where blow was struck, 927.
Jury to ascertain degree of crime, 928.
Death by duel, 929.
Homicide at common law, 930.
Murder, definition of, 930.
Manslaughter, definition of, 931.
Voluntary manslaughter, definition of, 932.
Involuntary manslaughter, definition of, 933.
Excusable homicide, definition of, 934.
General incidents of homicide.
Justifiable homicide, definition of, 936.
Must be proved that the deceased was living at time mortal blow was struck, 938–9.
Necessary to show that the violence of the defendant was the cause of deceased's death, 941.
Must be proof of *corpus delicti*, 939.
Presumption is, that a person alive continued to be, 940–1–2.
Presumption arising from defendant's flight, 714.
Surgical operation when producing death does not cause responsibility when skilfully and necessarily conducted, 941.
If prisoner's violence contributed to deceased's death, his guilt is not extenuated by the fact that death was the general result of disease, 941.
Where indictments for homicide are to be tried, 1052, &c.
Infanticide.
Killing in mother's womb not murder unless child is born alive, and afterwards die from wound, 942.
Child must have been entirely born, 942.
Premature delivery of child causing death is murder when child dies after birth, 942.
Not necessary that the deceased should have been really in the "peace of the commonwealth," 942.
Killing an alien enemy except in war, is murder, 944.

HOMICIDE.—*Continued.*

Homicide from malice aforethought express, when the deliberate purpose of the perpetrator is to deprive another of life or do him some bodily harm, 944–5.

Malice presumed from death by deadly weapon, 944–5.

When presumption leads to murder in first or second degree, 944.

Express malice is where one with a sedate and deliberate mind and formed design kills another, 945.

Formed designs to be evidenced by menaces, former grudges, &c., 635, 945–6–7.

Malice in husband towards wife.

Poison always implies malice, 947.

Previous malice once ascertained, always presumed to continue, unless there be evidence to repel it, 949.

Particular malice towards person killed, 950.

Evidence of design from old grudge or other motive, 950–1.

Presumption is, that old grudge continues, 953.

Intermediate provocation, no defence, 953–7.

Previous challenge, indication of malice, 954.

When new provocation is grievous, it ought clearly appear that the fatal blow was on the antecedent malice, 950–7.

Duelling, murder at common law, 958.

Malice may be exerted against a party in his absence, 960.

Not necessary that the homicide should have been the result of *direct* violence; if the death come from apprehension, it is the same, 961.

Malicious exposure of sick and feeble.

If an act is done to a helpless person which must necessarily lead to death, it is murder, 962.

Exposure of young children, 962.

Seamen, exposure of, 962.

Encouragement of another to self-murder, 122, 964.

If two encourage each other to murder themselves together, and one does so, and the other fails in the attempt upon himself, he is principal in the murder of the other, 122–964.

Encouragement and suggestions from one party to another, make the former accessary before the fact to the other's murder, 964.

Homicide from a particular malice to one which falls by mistake or accident on another, 965.

Blow aimed at one, falling on another, is murder, 965.

Malice in such case is transferred, 965.

And so in case of poison, 965–6–7.

And so, where a woman was killed, when the object was to kill the infant with which she was pregnant, 965–6.

When a party in hot blood strikes an innocent stranger when intending to strike an assailant, it is manslaughter, 965–6.

Homicide from a general malice or depraved inclination to do evil, fall where it may, 967.

General depraved inclination or malice resulting in death, is murder, 967.

Mischievously and malignantly throwing a heavy piece of timber, or letting loose a wild animal in a large crowd, is murder, if resulting in death, 967.

HOMICIDE.—*Continued.*

Homicide from transport of passion, &c., what is a sufficient provocation, and up to what extent to extenuate the guilt of homicide, 970.

No provocation can justify homicide, it can never fall below manslaughter, 970.

Words of reproach cannot lower the offence from murder, 970.

The instrument used must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter, 971.

Relation of parties as to strength, to be considered, 970–1.

Provocation will not excuse a cruel or unmanly blow, 976.

Mere unintentional and trivial assault no palliation, 972.

Entering armed into a contest, with intent to kill, is murder; otherwise, where the fatal instrument is unpremeditatedly drawn out in a passion, 974.

Trespass against the property of another, not his dwelling-place, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence, 975.

Character of weapon an important element in the consideration of extent of provocation, 971–85.

Important to consider relative strength of parties, 972–80.

Right of party to eject another from his house, 977.

When in ducking a pickpocket he was unintentionally killed, it was held but manslaughter, 977.

An assault made with violence or on circumstances of indignity, if resented immediately, by the death of the aggressor, involves only manslaughter, 978.

Fight upon an unexpected quarrel, manslaughter, 979.

Unlawful arrest reduces offence to manslaughter, 981.

Homicide of officers of justice when unlawfully arresting, 981, 1030.

Killing of parties interfering to stop a brawl, murder, 982.

Dishonor, how far adequate to reduce to manslaughter, 983.

Adultery, reduces offence to manslaughter, when retaliation is immediate, 983.

Question of cooling-time, an important one for the jury, 984.

If the provocation be so recent and strong that the prisoner cannot be considered master of his own understanding, the offence is manslaughter, 984.

Words of reproach or indecent provoking actions or gestures of contempt will not reduce the offence to manslaughter, 985.

In sudden quarrels, it matters not who struck the blows, 985–6.

Provocation of no avail, if sought by the defendant, 986.

How far the law regards heat of blood in mitigation of homicide, as in case of mutual combat, 987.

When death ensues in heat of blood, without previous malice, it is manslaughter, 987–90.

When malice exists, heat of blood no defence, 988–9.

But when deadly weapon is suddenly caught up, malice not to be implied from weapon, 988–9.

How long the law will allow for the blood continuing heated, under the circumstances, and what shall be considered evidence of its having cooled, 990.

If there be cooling-time, no provocation avails, 990.

When a party assailed retreats, and then returns armed, the provocation is no excuse, 990–1.

The law assigns no limits to cooling-time, 990–5.

HOMICIDE.—*Continued.*

When there is an agreement to fight which is afterwards consummated in cool blood, it is murder, 990–1–2.

Major Oneby's case, 991.

Where weapon is brought from a distance and then concealed, this is evidence of cooling-time, 992.

If the defendant fall into other discourse or diversion, this is evidence of cooling, 993.

When there are two combats, in order to mitigate homicide committed in second, the two must be proved to have been continuous, or the first must be treated as provocation of the second, 994.

How evidence of grudge or continued malice affects defence of provocation, 994–5.

Homicide in the prosecution of an unlawful act, when the death is collateral, 997.

When a man designing to kill another, kills by mistake a third person, this is murder, 977–8–9.

Whether such a homicide be murder or manslaughter, depends upon the intent or motive, 997–8.

If the collateral intent be a felony, the offence is murder, 997–8.

Riots, conspiracies, &c.—When several conspire to do an unlawful act, and death happen, it is murder in all, if unlawful act be a felony, 998–9.

If the unlawful act be a misdemeanor, the homicide is manslaughter, unless it is part of the original design, in which case it is murder, 997–8.

When in prosecution of a riot, whose purposes are felonious, death ensues, all the rioters are guilty of murder, 998–9.

General law of riotous homicide, 999–1000.

Where the object is to effect the riotous object in despite of all resistance, it is murder if death ensue, 999–1000.

When several persons are engaged in a smuggling transaction, and one shoots a king's officer, it is murder in the others if it was part of the original design, 1000.

When a stranger interferes to part combatants, and gives notice, and is killed by one of the disputants, it is murder, 1001.

But otherwise when no notice is given, 1001.

Homicide arising from impropriety, negligence, or accident, in the prosecution of an act unlawful in itself, or intended as a sport or recreation, 1002.

Death from negligence is manslaughter, 1002.

Greater the risk, greater the caution, 1002–3.

Persons driving out of the ordinary track required to use the better lookout, 1002.

Distinction between cases where the responsibility is *compulsorily* and where it is *voluntarily* assumed, 1002.

Where an incompetent person is forced to act as *surgeon or physician*, his responsibility is lower than if the office was voluntarily assumed, 1002.

Negligent homicide depends for its grade upon the degree of grossness of negligence, 1002.

Defendant is responsible for negligence whether the object be lawful or unlawful, 1003–4–5.

Manufacturers and workmen, persons having charge of children or dependants, and officers of steam and other vessels, 1005–6–7.

HOMICIDE.—*Continued.*

Death from racing, manslaughter, 1005.

And so of death from furious driving, 1003–6.

General principle is that recklessness or negligence makes manslaughter, but wilfulness and malice, murder, 1005–7.

Effect of *deceased's* negligence, 1008–16.

Negligent *omission* as well as *commission* involves responsibility, 1001.

Parents and others responsible for negligent omission of duty to children and dependants, 1011.

Negligent omission by *engineer or steamboat officers*, involves manslaughter, 1008.

(For U. S. Statutes, and decisions thereon, see 888, &c.)

Firing pistols negligently in a crowd, involves manslaughter, 1010.

Homicide in unlawful and dangerous sport, is manslaughter, and under this is ranked prize public boxing matches, &c., 1012.

Killing another when shooting at game, is *misadventure*, 1012.

And so where a man, intending to kill a person attempting to commit an atrocious crime against his person, by mistake kills one of his own family, 1012.

And so where a hatchet head flies off and kills a bystander, 1013.

When death ensues in consequence of the *correction by parents, masters, &c.*, and such correction is considered nothing more than reasonable, the death will be considered accidental, 1014.

When correction is excessive, it is manslaughter, 1014.

Negligence in physician or surgeon generally, 1015.

Negligence on both sides, 1016.

Homicide from necessity in defence of property or person, 1019.

When a felony is contemplated, it is allowable to use force to repel it, 1019.

The right of self-defence is founded on a law of nature, 1019–20.

If there is a reasonable belief that a felony is about to be committed, it is enough, 1019–20–21.

The damage, however, must be actual and urgent, 1020.

No contingent necessity will avail, 1020–1.

If the conflict was premeditated by the defendant, the defence of self-defence cannot be set up, 1022.

It must be proved that the assault was eminently perilous, 1022.

Whether there is reasonable ground to believe the danger is imminent, is to be decided by the *defendant's* disposition and temper, 1023–7.

If the attack of the deceased desist, and the defendant then renew the conflict, the necessity ceases to exist, 1022–9.

Cases may exist where an assailant may be killed without retreating to the wall, 1023.

Nature of the distinction between this species of homicide and manslaughter, 1023–5.

Where the assault is so fierce as to leave no opportunity to retreat, &c., this is homicide in chance medley, 1024–6.

Doctrine laid down in Selfridge's case, 1026, &c.

Self-defence cannot be allowed as a cloak for deliberate homicide, 1022–6.

Necessity ceases to exist where the defendant escapes and arms himself with a dangerous weapon, and returns and slays his antagonist, 1023.

HOMICIDE—Self-defence.—*Continued.*
Law of self-defence extended to the protection of the relations of master and servant, parent and child, and husband and wife, 1024.
And so, where the attempt is to commit arson or burglary on the defendant's house, 1024.
Trespass not an adequate provocation, 1025.
How far a party has a right to order another to leave his house, 1028–1255–7.
General doctrine of what degree of necessity excuses homicide, 1026.
General weight of Selfridge's case, 1026–7.
How far reasonable belief that a felony is to be committed, will excuse homicide, 1026–7.
Opinion of Marvin, J., 1026–7.
Bronson, J., 1026–7.
Conyngham, J., 1026–7.
Death in shipwreck, from necessity, 1028.
When two persons are on the same plank, either may save himself if necessary, by thrusting the other overboard, 1028–9.
But when one is a sailor, it seems that his life is to be postponed, 1028.
Opinion of Baldwin, J., 1028–9.
Homicide, when committed in advancement and execution of the laws, 1030.
Officers of the law have peculiar sanctions, 1030.
In execution of the law, officer has power to take life when necessary, 1030.
But due caution must be used, 1030–1.
Officer of justice justified in killing person when necessary, 1030–3.
In civil cases, so long as a person liable to arrest, endeavors peacefully to avoid it, he may not be killed, 1030–3.
If party pursued turn, and kill a pursuer, it is murder, 1030–3.
Even an innocent person, when indicted for a felony, cannot resist and kill the party attempting to arrest him, though without warrant, 1030–3.
No one, except a minister of justice, has a right to punish by homicide, a felony already committed, 1030–3.
Becomes a material question whether warrant be regular or otherwise, 1030–3.
A well grounded belief that a felony is about to be committed, will not excuse a homicide committed in pursuit, unless special authority be given, 1030–3.
Constables and bailiffs, homicide by, when justifiable, 1030–3.
Homicide of private persons interfering for the furtherance of public justice, 1030.
By officers under legal process, 1030–1.
Of officers or others when the arrest is illegal, 1034.
By officers of a foreign government, 1038.
By, or of, private citizens when attempting to prevent felony, 1039.
What is sufficient notice of an officer's authority, 1041.
Homicide, as affected by Slavery, 1043.
Law of provocation different in different relations, 1043–50.
If a slave kill his master whilst the latter is correcting him, it is murder at common law, 1043–4.
A slave administering laudanum to an infant through negligence, guilty of manslaughter, 1045.
Ordinary provocation by a white man upon a slave will not reduce the offence to manslaughter, 1045.
Felonious killing of slave, without malice, is manslaughter, 1046.

HOMICIDE.—*Continued.*
Grade of provocation different in slavery than among parties who are eqnal, 1047.
Killing a slave in instant anger, is manslaughter, 1046.
Better opinion is that wilful killing of a slave is murder, 1048–9.
Death produced by immediate chastisement is murder, or otherwise, according to the intent, 1048–50.
Indictment.
Time and place, 1052.
"In the Peace of God," 1055.
Name, 1056.
"Force and Arms," 1057.
Clerical and grammatical errors, 1058.
Instrument of death, 1059.
Assault, 1065.
Scienter in poisoning, 1066.
"Strike and beat," 1067.
Description of wound, 1069.
Time of Death, 1070.
"Feloniously" and "Malice aforethought," 1071.
Averment of time and manner of death, 1073.
Principles and accessaries, 1074.
Murder in first and second degree.
Statutes.
Maine, 1076.
Massachusetts, 889(*a*).
New Hampshire, 1077.
New York, 912(*a*).
Pennsylvania, 913.
New Jersey, 1078.
Virginia, 919.
Ohio, 924.
Alabama, 1079.
Tennessee, 1080.
Michigan, 1081.
Synopsis of Statutes, 1082.
General definition, 1083.
Enumerated instaness, 1082–3.
Meaning of term "any kind of wilful and deliberate killing," 1083.
Opinion of Daniel, J.
What features are necessary to constitute murder in the first degree, 1084.
Leading cases in Virginia and Pennsylvania, 1084.
Murder in the second degree includes all cases of deliberate homicide where the intention is not to take life; of which, homicide by a workman throwing timber into the street of a populous city, and of a person shooting at a fowl *animo furandi*, and killing a man, are instances, 1107.
It may include, also, cases of murder where there was no intention to take the life of a *specific individual*, as in riotous homicide, 1107–8–9.
And so, where the defendant is incapable from drunkenness of forming a specific design, 1107–9.

HOMICIDE—Indictment.—*Continued.*

And where a pregnant woman is killed in an attempt to produce an abortion on her, 1110.

In Virginia and Ohio, the presumption is, where a homicide is proved, that it is murder in the second degree, 1111.

Juries frequently select murder in the second degree as a compromise, in which case, the court will not disturb the verdict, 1112.

Where express intention to take a specific life is proved, the court will give instructions that the offence is murder in the first degree, 1113.

Evidence of threats or of prior design, always admissible for this purpose, 1113.

Whether murder by "poison," or by "lying in wait," is necessarily murder in the first degree, *dubitatur*, 1114.

When the intention is to commit homicide, and a person other than the one intended, is killed, *dubitatur*, whether it is murder in the first or second degree, 1114.

May be accessaries to murder in second degree, 1114.

Not necessary to designate grade of homicide in indictment, nor aver that killing was wilful, &c., 1115.

Nor is it necessary to designate the fact of murder being committed in perpetration of arson, rape, burglary or robbery, 1115.

Distinctions taken under Maine Statute, 116.

" " " Kentucky Statute, 1118.

Verdict.

New trial after conviction for manslaughter, how far it opens the whole case, 550–3233.

Manslaughter may be found under indictment for murder, 1119.

Character of finding, 1120.

Murder in the first degree should be specified when so found, 1121.

Finding a murder in the second degree need not negative murder in the first degree, 1021.

At common law, an assault cannot be found on an indictment for murder, 1122.

HORSES,

malicious injuries to.

(See MALICIOUS MISCHIEF.)

HOUSE,

how far a party has a right to order another out of it, 1025, 1256–7.

(See ARSON, BURGLARY.)

HOUSE OF ILL-FAME. (See NUISANCE.)

HUSBAND AND WIFE,

incompetent witnesses for each other, 667.

(See WITNESSES.)

HUSBAND,

right of, to chastise wife, 1259.

How far presence exonerates wife.

(See FEME COVERT.)

HUSH MONEY,

conspiracy to extort.

(See CONSPIRACY.)

IDIOTS,
not competent as witnesses, 752.
Idiots.
(See INSANE PERSONS.)
IGNORAMUS,
no bar to a subsequent indictment, 544.
IGNORANCE,
how far creating irresponsibility, 82.
Persons away at passing of statute, 82.
Foreigners, 82–4.
Custom no defence, 82.
ILL FAME. (See NUISANCE.)
ILLICIT INTERCOURSE. (See ADULTERY, FORNICATION.)
IMMORALITY,
conspiracies to commit.
(See CONSPIRACY.)
INCEST. (See BIGAMY, ADULTERY.)
INCITING TO OFFENCES. (See ATTEMPTS.)
INCOMPETENCY OF GRAND JURORS. (See GRAND JURY.)
Petit jurors.
(See CHALLENGES.)
Witnesses.
(See WITNESS.)
INDECENT PUBLICATIONS. (See LIBEL.)
INDECENT EXPOSURE OF PERSON. (See NUISANCE.)
INDICTMENTS,
where indictments lie.
(See CRIMES AND MISDEMEANORS.)
Finding of.
(See GRAND JURY.)
How to be signed, 474–97.
Constitutional provision as to, 211–2.
Grand Jury made requisite in prosecutions, 211–2.
Distinctions between presentment and indictment, 211–2.
Information generally, 211–4.
When constitutional, 211–4.
When information will be granted, 214.
Statute of amendments in England, 215–6.
To what applicable, 216.
Massachusetts, 217.
New York, 218.
Construction of, 217–8.
Caption and commencement, 219–27.
Caption no part of indictment, 219.
If omitted can be supplied by clerk of inferior court, 219–20.
English form of caption, 221.
Practice on removal to superior court, 221–2–3.
Essentiality of caption, 222–3.
Record must show number of jurors, 222–3.
Commencement—form of, 224–5–6.
How far number and qualifications of grand jurors must be set out, 226.

INDICTMENTS—Commencement.—*Continued.*
Defects in caption may be supplied in superior court, 226–31.
Each court must show that it was formed by the jurors on their oath, 226–31.
Name and addition of parties, 233–595.
How name of corporations to be pleaded, 233.
When managers individually to be indicted, 233.
Name of defendant to be repeated at allegation, 234–5.
Error in surname, how to be corrected, 235–595.
Misspelling, how far fatal, 236–258–597.
Alias dictus, as to Christian name, 237.
Middle names, how far essential, 238.
Variance when a misnomer, 236–258–597.
Alias dictus as to surname, 237.
Abbreviations and initials, 239–40.
Statute of additions, 243.
Mystery and addition, how far necessary, 243–8.
Usual practice concerning, 243–8.
Omission of, how to be taken advantage of, 243–8.
Residence of defendant, how far to be set out, 248.
"Junior" and "Senior," how far description, 249.
Third persons require no additions, 243–250.
General effect of "unknown," as a descriptive, 242–251.
In larceny, when owner of goods is unknown, 251.
General method of describing third parties, 250–1.
Effects of misnomer of third party, 256–597.
Variance in defendant's name or addition can only be taken advantage of by plea in abatement, 233–59, 597.
Blank in name or addition to be taken advantage of on motion to quash or plea in abatement, 245, 259, 597.
No abatement to yeoman for a man, &c., 245.
Variance in sound in names of material third parties is fatal, 233–59, 597.
Time, Place, and Venue, 261.
Time and place to be attached to all material facts, 261.
Not necessary that time should be true, 261, 275, 599.
Cases occurring on Sunday, 263.
Day, month, and year, must be stated, 264.
How date can be set out, 264–5.
"Divers days" insufficient, 264–5.
Practice in England, 269.
Hour not necessary unless made so by statute, 270.
Night-time necessary in burglary, 270, 600.
In perjury the time of the false oath must be accurately stated, 271.
"Then and there," effect of, in allegation of time, 272.
Repugnancy in setting out time, effect of, 273.
Future or impossible day, 273–4.
Exceptions to rule, as to immateriality of time, 275.
Venue.
Parish, when to be set forth, 277.
Practice in the United States as to averment of place where the offence was committed, 278–80.
When defendant resides out of the jurisdiction, 278.

INDICTMENTS—Venue.—*Continued.*

Indictment must aver offence to be within jurisdiction of court, 279.

In New York, practice is to aver ward, 280.

When place stated by way of local description variance is fatal, 281.

Practice in Pennsylvania, 284.

Statement of the offence.

(See Evidence.)

Offence must be made judicially to appear, 285.

Statement must be technically exact, 287.

Not enough to charge a conclusion of law, 298.

Common barrator and common cheat, 289.

Matters unknown, 290.

Bill of particulars, 291.

Surplusage need not be stated, 291.

Alternative or disjunctive statements, 294.

Knowledge and intent, 297.

Inducement and aggravation, 298.

Objects for which particularity is required, 299.

Identification, 300.

Protection, 301.

Indulgence, 302.

Preparation, 303.

Sentence, 304.

Written instruments, 305, 606–8.

Where the instrument, as in forgery and libel, must be set out in full, 305.

In such case literal exactness is necessary, 606–8.

"Tenor," "Purport," and "Substance," 307.

What variance is fatal, 309.

Quotation marks, 310.

Lost, destroyed, obscene, or suppressed writings, 311.

When any part may be omitted, 312.

Where the instrument is in a foreign language, or is on its face insensible, 313.

Where the instrument, as in larceny, &c., may be described merely by general designation, 314.

U. S. Courts, 316.

Massachusetts, 319.

Connecticut, 320.

New York, 321.

Pennsylvania, 325.

New Jersey, 331.

Maryland, 332.

North Carolina, 333.

Georgia, 335.

Alabama, 336.

Mississippi, 337.

Missouri, 338.

Tennessee, 339.

Ohio, 340.

What general legal designation will suffice, 341.

"Purporting to be," 342.

INDICTMENTS—Designation of written instruments.—*Continued.*
"Receipt," 343.
"Bill of Exchange," 344.
"Promissory Note," 345.
"Bank Note," 346.
"Money," 347.
"Goods and Chattels," 348.
"Warrant, order, or request for the payment of money," 349.
"Piece of Paper," 349.
Words spoken, how to be set forth, 351.
Same particularity necessary as in written instrument, 351.
Not the practice to set forth the tenor, 251–2.
Personal Chattels, how to be described, 354, 610–1–2.
Must be described specifically, 354.
Lumping of articles not permissible, 354.
Certainty to common intent enough, 354–5.
When nature of article is unknown, 366.
Animals, how to be described, 359–60–1, 377, 611.
"Sheep" includes "lamb," 611.
"Horse" does not include gelding, 611.
Great exactness not required in larceny, 356–60.
Value must always be assigned in larceny, 362.
An article which is valueless is not the subject of larceny, 362.
Live animals, how to be described, 359.
Dead animals must be so described, 359.
When a number of articles are given, proof of any one will sustain the indictment, 391.
Money and coin, how described, 363.
Offences created by statute, 364.
Generally sufficient to set forth the offence in the words of statute, 364–70.
A variance from the statute is fatal, 364–70.
Indictment will be strictly construed, 364–70.
Section of act need not be indicated, 364–70.
Obvious meaning of statute to be followed, 370.
When a common law term, such as "burglary," is used by a statute to designate a particular offence, it is still necessary to describe the offence specifically, 371–2–3.
Not enough to charge conclusion of law, 372.
When a statute makes indictable an offence not before indictable, the statute alone must be pursued, 364–70.
In Pennsylvania, when a statute exists, the common law cannot be followed, 373.
No statute can have an *ex post facto* operation, 364–5.
Private statute must be set out in full, 365.
When offences are stated disjunctively in statute, they are to be stated conjunctively in indictment, 368—see 294.
When a general term is followed by a particular description, the matter must be followed, 365.
What is a variance from statutory description, 364–6.
Technical averments in statute, 374.
Animals in statute, what a variance for, 377.

INDICTMENTS—Offences created by statute.—*Continued.*

Provisos and exceptions, how to be set out, 378–9.

When contained in distinct clauses, not necessary to state the exceptions or negative the provisos, 378–9.

Otherwise when the exceptions are in the enacting clause, 378–9.

Licenses must be negatived, 378–9.

Duplicity, 381.

In count vitiated by including more than one offence, 381.

In England the only exception is burglary, 383.

Exceptions here more frequent, 383–5.

When minor offence is included in greater, the jury may convict of the former and acquit of the latter, 383–5, 560.

Assaults with intent, 385.

Where on indictment for felony there can be a conviction for misdemeanor, 388, 400.

When two distinct acts are coupled by a statute as different stages in the same offence, they may be joined in the same indictment, 390.

Duplicity may be objected to by special demurrer, 395.

Doubtful whether it can be excepted to by motion in arrest of judgment, 395.

Double articles in larceny, 391.

Double overt acts or intents, 392.

Double batteries, libels, or sales, 393.

Surplusage, 394.

Several overt acts may be laid in treason, 392.

Repugnancy, when one material averment contradicts another, the indictment is bad, 396.

Technical Averments,

"Traitorously," 398.

"Feloniously did kill," "Malice aforethought," "Strike," 399.

"Feloniously," when necessary, and when it may be discharged as surplusage, 400.

"Ravish," "Carnally knew," "Forcibly," "Falsely," 401.

"Burglariously," "Feloniously took," "Against the will," "Piratically," "Unlawfully," "Wilfully," "Maliciously," "With a strong hand," 402.

"Vi et armis," "Present," 403.

Clerical Errors, 405, 597, 606.

Verbal or grammatical inaccuracies not fatal, 199, 278.

Omission of words, 405–6.

letters, 405–6, 597, 606.

Conclusion of Indictments, 410.

Generally provided for by State constitutions, 410.

What conclusions are required by the constitutions and statutes of the several States, 410.

When the conclusion is to be statutory, 411.

When the statutory conclusion must be in the plural, 412.

When the statutory conclusion may be rejected as surplusage, 413.

Joinder of Offences, 414.

Offences of the same character may be included in the same indictment, but in different counts, 414–22.

Misdemeanors generally may be joined, 414–22.

Objection cannot be taken on error to such joinder, 414–22.

INDICTMENTS—Joinder of offences.—*Continued.*
Counts for conspiracy can be joined with a count for the individual offence, 415.
Felonies can be joined when referring to the same general transactions, 416–7.
And so where the felonies are of the same class, but refer to different articles of property, 417.
General rule is, that when the legal judgment is different, offences cannot be joined, 414–22.
But this does not always apply, 418.
Felonies with assaults with intent to commit felonies may be joined, 419.
Larceny with receiving stolen goods may be joined, 419.
Election, right of, how to be exercised, 422.
Advantages of inserting counts to meet each contingency of proof, 424–5.
When two counts set forth the same offence, judgment will be arrested, 426.
Practice as to verdict when there are several counts, 426–7.
When jury may disregard bad count, 426–7.
Joinder of Defendants, 429.
Joint offenders may always be jointly indicted, 429.
In conspiracy less than two cannot be joined, 431.
In riot there must be three defendants, 431.
Misjoinder may be examined on demurrer, arrest of judgment, or in error, 433–4.
Impositions of joint fine irregular, 434.
Evidence must show joint action, 434.
When defendant may elect to be tried separately, 433.
When two persons may be charged in the same indictment with murder, one may be convicted for murder and the other for manslaughter, 434.
There can be no joinder where the offences of parties are different, 430.
Verdict, 430.
Limitation as to time of finding indictment, 436.
Massachusetts, 436.
New York, 437.
Pennsylvania, 438.
Ohio, 443.
Two term laws of Virginia and Pennsylvania, 450, 451.
Right of prisoner to discharge, 450, 451.
How the statutes of limitation may be taken advantage of, 445–9.
INDICTMENT FOR HOMICIDE. (See HOMICIDE.)
For rape.
(See RAPE.)
For sodomy.
(See SODOMY.)
For mayhem.
(See MAYHEM.)
For abortion.
(See ABORTION.)
For concealing death of bastard child.
(See CONCEALING DEATH OF BASTARD CHILD.)
For assaults.
(See ASSAULTS.)
For forgery.
(See FORGERY.)

INDICTMENT—Form of.—*Continued.*
For burglary.
(See BURGLARY.)
For arson.
(See ARSON.)
For robbery.
(See ROBBERY.)
For larceny.
(See LARCENY.)
For receiving stolen goods.
(See RECEIVING STOLEN GOODS.)
For embezzlement.
(See EMBEZZLEMENT.)
For malicious mischief.
(See MALICIOUS MISCHIEF.)
For forcible entry and detainer.
(See FORCIBLE ENTRY AND DETAINER.)
Against cheats.
(See CHEATS.)
For secreting, &c., goods with intent to defraud.
(See SECRETING, &C., GOODS WITH INTENT TO DEFRAUD.)
For perjury.
(See PERJURY.)
For conspiracy.
(See CONSPIRACY.)
For nuisance.
(See NUISANCE.)
For riot, rout, unlawful assembly and affray.
(See RIOT, ROUT, UNLAWFUL ASSEMBLY AND AFFRAY.)
For compounding a felony.
(See COMPOUNDING FELONY.)
For extortion and misconduct in office.
(See EXTORTION AND MISCONDUCT IN OFFICE.)
For libel.
(See LIBEL.)
For escape and breach of prison.
(See ESCAPE AND BREACH OF PRISON.)
For bigamy.
(See BIGAMY.)
For adultery.
(See ADULTERY.)
For fornication.
(See FORNICATION.)
For seduction.
(See SEDUCTION.)
For challenging to fight.
(See CHALLENGING TO FIGHT.)
For false personation.
(See FALSE PERSONATION.)
For attempts to commit offences.
(See ATTEMPTS.)
For offences against the Post Office.
(See OFFENCES AGAINST THE POST OFFICE.)

INDICTMENT—Form of.—*Continued.*

For treason.

(See Treason.)

For violation of the neutrality laws.

(See Violation of the Neutrality Laws.)

For piracy.

(See Piracy.)

For confining the master of a vessel.

(See Confining the Master of a Vessel.)

For maltreatment of the crew.

(See Maltreatment of the Crew.)

For revolt and endeavor to make a revolt.

(See Revolt, &c.)

For forcing on shore or deserting in a foreign place, a subordinate by the master.

(See Forcing on Shore, &c.)

For engaging in the slave trade.

(See Engaging in the Slave Trade.)

For plunder of, or attack with intent to plunder a vessel or wreck.

(See Plunder, &c.)

For destroying a vessel with intent to defraud the underwriters.

(See Destroying a Vessel with intent, &c.)

Finding of.

(See Grand Jury.)

INDIVIDUALITY,

evidence of.

(See Preparation of Evidence.)

INDUCEMENT,

how far to be proved, 624, &c.

INFAMY,

when incapacitating a witness.

(See Witnesses.)

Witness not compellable to expose himself to.

(See Witness.)

INFANCY,

when incapacitating a witness, 725.

(See Witness.)

INFANTICIDE,

evidence of.

Condition of the body of the child, 872–3–4.

Degree of its maturity, 873.

Viability, tests of, as applied to lungs, organs of digestion, liver or bladder, 872–3.

Hydrostatic test, 872–4.

Hemorrhal test of Plouquet, 873.

Pneobiomantic test, 874–5–6.

Evidence with regard to breath, 875–6.

Mere respiration during the course of birth, not enough, 876.

Person suspected, 877–8.

To be determined whether person suspected was pregnant at the given time, 877–8.

No certainty in the signs of virginity or of recent delivery, 877–8.

INFANTICIDE.—*Continued.*
Violent death by no means implies participation of mother in child's death, 877-8.
Cause of death.
Presumption to be drawn from child's discovery in privy, 879-80.
Presumption as to loosing umbilical cord, 879-82.
Quickness, evidence and law of, 883.
Killing in mother's womb, not murder unless child be born alive, and afterwards die from wound given, 942.
The child must have been entirely born into the world in a living state, 942.
Premature delivery of child producing death is murder, 942.
Law of.
(See Homicide. See, also, Abortion.)
INFANTS.
How far responsible for crime, 58-65.
Can be no conviction for capital offence under seven, 58-65.
Responsibility was said to commence at fourteen, 58-65.
But now commences at discretion, 58-65.
Under fourteen incapable of rape, 58-65.
But may be convicted of assault, &c., 61.
May be convicted of forcible entry, &c., 62.
And riot, 62.
Must appear in person or by attorney, not by guardian, 63.
Onus is upon defendant to prove infancy, 64.
Liability under seven, 58-65.
Between seven and fourteen, and over fourteen, 58.
INFIDELITY,
when affecting competency of witnesses.
(See Witness.)
INFORMATION. (See Indictment.)
INNKEEPER.
INNOCENCE,
presumption of.
(See Presumption.)
INSANE PERSONS,
not competent as witnesses, 752.
How far responsible for crime, 15.
Where the defendant is incapable of distinguishing right from wrong in reference to the particular act, 15.
Where the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility, or where his reasoning powers are so depraved, as to make the commission of the particular act the natural consequence of the delusion, 17.
Where the defendant is impelled by a morbid and uncontrollable impulse to commit the particular act, 24.
How intoxication affects responsibility for crime, 32.
Medical witnesses as experts, 45.
By whom and how, the defence of insanity may be taken, 51.
Statutes regulating trial of insane persons, 51-55.
Presumption of sanity, and when such presumption shifts, 55-711.
How far evidence of prior insanity is admissible, 57.

INSANITY,
when set up as a defence, must be proved satisfactorily to a jury, 55, 711.
INSOLVENCY.
Fraudulent.
(See SECRETING GOODS.)
INSTRUMENT OF DEATH,
presumptions to be drawn from, 385, 387, 388, 389.
INSTRUMENTS OF WRITING,
variance in setting forth, how far fatal, 281, 282.
INSURERS,
attempts to defraud, Statutes, 2907, &c.
Decisions on above, 2914.
INTEMPERANCE. (See DRUNKENNESS.)
INTENT,
to be presumed from former guilty acts, 631, 647, 649, 651, &c.
When uncommunicated.
(See VOL. II.)
To be presumed from nature of fact, 631, 647, 712, &c.
Proof of, see 631, 647, 649, 651, &c.
How to be pleaded, 292.
Where two intents are averred, proof of one is enough, 392.
INTENT TO DEFRAUD IN FORGERY. (See FORGERY.)
INTEREST,
how far interfering with capacity of witness to testify in criminal cases.
(See WITNESSES.)
INTOXICATION,
when incapacitating a witness, 753.
When produced by the effects of ether, 1146.
When a defence to an indictment, 32.
When itself indictable.
(See NUISANCE.)
IRRELIGION,
when affecting competency of witness.
(See WITNESSES.)
ISSUE,
evidence to be confined to.
(See EVIDENCE.)

JEALOUSY,
as a motive in homicide, 849.
JEOFAILS,
statutes of.
(See INDICTMENT.)
JEOPARDY. (See PLEAS.)
JOINDER OF OFFENCES,
how far permissible.
(See INDICTMENT.)
JOINDER OF DEFENDANT,
practice concerning, 427.
In demurrer to evidence, 529.
JOINDER OF OFFENCES, 414.
Where such joinder is permissible, 414.

JOINDER OF OFFENCES.—*Continued.*
Where an election will be compelled, 422.
Advantages of alternative statements in distinct counts, 424.
How second and subsequent counts are to be prefaced.
Effect of one bad count upon others, and herein of the transposition of counts, 427.

JOINT OFFENCES.
When two offences are committed by the same act, *quære*, as to whether the defendant can be severally prosecuted, 390–1–2–3, 565.

JUDGES,
when admissible as witnesses, 777.
Error by, when ground for new trial.
(See New Trial.)

JUDGMENT,
arrest of.
(See Arrest of Judgment.)
On demurrer.
(See Demurrer.)
On pleas.
(See Pleas.)

JURISDICTION,
plea of.
(See Pleas.)
County having jurisdiction of a portion of an offence, has jurisdiction over the whole case, 277–80.
In cases of threatening letters, 277–80, 603–4.
In conspiracy and larceny, 277–80, 604–5.
In cases of absent principal when offence is committed by agent, 604–5.

JURISDICTION OF COURTS. (See Courts.)

JURY,
challenges of.
(See Challenges.)
Grand.
(See Grand Jury.)
When to be permitted to separate.
(See New Trial.)
Irregularity in impanelling of.
(See New Trial.)
Conduct of.
(See New Trial.)
Tampering with.
(See New Trial.)
Doctrine as to discharge of, under constitutional provision of, once in jeopardy, 573–91.
In Pennsylvania, Virginia, North Carolina, and Tennessee, the rule is that if the defendant is once put in jeopardy, he cannot be a second time tried, even though the jury be discharged the first time by order of court.
No discretionary power, in these States, to discharge, 573–9.
In Pennsylvania, prisoner is now said to be able to consent to discharge, 591.
In the U. S. courts and Massachusetts, New York, Illinois, Kentucky, and Mississippi, better opinion now is that the courts have a discretion to discharge upon pressing legal necessity, 573–9.

JURY.—*Continued.*
Practice when juryman dies during trial, 588.
General rule now as to withdrawal of juryman, 587, 591.
Can separate by prisoner's consent, 274.
Jury not impanelled until sworn, 590.
When jurymen may be said to be charged, 590.

JUSTICE OF THE PEACE,
misconduct by.
(See MISCONDUCT.)
Power of, in riot.
(See RIOT.)

JUSTIFIABLE HOMICIDE. (See HOMICIDE.)

JUSTIFICATION,
in libel.
(See LIBEL.)

KIDNAPPING. (See ABDUCTION.)

KNOWLEDGE,
proof of.
(See EVIDENCE.)

KNOWLEDGE AND INTENT, 631, 647, 649, 651, 712.

LANDMARKS,
malicious defacing of.
(See MALICIOUS MISCHIEF.)

LARCENY FROM THE MAIL. (See POST OFFICE.)

LARCENY. (See VOL. II.)
There must be possession in the prosecutor, either actual or constructive, to enable larceny to exist, 657.
Several articles stolen at the same time may have distinct indictments, 391, 565.
Count for, may be joined with a count for receiving stolen goods, 414–22.
Description of property in.
(See INDICTMENT.)

LAW OF NATIONS,
violation of.
(See NEUTRALITY LAWS.)

LETTERS,
threatening, jurisdiction of indictment for, 603.

LEVYING WAR. (See TREASON.)

LEWDNESS,
when indictable, 17.
(See NUISANCE.)

LEWD PUBLICATIONS. (See LIBEL.)

LIBEL. (See VOL. II.)
Malice, how proved and rebutted, 292, 339, 384.

LICENSE LAWS,
selling liquor in violation of.
(See NUISANCE.)
When license should be negatived in indictment, 378, 380.
Indictment for breach of, onus of proof of is on defendant, 707, &c.

LIMITATIONS OF CRIMINAL PROSECUTIONS, 436.
Massachusetts, 436.
New York, 437.
Pennsylvania, 438.
Virginia, 442.
Ohio, 443.
Under the Virginia and Pennsylvania two terms law, 450, &c.
When on face of indictment offence appears excluded by statute of, judgment may be arrested, 445.
General practice under the statute, 445.

LIQUOR,
retailing of, without license.
(See Nuisance.)

LOCK,
malicious injury to.
(See Malicious Mischief.)

LOST INSTRUMENT,
how to be averred.
(See Indictment.)

LOTTERIES. (See Vol. II.)

LOTTERY LAWS,
conspiracies to avoid.
(See Conspiracy.)

LUNATICS. (See Insane Persons.)
When witnesses.
(See Witnesses.)

MACHINERY,
trespass on.
(See Malicious Mischief.)

MAGISTRATES,
power of dispersing riots.
(See Riot.)

MAIL. (See Vol. II.)

MALICE AFORETHOUGHT,
effect of, as a technical averment, 399.

MALICE. (See Homicide.)
To be presumed from killing, 712, 950, &c.
(See Intent.)

MALICIOUS MISCHIEF. (See Vol. II.)

MALPRACTICE. (See Homicide.)

MALTREATMENT OF CREW. (See Vol. II.)

MANIA-A-POTU. (See Drunkenness.)

MANSION-HOUSE. (See Arson, Burglary.)

MANSLAUGHTER. (See Homicide.)

MARRIAGE. (See Bigamy.)

MARRIED WOMEN. (See Feme Coverts.)

MASSACHUSETTS,
Statutes of.
Amendment, 217.
Limitations, 436.

MASSACHUSETTS—Statutes of.—*Continued.*
Homicide, 869.
Rape, 1126.
Sodomy, 1157.
Mayhem, 1163.
Abduction and kidnapping, 1176.
Abortion, 1214.
Concealing death of bastard, 1231.
Felonious assaults, 1266.
(For remaining statutes see VOL. II.)
MASTER OF VESSEL.
Forcing seamen on shore.
(See VOL. II.)
Confining.
(See VOL. II.)
Revolt against.
(See VOL. II.)
MASTER'S EXCESSIVE CORRECTION OF SERVANT, consequences of, 1014.
MAYHEM.
Statutes.
United States.
Cutting ear, tongue, nose, etc., or limb, on the high seas, or abetting in same, 1162.
Massachusetts.
Cutting tongue, eye, ear, lip, limb, etc., or aiding in same, 1163.
New York.
Cutting tongue, eye, lip, or limb, etc., 1164.
Pennsylvania.
Cutting tongue, eye, nose, or limb, or pulling out eye, 1165.
Punishment for the same, 1166.
Virginia.
Shoot, stab, cut, or wound, or causing bodily injury, with intent to maim, disfigure, disable, or kill, 1167.
An attempt to commit felony, unlawfully shoot, stab, cut, or wound another person, 1168.
Unlawfully shooting at another person, 1169.
Ohio.
Maiming or disfiguring another, with intent, etc., 1170.
Mayhem at common law, 1171–5.
Defined to be such a hurt as renders a man less liable in fighting to defend himself or annoy his adversary, 1171–5.
When it disfigures only it is not mayhem, 1171–5.
All mayhems presumed to be malicious, 1171–5.
In England and in Pennsylvania mayhem is a felony, otherwise in Massachusetts and in Georgia, 1171–5.
Construction of North Carolina statute, 1171–5.
Putting out an eye mayhem at common law, 1171–5.
MEDICAL MEN.
When privileged as witnesses, 774.

MEDICAL MEN.—*Continued.*
When responsible.
(See HOMICIDE.)
How to be examined in cases of insanity, 94, 95.
MERGER,
of misdemeanor in felony, 564.
Now doubted whether such a merger exists, 564.
Of fornication in rape.
(See VOL. II.)
MINORS. (See INFANTS.)
MISADVENTURE. (See HOMICIDE.)
MISCARRIAGE. (See ABORTION.)
MISCONDUCT IN OFFICE. (See VOL. II.)
MISDEMEANORS,
no accessaries in, at common law, 131.
General definition of.
(See CRIMES AND MISDEMEANORS.)
Mala in se, 3.
Disturbance of public peace, 4.
Malicious injury to others, 5.
Nuisances, or scandal to the community, 6.
Personal lewdness, 7.
Attempts, 8.
Mala prohibita, 10.
Merger of, 564.
Where there can be conviction for, under indictment for felony, 400.
MONEY,
how to be described, 363, 610, 611.
MOTION FOR CONTINUANCE. (See VOL. II.)
MOTION IN ARREST OF JUDGMENT. (See ARREST OF JUDGMENT.)
MOTION FOR NEW TRIAL. (See NEW TRIAL.)
MURDER,
evidence of corpus delicti necessary, 745, 939.
Preparation for evidence.
(See PREPARATION.)
Law of.
(See HOMICIDE.)

NAME,
pleading of.
(See INDICTMENT.)
How to be proved in evidence.
(See EVIDENCE.)
Of prosecutor, when to be indorsed on bill.
(See GRAND JURY.)
Name and addition of defendant, and name of prosecutors and third parties, 233.
When defendant is a corporation, 233.
How often the defendant's name must be repeated, and how far a subsequent full name cures a former omission, 234.
What is a misnomer, 236.

NAME.—*Continued.*
Alias dictus, 237.
Defendant's middle names, 238.
Abbreviations and initials, 239.
Where defendant's name is unknown, 242.
Addition and mystery, 248.
Junior and senior, 249.
Description of parties injured and third parties, 250.
General summary of practice, 259.

NECESSITY,
homicide by.
(See HOMICIDE.)

NEGATIVE AVERMENTS,
evidence of.
(See EVIDENCE.)
Pleading of.
(See INDICTMENT.)

NEGLIGENCE,
death by.
(See HOMICIDE.)
General rule as to negligence, 1002.
Death from carelessness, where the death was by no means a likely consequence of the careless act, 1003.
Carelessness on the public road, 1005.
Acts of omission, as well as commission, on the part of those charged with specific duties, 1011.
Unlawful or dangerous sports, 1012.
Undue correction by persons in authority, 1014.
Medical malpractice, 1015.
Negligence on both sides, 1016.

NEGRO,
abduction of.
(See ABDUCTION.)

NEUTRALITY LAWS,
violation of.
(See VOL. II.)

NEW TRIAL,
motion for.
(See VOL. II.)
Erroneous rendition of verdict, 1024.

NEW YORK,
Statutes,
Amendment, 215.
Limitations, 437.
Homicide, 894–911.
Rape, 1127–8.
Sodomy, 1158.
Mayhem, 1164.
Abduction and kidnapping, 1180–91.
Abortion, 1216–17.

NEW YORK—Statutes.—*Continued.*
Felonious assault, 1270–5.
(For other statutes, See Vol. II.)
Instruments of writing, how pleaded in,
Statutes of limitations.
(See Indictment.)

NOLLE PROSEQUI,
no bar to subsequent indictment, 513–517.
Power of attorney general in respect to, 514–516.
Practice concerning, 515.

NOLO CONTENDERE. (See Pleas.)

NON COMPOS MENTIS.
Where the defendant is incapable of distinguishing right from wrong in reference to the particular act, 15.
Where the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility, or where his reasoning powers are so depraved, as to make the commission of the particular act the natural consequence of the delusion, 17.
Where the defendant is impelled by a morbid and uncontrollable impulse to commit the particular act, 24.
How intoxication affects responsibility for crime, 32.
Insanity produced by *delirium tremens,* affects the responsibility in the same way as insanity produced by any other cause, 33.
Insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated, 37.
While intoxication *per se* is no defence to the *fact* of guilt, yet when the question of *intent* or *premeditation* is concerned, evidence of it is material for the purpose of determining the precise degree, 41.
Medical witnesses as experts, 45.
By whom and how, the defence of insanity may be taken, 51.
Presumption of sanity, and when such presumption shifts, 55.
How far evidence of prior insanity is admissible, 57.

NOT GUILTY. (See Pleas.)

NOTES,
variance in setting out, when fatal, 281, 282.
And bonds, how to be described.
(See Forgery, 178, 180, Indictment.)

NOTICE TO PRODUCE. (See Evidence.)

NOTORIOUS LEWDNESS, &c. (See Nuisance.)

NOXIOUS TRADE OR OCCUPATION. (See Nuisance.)

NUISANCE,
acquittal for former offence no bar to subsequent, 548.
Pleading and evidence generally. (See Vol. II.)
Meeting in a party and disturbing a neighborhood by unsuitable noises at night, 803.
Number of witnesses necessary.
(See Witnesses.)
Of grand jurors necessary to find a bill.
(See Grand Jury.)
Of defendants necessary to constitute offence, 431.

NUMBERS AND FIGURES,
how averred and proved on trial.
(See EVIDENCE.)

OATH,
manner of taking.
(See PERJURY.)
OBSCENE PUBLICATIONS. (See LIBEL.)
OBSCENITY,
when indictable.
(See NUISANCE.)
OBSTRUCTION OF PROCESS. (See ASSAULTS UPON OFFICERS.)
OBSTRUCTION OF ROADS, STREETS, STREAMS, &c. (See NUISANCES.)
OFFENCES GENERALLY. (See CRIMES AND MISDEMEANORS.)
OFFICERS,
embezzlement by.
(See EMBEZZLEMENTS.)
Presumed to be duly appointed, 713–1041.
Of steamboats, negligence of.
(See HOMICIDE.)
Right to disperse riots.
(See RIOTS.)
Of justice, homicide of and by.
(See HOMICIDE.)
In execution of their duties, assaults on.
(See ASSAULTS.)
Misconduct or extortion by.
(See EXTORTION, MISCONDUCT.)
OHIO.
Statutes.
Limitations, 443.
Homicide, 924–9.
Rape, 1131–3.
Mayhem, 1170.
Abduction and kidnapping, 1199, 1204.
Abortion, 1218–19.
Assaults, 1240, 1276–8.
(For other statutes see VOL. II.)
ONCE IN JEOPARDY. (See PLEAS.)
OPINION,
preconceived, how far disqualifying juror.
(See CHALLENGES.)
OVERT ACTS,
preconceived.
(See CONSPIRACY, TREASON.)
OWNERSHIP. (See ARSON, BURGLARY, LARCENY.)

PARDON,
necessary to entitle a person convicted of infamy to testify, 765–6.
Effective when the disability is attached to the crime by statute, 765–6.
Must recite the offence specifically, 765–6.

PARDON.—*Continued.*
Granted after the sentence has been complied with purges the incompetency, 765–6.
Right of accomplice to, when making a clean breast, 763–791.
Void, when obtained by fraud, 357.
Conditional pardons, effect of, 357.
PARENTS, right of, to chastise child, 1014, 1259.
May be witnesses for or against children.
(See WITNESSES.)
Neglect to provide for children by, 1014.
Excessive correction of children by, consequence of, 1014, 1259.
Responsible for neglecting to provide for children, 454–6.
PAROL EVIDENCE. (See EVIDENCE.)
Particulars, bill of, when to be required, 171.
PASSION AND PREMEDITATION.
(See HOMICIDE, PREPARATION OF EVIDENCE.)
PEACE,
breach of, conspiracies to commit.
(See RIOT, CONSPIRACY.)
And dignity.
(See INDICTMENT.)
Offences against.
(See VOL. II.)
PEDIGREE,
hearsay evidence of, admissible, 306, 307.
PENALTIES. (See INDICTMENT.)
PENNSYLVANIA.
Statutes.
Limitations, 438.
Homicide, 913–18.
Rape, 1129.
Sodomy, 1159.
Mayhem, 1165–6.
Abduction and kidnapping, 1192–6.
Concealing death of bastard, 1133–4.
(For other statutes see VOL. II.)
Acts of Assembly to be strictly followed, 11, 373.
Instruments of writing, how pleaded in, 325.
When common law remedy merges in statutory, 11, 373.
Peremptory challenges.
(See CHALLENGES.)
PERJURY. (See VOL. II.)
PERSON,
indecent exposure of.
(See NUISANCE.)
PERSONAL CHATTELS,
how to be described.
(See INDICTMENT.)
PERSONATION,
false.
(See VOL. II.)

PERSONATION—*Continued.*
Statutes.
United States.
PERSONS IGNORANT OF LAW OR FACT,
how far irresponsible.
(See IGNORANCE.)
Non compotes mentis.
(See INSANE PERSONS.)
PETIT TREASON,
no longer existing here, 1.
PETITION,
when libellous.
(See LIBEL.)
PHYSICIANS,
negligence by.
(See HOMICIDE.)
Testimony of, 45, 774.
Responsibility of, 1015.
When permitted to divulge professional secrets, 774.
How to be examined in cases of insanity, 77, 141.
PIRACY. (See VOL. II.)
PLACE,
averment of.
(See INDICTMENT.)
Proof of.
(See EVIDENCE.)
PLANTS,
malicious destruction.
(See MALICIOUS MISCHIEF.)
PLEAS.
Not guilty, 530.
How defendant is arraigned, 530.
Double pleading not allowable, 530.
Similiter, how joined, 530.
Attorney cannot plead in felony, 530.
Deaf and dumb person, how to be tried, 531.
Effect of plea of not guilty, 531.
Practice when prisoner stands mute, 532.
Statute of Limitations, 431.
Nolo contendere, plea of, effect of, 533.
Plea to the jurisdiction, nature of, 534.
Non-residents, trials of, 535.
Plea in abatement, when to be taken, 536.
Only method of taking advantage of errors of name, &c., 536.
Must be verified by affidavit, 536.
When plea put in, practice to reindict, 537.
Issue upon such plea, 537.
Special pleas generally, 538.
Autrefois acquit.
When judgment on former acquittal or conviction is necessary, 540.
Former acquittal should have been regular, 541.

PLEAS.—*Continued.*
Proceedings for contempt, 542.
Habeas corpus, 543.
Ignoramus, or Nolle Prosequi, 544.
Discharge under Limitation Statute, 545.
Fraud, 546.
Pendency of other indictment, 547.
Acquittal on prior nuisance, 548.
Pendency of civil proceedings, 549.
New trial after conviction for minor offence, 550.
Insufficiency of former indictment, 551.
Acquittal as accessary or principal, 552.
Acquittal on one of several counts, 553.
Erroneous acquittal unreversed, 554.
Acquittal in wrong county, 555.
Acquittal from misnomer, 556.
Acquittal from variance as to intent, 558.
Acquittal from variance as to time, 559.
Acquittal on an indictment for a greater offence, a bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less, 560.
Acquittal on minor offence generally no bar to greater, 563.
Otherwise when on trial of the major offence there could have been a conviction of the minor, 563.
Acquittal from a supposed merger, 564.
When two offences are committed by the same act, 565.
Practice under plea of autrefois acquit, 568.
Judgment on plea of autrefois acquit, 572.
Once in jeopardy, 573.
Constitution of the United States provides that no person "shall be subject for the same offence, to be twice put in jeopardy of life and limb," 573.
This is a fundamental principle of the common law, 573.
Constitutional provision here extended beyond the common law doctrine, 573.
Different views as to extent of doctrine, 574.
In Pennsylvania, Virginia, North Carolina, Tennessee, Alabama, and Indiana, held that any separation of jury, except by consent in capital cases, bars a second prosecution, 575–9.
In the United States courts, Massachusetts, New York, Illinois, Kentucky, and Missouri, held that there is no jeopardy until verdict given, 580–6.
If indictment or process is defective, defendant is not considered in jeopardy, 587.
"Discretion," in exercise of which a court can discharge a jury, must be specified on the record, 588.
Illness on part of jurymen sufficient reason for discharge, 588.
Intermediate incapacity of juror, 588.
Sickness of prisoner, 588.
Surprise at trial, 588.
Sickness of judge, 588.
Sickness of witness, 588.
Jury may be withdrawn in case for legal necessity, 588.

PLEAS.—Once in jeopardy.—*Continued.*
When jury may be said to be charged, 590.
Form of plea, 590.
PLUNDER OF VESSEL OR WRECK. (See VOL. II.)
POISON, 837, 844.
(See HOMICIDE.)
POLYGAMY, &c. (See VOL. II.)
POST OFFICE,
offences against.
(See VOL. II.)
PREGNANCY. (See ABORTION.)
PREJUDICE OF JUROR. (See CHALLENGE, NEW TRIAL.)
PREPARATION OF EVIDENCE FOR TRIAL.
Character cannot be called in question by prosecution, 824.
Public policy requires that evidence should not be introduced as to character unless by defendant himself, 824.
Non-production of evidence of character no ground of presumption, 824.
Distinction in this respect between civil and criminal law, 824.
By the civil law evidence of tendency to commit an offence is received, and the question is made one of general psychological character, 824.
By the common law the only inquiry is whether the offender is guilty of the particular offence, 824.
Preparation in homicide cases, 825–30.
Marks of violence on the person indicating the weapon used, presumption to be drawn from, 831–2.
Inquiries in connection with wounds, whether accidental, self-inflicted, or given by another, 833.
Suicide, presumptions concerning, 834.
Passion or premeditation, how far to be drawn from character of wounds, 835.
Instrument of death, importance of determining nature of, 836.
Poison, 837.
Inspection and chemical analysis of corpse to be resorted to, 837.
Vessels and dishes found near deceased to be examined, 838.
Symptoms of disease and death to be examined, 838.
In conducting chemical analysis, earth near body to be examined, in order to see whether it is impregnated with arsenic, 840.
Specimens to be preserved by being carefully detached from external influences, 840.
Nature of veneficial test, 841.
Results of examination, 842.
Existence of poison to be proved, 843.
Inquiries as to parties within the range of suspicion, 844.
Materials appropriate to be converted into instruments of crime, 845.
Position of deceased, 847.
Traces of blood, 848.
Examination of clothes, &c., 848.
Liability of deceased to attack, 849.
Possession of money or valuable articles, 849.
Old grudge, 850.
Jealousy, 851.
Larceny, embezzlement, burglary, &c., 853.

PREPARATION OF EVIDENCE FOR TRIAL—*Continued.*
Inspection of the premises, 854.
Inquiries as to stolen articles, 855–6.
Inquiries as to burglarious instruments, 856.
Arson—inquiries concerning, 857.
Identification of offender, 858.
Inquiries for the purpose of suspicion, 858–9.
What facts lead to the particular person, 860.
What facts concern the effects of the crime, 861.
What facts appear as necessary conditions of the perpetration, 862.
Particular intent of supposed perpetrator, 860.
Threats uttered by such person, 860.
Marks on person, such as stains of blood, &c., 861.
Possession of articles known to have belonged to deceased, 861.
Intentional removal or destruction of traces of crime, 861.
Anxious inquiries into crime and judicial measures, 861.
Disclosures of circumstances to be known only to one acquainted with the particulars of the crime, 861.
Attempts to compound the matter with injured party, 861.
Uneasy deportment, 861.
Flight without proper motive, 861.
(See 714.)
Presence of accused at probable time of crime, 862.
Discovery at the *locus in quo* of articles known to have belonged to the accused, 862.
Footsteps leading from the place to the dwelling of the party, 862.
Possession of instruments adapted to the purpose, 862.
(See 832–3.)
Peculiar qualifications pre-eminently adapted for the undertaking, or perfect acquaintance with the localities, 862.
Merits of direct evidence as to individuality as distinguished from *indicatory*, 863.
Preparation in forgery and counterfeiting.
(See Forgery.)
Proper that in such case the writings should be placed under the custody of the court, 864.
Similitude of hands, 865.
Main question is, did the accused write the instrument, 865.
General opinion as to handwriting, 865.
Not necessary that witness should have seen party write, 865.
Judgment may be formed by comparison of hands, 865.
Evidence as to disguised hands, 865–6.
Chemical tests, 867.
Circumjacent tests, as to any discrepancy between date of handwriting and water mark, 868.
Presumption as same method of misspelling, 870.
PRESENTMENT. (See Indictment, Grand Jury.)
PRESUMPTIONS.
Presumptions of innocence, and herein of presumption of sanity, 707–12.
Every man presumed to be innocent until the contrary appear, 707–12.

PRESUMPTIONS—*Continued.*

If there be a reasonable doubt, the jury are to give the defendant the benefit of such doubt, 707–10.

Character of doubt necessary for this purpose, 707–10.

Must not be a mere chimerical doubt, 707, 744.

Burden of proof is on the prosecution in all cases where there is no positive defence set up, 327.

Doubted whether, when defendant confesses and avoids, he is to have benefit of doubts in respect to such avoidance, 708–12.

When insanity is set up, better opinion is that it must be made out to the exclusion of reasonable doubt, 55, 711.

Malice to be presumed from act of killing, 710, 944.

Presumption of intent.

Natural consequences of every act deliberately done are presumed to have been intended by the author, 712.

Thus, in forgery, intent to defraud to be presumed from act, 712.

Everything presumed to be rightfully done until the contrary appears, 713.

Presumption arising from attempts to escape and evade justice, 714.

Breaking jail, evidence of, admissible, 714.

So as to evidence of bribery, 714.

So as to evidence of flight, 714.

Not admissible for defendant to prove that he did not avail himself of opportunities to escape, 714.

Presumption arising from forgery of evidence, 715.

With a view to self-exculpation, 716.

Maliciously, with intent to injure accused, 718.

Fabrication of evidence with intent to cause a false conviction, 718–20.

In sport, or in order to effect some moral end, 721.

Suppression or destruction of evidence, 722–5

Presumption arising from antecedent preparations and previous attempts, 725.

Possession of instruments or means of offence, 725–6.

Presumptions arising from declarations of intent, 727—See 631, &c.

Threats, 727.

Fruits of offence, 728–9.

Possession of stolen property, 728.

Extrinsic and mechanical inculpatory indications, 731, 845.

Nature of wounds as indicating passion or design, 731, 831.

As to suicide or murder, 731, 831, &c.

PRETENCES,

false, statutory cheats by.

(See False Pretences.)

PREVIOUS ATTEMPTS,

presumptions to be drawn from.

(See Presumptions.)

PRINCIPAL AND ACCESSARY.

Statutes.

United States, 91.

Massachusetts, 93.

New York, 98.

Pennsylvania, 103.

PRINCIPAL AND ACCESSARY.—*Continued.*
Virginia, 107.
Ohio, 111.
Principals in the first degree, 112.
Not necessarily present at the time, 112.
Party acting through insane or innocent medium, or through a slave, is principal in the first degree, 112.
If agent is aware of the state of facts, and is responsible, he becomes principal in the first degree, and the absent instigator is accessary before the fact, 112.
All present aiding and abetting are principals, 113.
Non-resident principal answerable for his agent's criminal acts, 115.
Principals in the second degree, 116.
All aiding and abetting are principals in the second degree, though in point of fact watching outside, 116–20.
Confederacy in the act makes a principal in the second degree, 116–20.
Presence alone without confederacy insufficient, 116–20.
Complicity in motive essential, 116–20.
In duelling both seconds principal in second degree, 121, 959.
So in prize fights, 121.
So in suicide, 122.
Presence, actual or constructive, assented to, constitutes a principal, 124.
Keeping guard outside enough, 124–6.
Necessary to constitute a principal that a party should be sufficiently near to give assistance, 126.
Persons uniting to stand by each other in felony, all principals, 127.
All rioters principals in a homicide committed by riot, 126–30.
Distinction between principal in the first and principal in the second degree, a distinction without a difference, 129.
Otherwise when there is a different punishment inflicted on each, 129.
Principal in the second degree may be tried without the conviction of principal in the first degree, 130.
At common law no accessaries in treason and misdemeanors, 131.
Hence an indictment averring the commission of such offences by a principal is sustained by proof of the commission by an agent, 134, 594.
Accessaries before the fact,
Includes those who, though absent, counsel, command, or procure, &c., 134.
Party must have been absent, 134.
Accessary liable for all that happens in execution of command, 134.
Procurement must continue to the commission of offence, 134.
If principal commit a *different* crime, accessary not liable, 134.
At common law, conviction of principal must precede that of accessary, 135.
Rule in Massachusetts, Pennsylvania, and Virginia, 135.
Principal's conviction prima facie evidence of his guilt, 135–6.
Practice in Massachusetts under revised Statutes, 137.
Practice when principal and accessary are tried together, 138.
Practice under New York Statutes, 139.
Practice in Tennessee, 140.
Practice in Illinois, 143.
Particularity necessary in indictment, 142.
Not necessary that the accessary should have originated the design, 145.

PRINCIPAL AND ACCESSARY.—*Continued.*
Accessaries after the fact, 146.
Definition, 146.
Includes all assistance given to a felon in order to hinder his arrest, 146–50.
Does not include suffering felon to escape, 146–50.
nor supplying him in prison with necessaries, &c., 146.
Necessary that the felony should have been completed, 146.
defendant knew that the felon was guilty, 146.
Does not include wife harboring husband, 146.
No other ties will excuse, 146.
Principal's conviction prima facie evidence of his guilt, 146–50.
Practice in New York, 149.
The felony must have been complete, 147.
The defendant must know that the defendant was guilty, 147.
How far there can be accessaries in treason.
(See TREASON.)
How far principal is liable for agent's guilty act, 151–4.
PRISONER,
limitation of power to keep in custody, 450–1.
PRIVATEERING. (See NEUTRALITY LAWS.)
PRIVILEGE. (See WITNESSES.)
PROBABLE CAUSE. (See GRAND JURY.)
PROCESS,
obstruction of, indictment for, 1288, &c.
PRODUCE,
notice to.
(See EVIDENCE, INDICTMENT.)
PROFANE SWEARING,
when indictable.
(See VOL. II.)
PROPERTY,
malicious mischief to.
(See MALICIOUS MISCHIEF.)
PROPERTY, PERSONAL,
how to be described.
(See INDICTMENT.)
Stolen, presumption to be drawn from possession of, 728, see 631–5, 652–5.
PROSECUTING ATTORNEY. (See ATTORNEY-GENERAL, GRAND JURY.)
Entitled to attend grand jury.
(See GRAND JURY.)
PROSECUTIONS,
power to institute and practice concerning, 452.
That grand juries may on their own motion institute all prosecutions whatever, 453.
That grand juries may act upon and present such offences as are of public notoriety, and within their own knowledge, such as nuisances, seditions, &c., or such as are given to them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate, 458.
That grand juries are in all instances limited in their actions to cases in which there has been such a primary hearing as enables the defendant, before he is put on trial, to be confronted with the witnesses against him, and meet his prosecutor face to face, 459.

PROSECUTIONS.—*Continued.*
Summoning grand juries, 464.
Selection of foreman and oath, 466.
Disqualification of grand juror, and how it may be excepted to, 468.
Indictment must be sanctioned by the prosecuting attorney, 474.
Summoning of witnessess, and indorsement of their names on bill, 476.
Examination of testimony, 488.
How witnesses are to be sworn, 488.
How defects in this respect may be excepted to, 489.
Evidence confined to the prosecution, 490.
Probable cause enough, 491.
Legal proof only to be received, 493.
Attendance of prosecuting attorney, 495.
Defendant and others not entitled to attend, 496.
Finding and attesting of bill, 497.
Misconduct of grand juror, 507.
How far grand juror may be compelled to testify, 508.

PROSECUTOR,
when name to appear on back of bill.
(See Grand Jury.)
When a witness.
(See Witness.)

PROSTITUTION,
keeping house for the purpose of.
(See Nuisance. See also Seduction, Adultery, Fornication.)

PROVOCATION. (See Homicide.)

PUBLIC OFFICERS,
misconduct or extortion by.
(See Extortion, Misconduct.)
Communications by, when privileged.
(See Evidence.)
Testimony of, when privileged, 776.
Neglect of duty by.
(See Misconduct.)
Homicide by and of.
(See Homicide.)

PUBLIC JUSTICE,
offences against, cognizable in the U. S.
(See Courts.)
Nuisance.
(See Nuisance.)
Policy, when operating to exclude evidence.
(See Evidence.)
Peace, attempts to disturb.
(See Riots.)
Record, forgery of.
(See Forgery.)
Seals of courts or corporations, forgery of.
(See Forgery.)
Stream, nuisance in diverting the course of.
(See Nuisance.)

PUBLICATION IN LIBEL. (See LIBEL.)
PUBLISHING COUNTERFEIT MONEY. (See FORGERY.)

QUASHING, 518–24.
- When court will quash indictments, 518–24.
- When there is no jurisdiction in court, 518–24.
  - Offence charged on a day not yet come, 518–24.
  - Offences improperly joined, 518–24.
- Only usual in extreme cases, 518–24.
- Where motion to quash has been granted or refused, 518–24.
- Extrinsic matter no ground for motion to quash, 520.
- Quashing as to one defendant, quashes as to all, 520.
- When second bill may be found pending first, 521.
- Practice when one count is quashed, 522.

QUICKENING,
- how far necessary to produce the offence of abortion. (See ABORTION.)

QUO ANIMO,
- how to be proved, 631–6, 643, 651.

RAILWAY CONDUCTOR. (See VOL. II.)

RAPE.
- Statutes.
  - United States.
    - Rape on high seas, 1124.
    - Entering vessel with intent to commit rape, 1125.
  - Massachusetts.
    - Rape on female of ten or more, and carnal knowledge of child under ten, 1126.
  - New York.
    - Rape on female of ten years or more, or carnal knowledge of child under ten, 1127.
    - Rape through stupefaction, 1128.
  - Pennsylvania.
    - Rape and its punishment, 1129.
  - Virginia.
    - Rape by white person on female of ten years or more, 1130.
  - Ohio.
    - Rape upon daughter or sister, 1131.
    - Rape on woman of ten or more, or carnal knowledge of female under ten, 1132.
    - Carnal knowledge of insane woman, 1133.

RAPE AT COMMON LAW.
- Defendant's competency to commit offence, 1134.
- Infancy, 1124.
- Impotency, 1135.
- Relationship, 1136.
- In what carnal knowledge consists, 1137.
- In what want of will consists, 1141.
- Acquiescence obtained by fear, 1142.
- Acquiescence obtained by ignorance of nature of act, 1143.
- Acquiescence obtained by mistake or imposition as to the person, 1144.
- Acquiescence obtained by artificial stupefaction, 1146.

RAPE AT COMMON LAW.—*Continued.*
Party aggrieved as a witness, 1149.
Her admissibility and weight, 1149.
How far she may be corroborated by her own statements, 1150.
How she may be impeached, 1151.
Pleading, 1153.
Assault with intent to ravish, 1155.
RECEIVING STOLEN GOODS. (See VOL. II.)
Proof of such knowledge, 631–5, 639–40, 647–51.
Count for, may be joined with count for larceny, 205, 206.
RECORDS
may be exhibited by an examined copy, 654.
How pleaded and proved, 305–13, 606–10.
RELATIONSHIP,
how far affecting competency of witnesses.
(See WITNESSES.)
RELIGION,
Christian.
(See CHRISTIANITY.)
Want of, when excluding witnesses.
(See WITNESSES.)
RELIGIOUS CONGREGATION,
disturbances of.
(See RIOT.)
RELIGIOUS WORSHIP,
disturbance of, indictable, 4.
REPAIRING HIGHWAY. (See NUISANCE.)
REPUGNANCY. (See INDICTMENT.)
REPUTE,
when admissible.
(See EVIDENCE.)
RESISTANCE TO OFFICERS IN EXECUTION OF THEIR DUTIES.
(See VOL. II.)
RETAILING SPIRITUOUS LIQUORS. (See NUISANCE.)
REVOLT,
and endeavor to make a revolt.
(See VOL. II.)
RIOT, ROUT, UNLAWFUL ASSEMBLY. (See VOL. II.)
RIOTOUS HOMICIDE. (See HOMICIDE.)
RIVER,
obstruction of.
(See NUISANCE.)
ROADS,
obstructing.
(See NUISANCE.)
ROBBERY. (See VOL. II.)

SABBATH,
violation of, when indictable, 3.
SAILORS,
maltreatment of.
(See MALTREATMENT, FORCING ON SHORE, &c.)

SANITY,
presumption of.
(See PRESUMPTION.)
SCANDAL. (See NUISANCE.)
SCHOOL MASTERS,
right to chastise, 1259–60.
Teacher, excessive correction of scholars by, consequence of, 1259–60.
SCIENTER,
proof of, 631, 647, 651, &c.
May be proved by existence of independent felony.
SCOLD,
common, indictable at common law, 288.
SEAMEN,
maltreatment of.
(See MALTREATMENT.)
Forcing on shore.
(See FORCING SEAMEN.)
SECOND TERM LAW,
construction of, 450, &c. &c.
SECONDARY EVIDENCE. (See EVIDENCE.)
SECRETING PROPERTY WITH INTENT TO DEFRAUD. (See VOL. II.)
SECRETE GOODS OF A DEBTOR,
conspiracy to.
(See CONSPIRACY.)
SEDITIOUS WRITING. (See LIBEL.)
SEDUCTION. (See VOL. II.)
conspiracy to commit.
(See CONSPIRACY.)
SELF-CRIMINATION OR DISGRACE,
when ground for excusing witness.
(See WITNESS.)
SELF-DEFENCE. (See HOMICIDE.)
SELF-EXCULPATION,
presumption arising from attempt at, 718.
SELFRIDGE'S CASE,
doctrine of, discussed, 1022–41.
SENTENCE. (See NEW TRIAL, AUTREFOIS ACQUIT, &c.)
SEPARATION OF JURY,
when permissible.
(See NEW TRIAL.)
SHIFTING OF BURDEN OF PROOF,
when taking place, 774, &c.
SHIPPING. (See REVOLT, NEUTRALITY LAWS, CONFINING MASTER, DESTROYING VESSEL WITH INTENT TO DEFRAUD, MALTREATMENT OF CREW, ENGAGING IN SLAVE TRADE, PLUNDERING VESSEL, FORCING SEAMEN.)
SHIPWRECK,
death from necessity during, 1028–30.
When two persons are on the same plank, either may save himself, if necessary, by thrusting the other overboard, 1028–30.
But when one is a sailor, it seems that his life is to be first given up, 1028–30.
SIGNATURE. (See HANDWRITING.)

SIMILITUDE OF HANDS. (See Preparation of Evidence.)
SLANDER. (See Libel.)
conspiracy to.
(See Conspiracy.)
SLAUGHTER HOUSE. (See Nuisance.)
SLAVE TRADE. (See Engaging in the Slave Trade.)
SLAVES,
stranger has no right to chastise, 1259–60.
Marriage of, how far affecting the right to testify as to each other, 771.
Confession of, to be received with great tenderness, 701.
Any coercion excludes them as witnesses, 701–2.
Homicide of or by, 1043, 1051.
SLAVERY,
homicide in connection with.
(See Homicide.)
SODOMY.
Statutes.
Massachusetts, 1157.
New York, 1158.
Pennsylvania, 1159.
Virginia, 1160.
Offences at common law, 1161.
SOLICITING ANOTHER TO COMMIT OFFENCES. (See Attempts.)
SPECIAL PLEAS. (See Pleas.)
SPIRITUOUS LIQUORS,
retailing of.
(See Nuisance.)
SPRING OF WATER,
poisoning.
(See Malicious Mischief.)
STATUTE,
offences created by.
Generally sufficient, and always necessary, to use words of statute, 364.
Common law offences made indictable by statute, 371.
Statutory directions must be pursued, 371.
Not enough to charge offence as a mere conclusion of law, 372.
When common law and statutory indictments are cumulative, 373.
Technical averments in statutes, 374.
Description of animals in statute, 377.
Provisos and exceptions, 378.
Statutory indictments, how to conclude, 411.
Of limitations.
(See Indictment.)
STEAMBOAT NEGLIGENCE,
United States statute concerning, 888.
Decisions thereupon, 888.
New York statutes, 901–4.
STREAM,
obstruction of.
(See Nuisance.)

STREET,
obstruction of.
(See Nuisance.)
SUBORNATION OF PERJURY. (See Vol. II.)
SUICIDE,
encouragement of another to commit.
(See Homicide. See, also, 122.)
Presumptions concerning to be drawn from state of body, 833–5.
Parties aiding, responsible as principal, 122.
SUMS,
variance in proof of.
(See Evidence.)
SUNDAY,
violation of, when indictable, 6.
SUPPRESSION OF EVIDENCE,
presumptions arising from, 722.
SUPREME COURT OF THE UNITED STATES. (See Courts.)
SURGEONS,
homicide through negligence of, 1015.
(See Physicians.)
SURGICAL OPERATION,
when fatal, does not cause responsibility when skilfully and necessarily conducted, 941.
SURPLUSAGE,
what may be treated as.
(See Evidence.)
SWEARING WITNESSES,
practice in, 799.
Profane, when indictable, 6.
(See Nuisance.)

TAKING AWAY. (See Larceny.)
TEACHERS,
right of, to chastise child, 1259.
TECHNICAL AVERMENT. (See Indictment.)
Errors.
(See Indictment.)
TESTS,
chemical.
(See Preparation of Evidence.)
THREATS,
presumptions to be drawn from, 725–6, 860.
(See Presumptions.)
TIMBER,
cutting on lands of the United States.
(See Vol. II.)
TIMBER TREES,
cutting.
(See Malicious Mischief.)
TIME,
averment of.
(See Indictment.)

TIME.—*Continued.*
Proof of.
(See Evidence.)
Limitation as to.
(See Indictment.)
Conspiracy to affect the course of.
(See Conspiracy.)
"TRAITOROUSLY,"
how far essential to indictment for treason, 398.
TREASON,
against the United States.
(See Vol. II.)
TRESPASSES,
how far indictable.
(See Vol. II.)
Preparation of evidence for.
(See Preparation.)
TRUTH,
when admissible in libel.
(See Libel.)

UNDERWRITERS,
attempts to defraud.
(See Destroying Vessel.)
UNHEALTHY FOOD,
sale of, when indictable, 6.
UNITED STATES COURTS. (See Courts.)
UNITED STATES.
Statutes.
General recapitulation of, 174.
Concerning forts, dock-yards, &c., 174.
Offences against law of nations, 175.
Federal sovereignty, 176.
Persons, 177.
Property, 178.
Public justice, 179.
Homicide, 884–8.
Rape, 1124–5.
Mayhem, 1162.
Felonious assault, 1264–5.
Assault on officers, 1288.
(For other statutes see Vol. II.)
Instruments of writing, how pleaded in, 316.
UNKNOWN PERSON OR THING,
how to be averred and proved, 159–61, 168, 174, 177, 242, 251–57, 299.
UNLAWFUL ASSEMBLY. (See Riot.)
Effect of, as a technical averment, 402.
Arrest, how far a provocation to reduce homicide to manslaughter, 1030–41.
UNNATURAL OFFENCE. (See Sodomy.)
UNWHOLESOME FOOD. (See Nuisance.)
Sale of, when indictable, 6, 2372–3–5.

USURPING COMMAND AND CONFINING MASTER. (See Vol. II.)
UTTERING AND PUBLISHING. (See Forgery.)
Counterfeit money or paper.
(See Forgery.)

VALUE OF PROPERTY,
how to be proved, 612–13, 619–28.
Must always be assigned in larceny, 612.
How to be averred, 184.
VARIANCE. (See Evidence.)
VENUE,
averment of.
(See Indictment.)
Proof of.
(See Evidence.)
VERBAL ERRORS,
not fatal, 405.
(See Indictment.)
VERDICT. (See Arrest of Judgment, Writ of Error, New Trial.)
VESSEL,
destroying, with intent to defraud.
Statutes.
United States.
VESSEL. (See Piracy, Revolt, Confining Master, &c.)
Or wreck, plunder of.
(See Plunder of Vessel, &c.)
"VI ET ARMIS,"
no longer essential to indictment, 403.
VIOLATION OF NEUTRALITY LAWS. (See Neutrality Laws.)
VIRGINIA.
Statutes.
Homicide, 919–23.
Rape, 1131.
Sodomy, 1160.
Mayhem, 1167–9.
Abduction and kidnapping, 1197–8.
Abortion, 923.
(For other statutes see Vol. II.)
VOTING DOUBLE,
indictable, 6.

WAR,
treason in levying.
(See Treason.)
WEAPONS,
dangerous, public use of, when indictable, 4, &c.
Concealed, wearing.
(See Riot.)
Used, presumption to be drawn from, 725, 832–35.
WEARING CONCEALED WEAPON. (See Riot.)

WIFE. (See FEME COVERT.)
Sale of, indictable, 6.
When a witness for or against her husband, 358.
(See WITNESSES.)
WINDOWS,
malicious breaking of, when indictable, 5.
WITNESSES, 752.
Infancy, when an incapacity, 755.
Intoxication, 753.
Influence of ether, 1146, *n.*
Deaf and dumb, 754.
Weakness of understanding, 755.
When infirmity arises from neglect, court may delay trial, to enable witnesses to be instructed, 755.
Otherwise where it arises from extreme youth, 757.
Infamy, when incapacitating a witness, 758.
Forgery, perjury, conspiracy to affect testimony, and barratry work incapacity, 759.
Infamy, not mode of punishment, is the effective cause, 760.
Generally petit larceny disqualifies, 760.
As to receiving stolen goods, *quære*, 761.
Infamy does not attach to assault with intent to kill, and bribery, 761.
Effect of foreign judgment as to incapacity, 762.
Conflict of authority on this point, 762.
Conviction without judgment causes no disability, 763.
Prisoners pleading guilty, on whom no sentence is passed, are competent witnesses, 763.
Convicted party may be still a witness in special cases, 763.
Defective conviction, 764.
Pardon can restore competency, but not where the infamy is allotted to this offence by statute, 765.
Pardon is effective when granted after punishment is complied with, 765.
Relationship—
Husband and wife incompetent as to each other, 767.
In conspiracy the wife of one defendant is incompetent for the other, 767.
When the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one is a witness for the other, 768.
Wife inadmissible to prove non-access of husband, 768.
Wife of prisoner already convicted inadmissible against a joint offender, 769.
On trial of a man for the murder of his wife, her dying declarations are evidence against him, 769.
So when alive the wife may be witness as to force, 769.
Wherever husband and wife are admissible against each other, they are admissible for each other, 770.
Effect of divorce on husband and wife's capacity, 771.
Exemption does not apply to cohabitation without marriage, 771.
Effect of marriage among slaves, 771.
Father, mother, parent and child, servant and master, master and slave, are competent witnesses for or against each other, 772.
Privilege—
Attorney or solicitor ought not to be examined against his client, 773.

WITNESSES—Professional Privilege.—*Continued.*

How far such privilege extends, 773.

Clergymen and physicians, generally speaking, no exemption in favor of medical men, 774.

In New York and Missouri statute exists providing that no medical man or clergyman shall be allowed to disclose professional secrets, 774.

Party may waive the privilege, 774.

Communication to clergymen not privileged, 775.

Confidential officers privileged, 776.

Secrets bearing on public service, 776.

Officers of government, when privileged, 776.

Judges, jurors, and arbitrators, 777.

Interest.

Personal or private interest rarely allowed to interfere with criminal prosecutions, 778.

Party injured always admissible, 779–80.

Even a person entitled to reward is not incompetent, 779–80.

Informer, competent witness, 779–80.

Doubted whether the owner of a reversion may testify against the tenant for life, in a capital case, 779–80.

Vendee of restitution money incompetent, 780.

Party aggrieved competent on trial for indictment for perjury, 780.

Party whose name is forged, a competent witness, 781.

In forcible entry and detainer prosecutor is admissible to prove force and force only, 782.

Master admissible for slave, 782.

Accomplices and co-defendants, 783.

Accomplice competent witness, though the hope of his pardon depends upon the defendant's conviction, 783–4.

Preponderance of authority is, that a jury can convict a prisoner on the testimony of an accomplice alone, 783–4.

Even where doubts exist as to credibility, 783–6.

Accompliceship generally detracts from credibility, 783–6.

In England the practice is to acquit unless testimony be corroborated, 785–6.

Corroboration should be as to prisoner's agency, 785–67.

Practice in this country, 789.

Defendant is not a competent witness for co-defendant, unless acquitted by jury, 790.

Accomplices competent witnesses for each other, when tried separately, 790.

Defendant who has been acquitted or convicted, provided he is not thereby rendered infamous, is competent witness for his co-defendant.

Accomplice who makes a clean breast, is by the English practice entitled to pardon, though *quære* as to practice, 792.

Want of religion.

One who refuses to recognize a state of rewards and punishments is incompetent as a witness, 795.

Not essential that witness should be a Christian, 795.

Atheists, however, and such infidels, possessing no religion that can bind their consciences to speak the truth, are inadmissible, 795.

Real test seems to be belief in existence of a God, though not in eternal rewards and punishments, 795.

WITNESSES—Want of religion.—*Continued.*

Defect in religious faith never to be presumed, but to be thrown on party objecting to a witness to show he is a disbeliever, 796.

Witness's declarations to others must be taken as the test, 797.

Weight of opinion is that the witness himself cannot be questioned, 798–9.

Practice of examining witness himself on his *voire dire* to be discouraged, 798.

Common way of swearing witness is on the Evangelists, 799.

Oath must be one which witness himself thinks binding, 799.

Immorality and degradation of witness is a subject for jury, 800.

Number of witnesses necessary.

Two witnesses required for high treason, and in perjury, 801.

What corroboration is necessary, 801–4.

When witness will be excused from answering on the ground of self-crimination or disgrace.

It is for witness to avail himself of the privilege if not answering, 805–9.

Province of the court to determine whether the question is proper, 805–9.

Greater latitude allowed when the question is necessary to make out a case, than when the object is merely to disgrace the witness, 805–9.

Witness will not be compelled to furnish a link in the chain of testimony against himself, 807.

When the witness voluntarily states a fact, he is bound to go through the whole transaction, 808.

Privilege extends only to cases in which there is a liability to punishment, 808.

Whether *disgrace* is enough to excuse an answer, *dubitatur*, 809, 813.

Distinction to be kept always in mind, whether question is asked for the purpose of drawing out necessary facts, or for the purpose of disgracing witness, 809, 813.

Witness's answer given under compulsion cannot be used in evidence against him afterwards, 813.

How character of witness may be attacked.

Witness's character for veracity may be attacked, but the evidence must be restricted to general reputation, 814–16.

Though sometimes the inquiry has been enlarged to general character, 814–16.

In rape, prosecutrix's character for chastity may be attacked, 814–16.

Particular acts not admissible to impeach general character, 814–16.

Customary to ask whether attacking witness would believe impeached witness on his oath, 814–16.

How witness may be contradicted and sustained.

Credit may be impeached by proof that he made contrary statements, 817–21.

But this can only be as to relevant matters, 817–21.

Witness must first be examined on the point, 817–21.

Witness cannot justify himself by proof that he had made the same statement formerly to others, 817–21.

Experts, how far admissible, 45, 865, &c.

Witness, deceased or absent, testimony of, when admissible, 667.

WORDS SPOKEN,

how to be set forth.

(See INDICTMENT.)

WORKMEN,
combination of.
(See CONSPIRACY.)
WORSHIP,
disturbance of.
WOUNDS,
presumptions to be drawn from, 832, &c.
Meaning of term, 832.
WRECK,
plunder of.
(See PLUNDER OF VESSELS, &c.)
Destroying with intent to defraud.
(See DESTROYING.)
WRITTEN INSTRUMENT,
how to be set forth.
(See INDICTMENT, EVIDENCE.)